



**Garden Chicken Limited v Attorney General & 7 others (Environment and Land Case 9 of 2020) [2026] KEELC 11 (KLR) (15 January 2026) (Judgment)**

Neutral citation: [2026] KEELC 11 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE 9 OF 2020  
CA OCHIENG, J  
JANUARY 15, 2026**

**BETWEEN**

**GARDEN CHICKEN LIMITED ..... PLAINTIFF**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**KANG'ERI WANJOHI T/A KINDEST AUCTIONEERS ..... 3<sup>RD</sup> DEFENDANT**

**PETER MAINA NDEGWA ..... 4<sup>TH</sup> DEFENDANT**

**THE ESTATE OF THE LATE MONICA WANJIRU KIRAGU  
(DECEASED) ..... 5<sup>TH</sup> DEFENDANT**

**ARTHI HIGHWAY DEVELOPERS LIMITED ..... 6<sup>TH</sup> DEFENDANT**

**SOLOMON MWINZI MWAU ..... 7<sup>TH</sup> DEFENDANT**

**JOHN MICHENI MUSA ..... 8<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced this case vide a plaint dated 28<sup>th</sup> October 2015. It contends that the 6<sup>th</sup> Defendant was the registered owner of LR No. 7149/115, I.R No. 114440 situated in Mavoko, which parcel was the subject matter of disputes lodged in the High Court vide HCCC No. 105 of 2010 Peter Maina Ndegwa v Arthi Highway Developers Company Limited herein referred to as “the first case” and HCCC No. 127 of 2010 Monica Wanjiru Kiragu v Arthi Highway Developers Limited referred to herein as “the second case”. Further, that by a newspaper advertisement dated 2<sup>nd</sup> September 2011, the 3<sup>rd</sup> Defendant advertised the sale of the suit land by public auction in execution of a Decree in the first case and it purchased the said land after conducting a search at the 2<sup>nd</sup> Defendant’s records that



- only showed two restrictions arising from the first case and the second case, which were removed by consent and thereafter it paid a consideration of Kshs.60 million, out of which Kshs.45 million was paid to the 3<sup>rd</sup> Defendant and Kshs.15 million to the 5<sup>th</sup> Defendant.
2. It claims that in 2014, its directors were driven away from the suit land by persons claiming to be the legitimate owners and after inquiries, it unearthed that the property was part of land legitimately owned by Messrs West End Butchery Limited. Further, that the 6<sup>th</sup> to 8<sup>th</sup> Defendants had caused the original parcel to be subdivided into several portions including the suit land. It contended that messrs West End Butchery Limited had sued the 6<sup>th</sup> Defendant and its directors vide NAIROBI ELC No. 167 of 2007 and a judgment was issued on 20<sup>th</sup> December 2012, annulling the title to the suit land among others.
  3. It insists that by reason of the 2<sup>nd</sup> Defendant's negligent misrepresentation with regard to the registrable state of the suit land, which it particularized, it suffered loss and damage of Kshs. 67,402,140.00 and a bargain on the property which it also particularized at Kshs.395 million. By reason thereof, the Plaintiff sought for judgement against the Defendants jointly and severally for:
    - a. A declaration that the 2<sup>nd</sup> Defendant acted negligently and recklessly in failing to place warnings and restrictions in dealings on LR No. 7149/115, Mavoko, Machakos County.
    - b. An Order that the 3<sup>rd</sup> Defendant accounts for the sum of kshs.45, 000,000/= paid to him by the Plaintiff.
    - c. Kshs.395,000,000.00 being the market value and or loss of bargain of LR No. 7149/115, Mavoko, Machakos County.
    - d. Alternatively, Kshs.67,402,140. 00, as per paragraph 35 above from the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants accordingly.
    - e. General, exemplary and aggravated damages for loss of bargain from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
    - f. Any other relief that the Honorable court may deem fit and just to grant.
    - g. Interest at court rates.
    - h. Costs of this suit.
  4. The suit was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who filed a joint statement of defence denying allegations levelled against them in the Plaint and contended that the Plaintiff is the author of its own misfortunes since it did not conduct due diligence. Further, that the Plaintiff also admitted to knowing that the title to the suit land had restrictions as a result of legal suits filed in various Courts and that it transacted with the 3<sup>rd</sup> Defendant who was aware of the said restrictions thus any loss that accrues lies with him.
  5. The 3<sup>rd</sup> Defendant also filed a defence in which he denied allegations leveled against him in the Plaint and contended that he lawfully sold the suit land to the Plaintiff for Kshs.60 million at a public auction held on 8<sup>th</sup> September 2011 pursuant to a Decree issued in the first case. Further, that the transaction was complicated by an injunctive order issued in the second case restraining the 6<sup>th</sup> Defendant from dealing with the property, which was resolved through a consent between parties' advocates in the said suit upon payment of Kshs. 15 million to settle the Decretal sum in that case.
  6. He averred that he acted in good faith and was unaware of NAIROBI ELC N0. 167 of 2007 or any subsisting restrictions on the title to the suit land at the time of sale and that if any liability were to arise, he would seek indemnity from the parties who received the purchase monies who include



M.N Kanyara & Co Advocates who acted for the Plaintiff and allegedly received kshs.5 million, the 6<sup>th</sup> Defendant who was paid kshs.12 million, the 5<sup>th</sup> Defendant who was paid kshs.15 million and the 4<sup>th</sup> Defendant who was paid kshs.22 million. He also accounted for auctioneer's charges and purchase commissions at kshs. 3 million each.

7. The 6<sup>th</sup> Defendant also filed a statement of defence and what is available on the record is the Plaintiff's reply to the said defence which does not appear to be in the Court records.
8. The 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants did not defend the suit.
9. The suit was heard by way of viva voce evidence.

### **Evidence of the Plaintiff**

10. PW1 was Stephen Boniface Mureithi Wamae, a valuer. He testified that on instructions from the Plaintiff, he valued the suit land for mortgage purposes, willing buyer willing seller basis and forced sale value and after carrying out a market analysis, he valued it at a rate of kshs.30 million per acre in 2014. Further, applied to the suit land's acreage of 9.18 acres, the value was 276 million for open market willing buyer willing seller basis, Kshs.221 million for mortgage and kshs.207 million forced sale value. He produced the valuation report dated 18<sup>th</sup> March 2014 as Exhibit No. 1.
11. He further stated that around May 2015, he was instructed by PW2, who is one of the directors of the Plaintiff to carry out a valuation of the suit land on a willing buyer willing seller basis. After an inspection and sale analysis and after a comprehensive market survey, the average price for an acre of the suit land had shot to kshs.42 million and applying the value to the acreage of 9.18 acres, the result was kshs.395 million on a willing buyer willing seller basis. He attributed the big change in the value of the suit land to the beginning of the construction of the Standard Gauge Railway line (SGR) in the neighboring plot and construction of Syokimau Station, which he stated is barely three (3) meters from the suit land. Further, this caused the demand for land in the area to increase tremendously. He produced the second valuation report as P. Exhibit No.2.
12. In cross-examination by Counsel for the 6<sup>th</sup> Defendant, PW1 stated that when he first inspected the suit land, there was no development thereon. He could not explain the valuation of kshs.60 million on the stamp duty declaration dated 26<sup>th</sup> January 2012 since he did not know how it was arrived at, as it did not emanate from him.
13. He further explained that apart from the SGR aspect, other factors contributed to the increase in value as per Exhibit 2. Further, that a valuation is based on facts and assumptions and the years remaining in a Lease matter especially where there is rental income. He confirmed that the lesser the years remaining the less the valuation but there would be a reversionary interest acquired by the lessee on application for a Lease extension. He was insistent that his valuation was to determine open market value and not for Court purposes.
14. In cross examination by Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he stated that he did conduct a search on the title at the Lands Registry and specifically in the parcel file and not the correspondence file, which has stamp duty documents and this explains why he did not see the stamp duty valuation before. He confirmed that he did not conduct due diligence in Court as there was no specific reason to do so. Further, that there was a clear assumption that extension of Lease would not be unduly denied.
15. In cross-examination by Counsel for the 3<sup>rd</sup> Defendant, he stated that the transfer of the suit land to the Plaintiff was done on 20<sup>th</sup> March 2012, that he inspected the land on 3<sup>rd</sup> March 2013 and prepared a report in March 2024. On tenure of the Plaintiff's title, he pointed out that it was a Leasehold from



- 1<sup>st</sup> September 1930 and the unexpired lease period was 6 years. He clarified that he advised the Plaintiff to apply for extension of Lease. Further, that the value arrived at was based on continuity of the user. He was emphatic that the Plaintiff's property was residential and the comparable properties are all residential.
16. In re-examination, PW1 stated that it was not part of his brief to compare the purchase price with the market value.
  17. PW2 Engineer Minju Kariuki, was one of the directors of the Plaintiff. His evidence was that in 2011, he learnt of the sale of the suit land by public auction by way of a newspaper advertisement. Subsequently, the Plaintiff expressed interest and instructed its advocates, messrs M N Kanyara & Company Advocates to inquire about the sale from the 3<sup>rd</sup> Defendant who informed them that the property was scheduled to be sold through a public auction on 26<sup>th</sup> July 2011 but it was not auctioned. He explained that it was re-advertised in the Star Newspaper of 2<sup>nd</sup> September 2011 for sale by public auction on 8<sup>th</sup> September 2011, in execution of a Court decree issued in the first case.
  18. The Plaintiff instructed its said advocates to conduct a search on the title to the suit land which revealed that the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants' suit was pending in Court over the title. He explained that the Plaintiff was assured that the said restrictions would be lifted thus on that strength, its advocates presented a Letter of Offer dated 5<sup>th</sup> September 2011 to the 3<sup>rd</sup> Defendant who demanded that the Plaintiff deposits 25% of its offer of Kshs.60 million, which amounted to Kshs.15 million, that was refundable in the event the Plaintiff lost the bid. Further, to that end, its advocates paid a deposit of ksh.25 million on its behalf. He further testified that eventually the Plaintiff emerged the highest bidder at the auction and its advocates obtained the Certificate of Sale and Memorandum of Sale and on receipt of completion documents, the said advocates paid the balance of kshs.45 million on its behalf and the transfer of the property was successfully registered in favour of the Plaintiff but it did not obtain a certificate of title to the property though a search conducted on 11<sup>th</sup> April 2021 duly confirmed the title had changed hands.
  19. He claimed that officials at the Lands Registry advised the Plaintiff to apply for a provisional Certificate of Title which was issued on 20<sup>th</sup> November 2012 but in November 2014 when they visited the suit land, to identify the boundaries and put up beacons, they were denied access and chased away by unknown persons who claimed to be owners of the said suit land. They informed their advocates who upon investigations obtained a copy of the judgement issued in Nairobi ELC No. 167 of 2007 on 20<sup>th</sup> December 2012, which showed that the suit land was not owned by the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants, yet the Plaintiff had purchased it on the strength of official searches obtained from the Lands office. He produced the Plaintiff's list and bundle of documents dated 28<sup>th</sup> October 2015 as Exhibits No. 1-38.
  20. In cross-examination by Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, PW2 stated that initially they were two directors of the Plaintiff with his wife Wangui Beatrice Kariuku but they later incorporated other directors.
  21. He reiterated that despite the encumbrances on the title, the Plaintiff's Advocates advised it to proceed with the sale. He was not aware whether the said advocates conducted due diligence on the 6<sup>th</sup> Defendant but it was the owner of the suit land as per the search from the Ministry of Lands. He confirmed that 25% of the purchase price was paid on 5<sup>th</sup> September 2011 and the balance of the purchase price was not paid within fifteen (15) days of the auction but he could not recall the date when they finalized the payment.



22. He said that he visited the suit land severally before the auction and there were two beacons, which were pointed out to him by Engineer Wambugu Maingi, an old friend of his, who was familiar with the land and who had also seen the newspaper advertisement. Further, that when they were chased away from the suit land, he had gone there, accompanied with the other Plaintiff's directors and a surveyor to re-establish beacons, which were visible but not adequate to establish the general position of the land. He explained that after being chased from the land, they met at the Sub County Commissioner's office to understand the challenges and in one of the meetings, they were informed there is a Court case over the said suit land.
23. In cross-examination by Counsel for the 6<sup>th</sup> Defendant, PW2 stated that he did not know directors of the 6<sup>th</sup> Defendant. Further, that the consent dated 3<sup>rd</sup> July 2011 at page 27 of the Plaintiff's bundle was signed in the second case by lawyers for the 6<sup>th</sup> Defendant who were messrs J W. Wambua & Company Advocates and advocates for the Plaintiffs' in that matter (5<sup>th</sup> Defendant herein) who were Kagwimi Kang'ethe & Co. Advocates but he did not know how the purchase price was distributed in the matter and whether the 6<sup>th</sup> Defendant received any money.
24. In cross-examination by Counsel for the 3<sup>rd</sup> Defendant, PW2 stated that in the first case, the Plaintiff therein sought for the 6<sup>th</sup> Defendant herein to transfer four (4) acres of the suit land and in a consent between the said Plaintiff and the 6<sup>th</sup> Defendant herein, the 6<sup>th</sup> Defendant herein was required to pay the Plaintiff in that matter kshs.18,460,740/= and since the Plaintiff was at liberty to execute the Decree, it was given to the 3<sup>rd</sup> Defendant to undertake execution as against the 6<sup>th</sup> Defendant.
25. He insisted that the 3<sup>rd</sup> Defendant directly received kshs.45 million and on his assurance, the Plaintiff purchased the suit land. He testified that thereafter, the Plaintiff's concerns on the two restrictions placed on the title to the suit land were sorted out vide Court orders from the first and the second cases, discharging the prohibitory orders. Further, that in the first case, an Order was issued on 16<sup>th</sup> January 2012 where the Deputy Registrar was ordered to execute transfer of the suit land to the Plaintiff. He contended that the transfer was then executed by the 3<sup>rd</sup> Defendant, Deputy Registrar on behalf of the judgement debtor and himself for the Plaintiff, as purchaser and a Search was issued on 11<sup>th</sup> April 2012 confirming there was transfer to the Plaintiff. Further, upto that point, he could not fault the 3<sup>rd</sup> Defendant but he is sued because he received and distributed the purchase price which he ought to account for and is the author and initiator of the dispute due to the advertisement he placed in the newspaper.
26. He confirmed that the Plaintiff never developed the suit land as it never took possession. He also confirmed that the title was a Lease whose tenure was 99 years from 1<sup>st</sup> September 1930, thus the unexpired leasehold interest was six (6) years and the Plaintiff was advised to apply for its extension. Further, that even though PW1's valuation was based on current user and assumed continuity, he did not apply for extension of the lease.
27. He pointed out that in Nairobi ELC No. 167 of 2007 the 1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants herein were also Defendants in that suit. Further, that the Plaintiff in the said matter sought to cancel the 6<sup>th</sup> Defendant's title and in its judgement, the Court indicated that it is the 7<sup>th</sup> and 8<sup>th</sup> Defendants herein who committed fraud and there was complacency by the 1<sup>st</sup> and 6<sup>th</sup> Defendants, whom the Court opined could be sued for indemnity.
28. During re-examination, he explained that the Plaintiff did not apply for renewal of Lease because the matter was already in Court and it had not taken possession of the suit land. Further, that the 3<sup>rd</sup> Defendant must have supplied details of his bank account for the deposit of the purchase price to be paid before the auction, and did not reject the money paid in advance.



29. PW3 was Mercy Nyambura Kanyara, Advocate practicing in the firm of M.N Kanyara & Company Advocates. She confirmed that the Plaintiff instructed the said firm to make inquiries and conduct an official search on the suit land to determine ownership. She testified that the Search indicated that there were two pending cases over the suit land. She also confirmed that she presented an offer letter dated 5<sup>th</sup> September 2011 to the 3<sup>rd</sup> Defendant on behalf of the Plaintiff and she did deposit 25% of the Plaintiff's offer of kshs.60 million and, successfully put in a bid.
30. It was her further testimony that a meeting was held between the 3<sup>rd</sup> Defendant, messrs Kerongo & Company Advocates representing the Plaintiff in the first case, messrs Kagwimi Kang'ethe & Company Advocates for the Plaintiff in the second case and messrs J W Wambua (Advocate for the 6<sup>th</sup> Defendant herein who was the Defendant in the first and second cases and herself, and after lengthy discussions, Kshs.15 million was agreed as final settlement for the Plaintiff in the second case, which amount was paid to the firm of messrs Kagwimi Kang'ethe & Company Advocates, by herself on behalf of the Plaintiff being full and final settlement of the second case.
31. She contended that the Advocates for the 6<sup>th</sup> Defendant herein and the Plaintiff in the second case recorded a consent in Court on 16<sup>th</sup> December 2011 for the withdrawal of the restriction on the title to the suit land. Subsequently, the 3<sup>rd</sup> Defendant delivered the completion documents to her on behalf of the Plaintiff save for the original Certificate of Title, which the 3<sup>rd</sup> Defendant said was still with the Plaintiff's in the first and second cases.
32. She explained that after receipt of completion documents, she paid the balance of the purchase price being the sum of Kshs.30 million to the 3<sup>rd</sup> Defendant on behalf of the Plaintiff and a transfer was then executed by the 3<sup>rd</sup> Defendant, the Deputy Registrar High Court of Kenya at Machakos and the Plaintiff on 9<sup>th</sup> January 2012, which documents she lodged together with the Deputy Registrar's letter confirming the Court Orders in relation to the first and second cases. Further, that a transfer in the Plaintiff's favour was successfully registered as per an official search she conducted on 11<sup>th</sup> April 2012.
33. It was her testimony that officials at the Lands registry advised her to apply for a provisional Certificate of Title, which she did on 11<sup>th</sup> April 2012 and the Registrar of Titles issued a notice on the issuance of a provisional Certificate of Title on 11<sup>th</sup> June 2012 and thereafter the lost title was advertised in the Kenya Gazette on 15<sup>th</sup> June 2012 vide Gazette Notice No. 7933, after which the Plaintiff was issued with a provisional Certificate of Title for the suit land on 20<sup>th</sup> November 2012.
34. She stated that much later the Plaintiff's directors informed her that they had been chased from the suit land and her investigations led her to the judgement in Nairobi ELC No. 167 of 2007 issued on 20<sup>th</sup> December 2012, which stated that the suit land was not owned by the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants.
35. In cross-examination, PW3 reiterated that it is the 3<sup>rd</sup> Defendant who informed her that the second case could be settled out of Court, as all the Plaintiff in the said matter needed, was to be paid money. Further, that the provisional title was issued on 10<sup>th</sup> November 2012 before the judgement in Nairobi ELC No. 167 of 2007 was delivered and no injunction emanating from the said case was registered against the title and there was no objection to the issuance of a provisional title.
36. In cross-examination by Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, she explained that she reached out to the 3<sup>rd</sup> Defendant on phone and that he gave her the reserve price, of which 25% had to be paid before the date of the auction on 8<sup>th</sup> September 2011. Further, that she did not find it absurd because it was refundable, if the Plaintiff was not the successful bidder. She was emphatic that if she had been notified of the dispute in Nairobi ELC No. 167 of 2007, she would have advised the Plaintiff not to pay the balance of the purchase price but procure reimbursement of the deposit already paid.



37. In cross-examination by Counsel for the 3<sup>rd</sup> Defendant, PW3 reiterated that it is the Court that authorized the sale of the suit land by the 3<sup>rd</sup> Defendant through public auction and there was nothing wrong that the 3<sup>rd</sup> Defendant did.
38. She disclosed that she sought a refund of a portion of the purchase price of Kshs.10 million from the 3<sup>rd</sup> Defendant to hold as security until finalization of transfer, but he refunded kshs.4,250,000/= only to her law firm, being disbursements that the firm had used on behalf of the 3<sup>rd</sup> Defendant since she paid the land rates, land rent and Consents.
39. She also revealed that she never received any instructions to pay money to the 6<sup>th</sup> Defendant and in re-examination, she stated that the 6<sup>th</sup> Defendant did not complain that consents were reached without its participation.

#### **Evidence of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

40. DW1 Wanderi Mark Muigai, who was the Principal Registrar at the Ministry of Lands and Physical Planning testified that according to their records, the suit land was registered to the 6<sup>th</sup> Defendant on 23<sup>rd</sup> May 2008. He explained that on 14<sup>th</sup> June 2010, a Court order dated 11<sup>th</sup> June, 2010 emanating from the first case was registered against the suit land, restraining the Defendant in the matter from dealing with the said land pending determination of an application which was subsequently discharged vide an order dated 23<sup>rd</sup> December 2011. Further, that on 12<sup>th</sup> July 2010 a Court order dated 8<sup>th</sup> July, 2010 emanating from the second case was registered against the suit land restraining the Defendants' therein from dealing with the land, until 4<sup>th</sup> November 2010 and it was discharged vide a Court Order dated 16<sup>th</sup> December,2011.
41. He averred that on 20<sup>th</sup> March 2012, a Court order dated 6<sup>th</sup> January 2012 emanating from the first case was registered against the suit land authorizing the Deputy Registrar to execute the transfer vesting ownership on the purchaser and the Plaintiff herein was registered on the same date as owner. Further, a provisional Certificate of Title was then issued to the Plaintiff on 20<sup>th</sup> November 2012. However, on 20<sup>th</sup> March 2015, a Court order dated 20<sup>th</sup> December 2012 emanating from Nairobi ELC No. 167 of 2007 was registered against the title to the suit land cancelling all entries. He was insistent that at no time was a Court Order lodged at the 2<sup>nd</sup> Defendant's office emanating from the aforementioned suit, stopping dealings with the suit land pending determination of the said suit thus the 2<sup>nd</sup> Defendant did not misrepresent any information to the Plaintiff. He produced a bundle of documents dated 3<sup>rd</sup> September 2024 as D-Exhibit No. 1 -11.
42. In cross-examination by Counsel for the 6<sup>th</sup> Defendant, DW1 stated that it is the 6<sup>th</sup> Defendant who cleared rent and it was issued with receipts to that effect by Municipal Council of Mavoko. Further, that if a transfer is Court decreed, they did not require presence of parties thus the 6<sup>th</sup> Defendant's presence was not required at the time of transfer.
43. In cross-examination by Counsel for the 3<sup>rd</sup> Defendant, he reiterated the entries on the title pursuant to the first and second case and confirmed that the suit land was valued at Kshs.60 million for purposes of stamp duty, which value was accepted by the government valuer.
44. In cross-examination by Counsel for the Plaintiff, DW1 stated that he would expect the Plaintiff in Nairobi ELC No. 167 of 2007 to seek an injunction restraining any dealings on the title to the suit land pending hearing of the matter. He denied that West End Butchery Limited which was the Plaintiff in the said case had written to the Commissioner of Lands seeking to restrict any dealings on the mother title that gave rise to the suit land. He explained that if the letter had been written, there would



not be the ramifications now laid bare on the resultant subdivisions. He confirmed that there was no communication from the Land Registrar to the Plaintiff on the existence of Nairobi ELC N0. 167 of 2007.

45. He revealed that Mr. Charles Kipkurui Kipngetich, a Land Registrar, testified in support of the Plaintiff in Nairobi ELC N0. 167 of 2007, to the effect that the transfer to the 6<sup>th</sup> Defendant herein was fraudulent and in its judgement, the Court observed that the said Registrar was not able to explain the existence of two titles. Further, that the Court also observed that there was forgery by officials at the Ministry of Land thus the responsibility is to be borne by the Government of Kenya as there were no proper records relating to the suit land and there was no restriction to prevent dealings. He also confirmed that the Ministry of Lands received stamp duty before the transfer was effected and conceded that it was ready to refund the same.

### **Evidence of the 6<sup>th</sup> Defendant**

46. DW2 was Frankline Kamathi Kamau, one of the Directors of the 6<sup>th</sup> Defendant. He stated that the 6<sup>th</sup> Defendant purchased LR 7149/10 from West End Butchery Limited and thereafter subdivided it into ten (10) plots, one of them being the suit land. He clarified that the first and second cases were instituted against the 6<sup>th</sup> Defendant herein. Further, that Decrees were extracted from the said cases and forcefully executed by the 3<sup>rd</sup> Defendant, by selling the suit land to the Plaintiff, yet the 6<sup>th</sup> Defendant did not receive proceeds of the auction and it was not consulted or involved in negotiations included payment thus the Plaintiff was reckless.
47. He conceded that the transfer of the suit land to the 6<sup>th</sup> Defendant was nullified in Nairobi ELC N0. 167 of 2007 and the decision therein was upheld by the Court of Appeal thus the 6<sup>th</sup> Defendant became a total stranger to any subsequent transactions in regard to the said land. He insisted that had the Plaintiff conducted due diligence before purchase, it would have established the existence of the aforementioned suit.
48. In cross-examination by Counsel for the Plaintiff, DW2 claimed that the consent entered on the 6<sup>th</sup> Defendant's behalf in the second case is fraudulent because the advocates who purported to represent it had no instructions to do so. Further, that the firm of J.W Wambua & Company Advocates had no instructions to represent the 6<sup>th</sup> Defendant but it did not report them to DCI nor did it sue messrs Nyaga & Co. Advocates for receiving kshs.12 million on the 6<sup>th</sup> Defendant's behalf without instructions.
49. He confirmed that he knew the 4<sup>th</sup> and 5<sup>th</sup> Defendants, who had sued them in the first and second cases but they were not served with pleadings in the said matters.
50. In cross-examination by Counsel for the 3<sup>rd</sup> Defendant, DW2 reiterated that he did not know anything about the first and the second cases and that he was not aware of the sale of the suit land by 3<sup>rd</sup> Defendant, as he was in Tanzania at the time but only learnt about it two (2) months after the auction and since there was little he could do, he did not follow up.
51. He was aware that the 4<sup>th</sup> and 5<sup>th</sup> Defendants were awarded kshs.18 million by the Court and he respects this but the 5<sup>th</sup> Defendant wrote to the Plaintiff demanding money owed. He reiterated that he does not know how much the suit land was sold for and where the balance was paid and that he had no issue with the 3<sup>rd</sup> Defendant.
52. In re-examination, he stated that since he was not successful in the appeal that emanated from Nairobi ELC N0. 167 of 2007, its implication is that everybody dealing with the suit land deals with it at their own risk. Further, that he did not Appeal in the first and the second case because the said cases were



overtaken by events. He also did not claim consideration because everything was done discretely by different lawyers. He explained that there was no resolution by the 6<sup>th</sup> Defendant's directors to appoint messrs JW Wambua & Co. Advocates to represent the 6<sup>th</sup> Defendant.

### **Evidence of the 3<sup>rd</sup> Defendant**

53. The 3<sup>rd</sup> Defendant testified as DW3. It was his testimony that on 7<sup>th</sup> July 2011, he received a notification of sale issued by the Court in the first case ordering sale of the suit land by public auction to be held on 26<sup>th</sup> July 2011 at Mlolongo, Athi River pursuant to a Decree issued by the said Court in satisfaction of the claim of the Decree holder with costs and interest in the sum of kshs.18,460,040/=.
54. He confirmed that he advertised the suit land in the newspaper of 16/17<sup>th</sup> July 2011 for sale by public auction on 26<sup>th</sup> July 2011 and he conducted the auction but he did not get any bids. Thereafter, he re-advertised in the same newspaper of 2<sup>nd</sup> September 2011 for an auction to be conducted on 8<sup>th</sup> September 2011 and on 5<sup>th</sup> September 2011, he received a letter of offer from messrs M.N Kanyara & Co. Advocates acting for the Plaintiff, who communicated the Plaintiff's offer to purchase the suit land at kshs.60 million.
55. He confirmed that he did conduct the public auction as scheduled where the Plaintiff was declared the highest bidder and he received ksh.15 million being 25% deposit on the purchase price and issued the Plaintiff with a certificate of sale dated 8<sup>th</sup> September 2011 including a letter of confirmation dated 8<sup>th</sup> September 2011.
56. He explained that in the course of conducting the sale, it emerged that there was an Order issued in the second case restraining the 6<sup>th</sup> Defendant herein from dealing with the suit land in any manner thus they had to address it. It was his testimony that on 5<sup>th</sup> September 2011, the firm of messrs M N Kanyara & Co. Advocates wrote to him, seeking for the order emanating from the second case to be sorted out. Further, that the said advocates wrote proposing a meeting between them, messrs Kerongo & Company Advocates representing the Plaintiff in the first case (now 4<sup>th</sup> Defendant), Kagwimi Kangethe & Co. Advocates for the Plaintiffs in the second case (now 5<sup>th</sup> Defendant) and himself. He explained that in the meeting, Advocates for the Plaintiff in the second case indicated that the Court Order would be lifted if the Plaintiff was paid kshs.15 million, being the Decretal sum. In a follow up meeting held on 5<sup>th</sup> December 2011, it was agreed that advocates for the Plaintiff herein would pay advocates for the Plaintiff in the second case kshs.15 million in full settlement of their client's claim and remit the net balance of kshs.30 million to him. Further, this facilitated a consent letter dated 9<sup>th</sup> December 2011, filed in the second Case where the said Case was settled and injunctive orders issued on 8<sup>th</sup> July 2020, discharged.
57. He said that pursuant to instructions given to him by messrs Kerongo & Co. Advocates, for the Plaintiff in the first Case, he paid kshs.22 million to the Plaintiff in the said Case, advocates for the Defendant in the first and the second case kshs.12 million (6<sup>th</sup> Defendant) and kshs.5 million to messrs M.N Kanyara & Co. Advocates (representing the Plaintiff in the transaction) as security pending finalization of court cases relating to the suit land. He claimed that he expended kshs.3 million as purchase commissions while kshs.3 million were the charges payable to him and that on a without prejudice basis, if any liability attaches to him, he would seek an indemnity from all those he paid money to. He produced his list and bundle of documents dated 8<sup>th</sup> March 2016 as his Exhibits no. 1-27.
58. In cross-examination by Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, DW3 stated that he did not conduct investigations as to ownership of the suit land but as per documents from Court relating to the first and second cases, the suit land was registered to the 6<sup>th</sup> Defendant. Further, that out of kshs.60 million,



no money was paid to the Chief Land Registrar's office. He was not aware of Nairobi ELC No. 167 of 2007 and he never received any complaint from the 6<sup>th</sup> Defendant to the effect that money was paid to advocates who had no authority to represent it. Further, that there was no order stopping sale of the suit land to the Plaintiff.

59. In cross-examination by Counsel for the 6<sup>th</sup> Defendant, DW3 stated that he did not conduct a search to ascertain the 6<sup>th</sup> Defendant's ownership status. Further, that the balance of the purchase price was to be paid in 15 days but it was paid 90 days after the auction. He insisted that there was reason to be flexible since the purchaser had paid 25 % of the purchase price.
60. In cross-examination by Counsel for the Plaintiff, DW3 stated that since the 1<sup>st</sup> Defendant herein was sued on behalf of the Commissioner of Lands in Nairobi ELC No. 167 of 2007, if the 2<sup>nd</sup> Defendant herein had placed a restriction forbidding dealings on the suit land, he would not have transacted on it. Further, that the 6<sup>th</sup> Defendant has not commenced third party proceedings against him or issued any demand concerning the consent in the first case and the second case. He admitted that he did not file a statement of claim as required by law and that his fees were kshs.3 million but he did not file a breakdown. He also contended that it was not his responsibility to pay rates and rent and that Advocates for purchasers did not bring claim for any rates.
61. Parties thereafter filed written submissions.

## **Submissions**

### **Plaintiff's Submission**

62. On whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are liable to indemnify it for the loss and damage suffered in the purchase of the suit land, the Plaintiff relied on the case of Embakasi Properties Limited & Another v The Commissioner Of Lands & The Attorney General [2019] eKLR to submit that they are liable since the Land Registry failed to ensure the accuracy of the Lands Register under the Torrens system and that the said Registry was implicated in the fraud in dealing with the mother title upon which the suit land is derived, leading up to the loss and damage it suffered. It pointed out that the 2<sup>nd</sup> Defendant herein was sued in the West End Butchery Case through the 1<sup>st</sup> Defendant herein and duly participated in the proceedings where it was made aware of fraudulent dealings related to the mother title of the suit land through one Mohammed Khan (PW-7) in the West End Butchery Case), by a letter and affidavit delivered to the Commissioner of Lands then and by Caveats relating to the mother title of the suit land being placed in the Daily Nation and Standard Newspapers of 12<sup>th</sup> February 2007, but the 2<sup>nd</sup> Defendant proceeded with sub-divisions conducted by the 6<sup>th</sup> Defendant and even issued titles to the same.
63. Further, that the 2<sup>nd</sup> Defendant was found to have participated in the fraud by the 6<sup>th</sup> Defendant, by the High Court and the Court of Appeal in the West End Butchery case in issuing two titles for the same property to different persons and producing the title, which was held to be a forgery in evidence. Further, that it was also faulted for conducting sub-divisions on the mother title in 2008, one (1) year after the West End Butchery Case had been filed. To this end, the Court is urged to apply the same findings in the West End Butchery Case to this suit and fault the 2<sup>nd</sup> Defendant.
64. The Plaintiff also submitted that the valuation of PW1 was not challenged by any other valuation report thus the Court should award compensation as prayed. The Plaintiff reiterates that it is liable to be indemnified by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who knowingly misrepresented to it that the title of the 6<sup>th</sup> Defendant to the suit land is valid and even issued it with



a Provisional Certificate of title. To this end, it relied on the case of *Gitwany Investment Limited v Tajmal Limited & 2 Others; Commissioner of Lands Thro' Attorney General 3<sup>rd</sup> Party*.

65. On quantum, the Plaintiff submitted that the 2<sup>nd</sup> Defendant rectified the Register on 20<sup>th</sup> March 2015 vide Entry 114440/9 cancelling its title thus it should be indemnified under Section 81 of the [Land Registration Act](#). It pointed out that PW3 testified that she conducted due diligence on its behalf and the whole process of transfer to the Plaintiff was done within the law and pursuant to Section 84 of the [Land Registration Act](#). It insists that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are parties to fully indemnify it for the loss it suffered by the correction of the Register and recover the same from the other Defendants herein.

1<sup>st</sup> and 2<sup>nd</sup> Defendants submissions

66. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants relied on the decisions of *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another (2015) eKLR* and *Nairobi ELC Case No. 4 of 2021 [Formerly THIKA ELC Case No. 115 of 2019] Marriot Africa International Limited v Margaret Nyakinyua Murigu & Others*, to submit that the sale of the suit land was in breach of the doctrine of *lis pendens*, pointing out that the 6<sup>th</sup> Defendant's active participation in the proceedings in HCC 167 OF 2008 barred it from discharging any part of the subject matter in dispute.
67. They cited the decisions of *Katende v Haridar & Company Ltd [2008] 2 EA 173*; *Torino Enterprises Limited V Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR)* *Dina Management Ltd v County Government of Mombasa & 5 Others [2021] eKLR*; *Ukan & Another (Administrators of the Estate Of The Late Jason Kukan Lila) v Kibutha (Civil Appeal 339 OF 2018) [2023] KECA 742 (KLR)*; *Flemish Investments Ltd V. Town Council Of Mariakani, CA No. 30 of 2015*, and *Eldoret Civil Appeal NO. 100 of 2018, Hon AG & Anor v Abdi Adan Hussein* to submit that the Plaintiff does not qualify as an innocent purchaser for value because from its conduct, it had knowledge of the fraud perpetuated by the 6<sup>th</sup> Defendant herein since it failed to conduct further due diligence prior to purchase of the suit land which would have revealed the possession by West End Butchery Limited. They argued that the Plaintiff only relied on the official search, yet there was evidence of two Court cases relating to the same property. Further, that the Plaintiff did not visit the suit land prior to its purchase thus it cannot wholly lay blame on the 2<sup>nd</sup> Defendant for the loss allegedly suffered and it is not entitled to compensation.
68. They also submitted that the Plaintiff's alleged misrepresentation on their part was not proved and pointed out that in the absence of a Court order directing registration of a restriction or inhibition on the register for the suit land, the Registrar had no authority to enter such notations unilaterally. Further, that the Registrar was obliged to collect stamp duty pursuant to Section 19 (2) of the [Stamp Duty Act](#). To this end, the case of *Atoya v Standard Chartered Bank (K) Ltd & Others (2003) I EA 140* was relied upon.
69. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also relied on the case of *Attorney General v Law Society Of Kenya & Another [2017] eKLR* to submit that a claim in negligence requires proof of fault and that Section 81 (2) of the [Land Registration Act](#), bars indemnity in circumstances where the claimant's negligence contributed to the damage and where title was derived from a person who caused or substantially contributed to the damage. Further, that in the *West End Butchery Case*, the 6<sup>th</sup> Defendant herein and the 1<sup>st</sup> Defendant were ordered to indemnify two purchasers who had purchased the suit land prior to the filing of the suit but in this case, the sale to the Plaintiff offended the doctrine of *lis pendens*.
70. The case of *Mark Lecchini v Attorney General & Another [2021] eKLR* was relied on to urge the Plaintiff to claim indemnity from the 3<sup>rd</sup> Defendant for monies paid to them from the auction or from the 6<sup>th</sup> defendant for fraudulent transfer. Further, that Section 82 of the [Land Registration Act](#)



explicitly limits compensation to the value at the time of the error, not subsequent appreciation thus the Plaintiff's loss, if any, would be assessed based on the value of the interest in land at the time of cancellation of the its title on 20th March, 2013.

71. On a without prejudice basis, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that they are only under obligation to refund the amount paid as stamp duty and registration fees being Kshs. 2,402,140/=.

#### 3<sup>rd</sup> Defendant's Submissions

72. On his part, the 3<sup>rd</sup> Defendant submitted that in its pleadings and evidence, the Plaintiff did not allege any wrongdoing /unlawful actions on his part in the execution of the order for sale of the suit land issued in Machakos HCC No. 105 of 2010, which he alleged to have executed lawfully, procedurally and in good faith in accordance with Section 23 of the *Auctioneers Act*. Further, that as an Auctioneer, he is offered protection under Section 6 of the *Judicature Act* and cannot be liable to be sued for execution of the Court order. To this end, he relied on the following decisions: Nairobi Civil Case No. 467 of 2010 Santam Singh Bahra v Housing Finance of Kenya and Civil Appeal No. 141 of 2018 Bhavin Ashwin Gudka & another v John Oruru Machoka.
73. On the issue of his liability to account for the sum of Kshs.45 million paid to him by the Plaintiff, he submitted that he gave a satisfactory account of the proceeds of sale of the suit land in compliance with Rule 18(4) of the Auctioneers Rules.

#### 6<sup>th</sup> Defendant's Submissions

74. On its part, the 6<sup>th</sup> Defendant submitted that the Plaintiff is not entitled to reliefs sought as restitution, being an equitable remedy, cannot be awarded to an illegal transaction. It insisted that the Plaintiff did not come to equity with clean hands as it orchestrated the subject auction with the 3<sup>rd</sup> Defendant with an intention to defraud it by alienating it, in transactions in the first and second cases. It pointed out that the Plaintiff and the 3<sup>rd</sup> Defendant were keen to defeat any effort of any other party likely to outbid the Plaintiff in the auction process, which explains the Plaintiff's Letter dated 5<sup>th</sup> September 2011, that came three days before the scheduled auction geared to make the Plaintiff the only purchaser, which action is in outright breach of the Auctioneers' Rules.
75. It pointed out that neither its Advocate messrs J W. Wambua & Company nor itself received any monies from the Plaintiff and the 3<sup>rd</sup> Defendant. Further, that neither the Plaintiff nor the 3<sup>rd</sup> Defendant confirmed the status of the land in question and while the Plaintiff carried out an official search, which revealed the encumbrance on the suit land, it still proceeded with the purchase thus it cannot blame it, for having gotten into a bad bargain.
76. On whether there is a cause of action against it, the 6<sup>th</sup> Defendant submitted that the Plaintiff was the author of its own mischief as it forced its way through an illegal auction, circumvented the wheels of the rule of law and purported to negotiate other related matters on its behalf.
77. To this buttress its averments, the 6<sup>th</sup> Defendant relied on the following decisions: Haile Menkerios v Mureithi & another; Wina Trading Company Limited & another (Third party) (Civil Suit 197 of 2018) [2024] KEHC 13993 (KLR), Bwanyange Limited v Yusuf Alibhai and another [2023] eKLR and Johnson v Yellow Cab Transit Co. U.S. 383, 64 S.Ct. 622 (1944).



## Analysis and Determination

78. Upon consideration of the Plaintiff, Statements of Defences, Witnesses testimonies, exhibits and rivalling submissions, the following are the issues for determination: Whether the sale of LR No. 7149/115 to the Plaintiff was lawful. Whether the 2<sup>nd</sup> Defendant made negligent misrepresentations in the transaction leading to the sale of the suit land to the Plaintiff. Whether the Plaintiff is entitled to statutory indemnity /compensation under the Land Registration Act, of Kshs.395, 000,000.00 or Kshs. 67, 402, 140.00/= and the extent of the Defendants' liability. Whether the 3<sup>rd</sup> Defendant is liable to account for monies received from the Plaintiff. Is the Plaintiff entitled to General, exemplary and aggravated damages?

### **As to whether the sale of LR No. 7149/115 to the Plaintiff was lawful and if the 2<sup>nd</sup> Defendant made negligent misrepresentations in the transaction leading to the sale of the suit land to the Plaintiff.**

79. The suit land is a subdivision of LR No. 7149/10, owned by West End Butchery Limited according to a decision in Nairobi ELC N0. 167 of 2007, where it annulled the mother title held by the 6<sup>th</sup> Defendant and its resultant subdivisions, which includes the suit land, on the basis of fraud. Further, the said decision was upheld by the Court of Appeal, thereby conclusively determining that the 6<sup>th</sup> Defendant had no valid title to pass to any third party whatsoever.
80. The Plaintiff's title, was obtained pursuant to a Court-sanctioned auction in the first case which was conducted by the 3<sup>rd</sup> Defendant. The sale was 'completed' pursuant to a Consent entered in the first case and second case respectively.
81. PW3 who was the Plaintiff's advocate that represented the Plaintiff in the transaction testified that when she conducted a Search, prior to the purchase, which revealed two restrictions arising from the first and the second cases. Further, the said restrictions were removed by consent of all the parties and thereafter it paid a consideration of Kshs.60 million, out of which Kshs.45 million was paid directly to the 3<sup>rd</sup> Defendant and Kshs.15 million to the 5<sup>th</sup> Defendant. She explained that she made an offer dated 5<sup>th</sup> September, 2011 to the 3<sup>rd</sup> Defendant on behalf of the Plaintiff and she paid a deposit of 25% which is Kshs. 15 million, of the Plaintiff's offer of kshs.60 million and, successfully put in a bid to purchase suit land. It emerged that there were two cases being Machakos HCCC No. 127 of 2010 and 105 of 2010 which were both against the 6<sup>th</sup> Defendant, where the Court had issued Decrees in favour of the Plaintiffs' therein, who are the 4<sup>th</sup> and 5<sup>th</sup> Defendants herein. Further, PW3 explained that she held meetings with legal representatives of the parties in the two cases and after lengthy discussions, Kshs.15 million was agreed as final settlement for the Plaintiff in the second case and it was paid to the firm of messrs Kagwimi Kang'ethe & Company Advocates, by herself on behalf of the Plaintiff being full and final settlement of the second case.
82. She contended that the Advocates for the 6<sup>th</sup> Defendant herein and the Plaintiff in the second case recorded a consent in Court on 16<sup>th</sup> December, 2011 for the withdrawal of the restriction on the title to the suit land. Subsequently, the 3<sup>rd</sup> Defendant delivered the completion documents to her, on behalf of the Plaintiff save for the original Certificate of Title. It was her testimony that after receipt of completion documents, she paid the balance of the purchase price being the sum of Kshs.30 million to the 3<sup>rd</sup> Defendant on behalf of the Plaintiff and a transfer was then executed by the 3<sup>rd</sup> Defendant, the Deputy Registrar High Court of Kenya at Machakos and the Plaintiff, on 9<sup>th</sup> January 2012 which documents she lodged at the Lands' office, together with the Deputy Registrar's letter confirming the Court Orders in relation to the first case and second case respectively. Further, that a transfer in the



Plaintiff's favour was successfully registered as per an official search she conducted on 11<sup>th</sup> April 2012. She further confirmed that she applied for a Provisional Certificate of Title on the 11<sup>th</sup> April 2012 and the Registrar of Titles issued a notice on the issuance of a provisional Certificate of Title on 11<sup>th</sup> June 2012. Thereafter the lost title was advertised in the Kenya Gazette on 15<sup>th</sup> June 2012, vide Gazette Notice No. 7933, after which the Plaintiff was issued with a provisional Certificate of Title for the suit land on 20<sup>th</sup> November 2012. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants contend that the sale of the suit land was in breach of the doctrine of *lis pendens*, as the 6<sup>th</sup> Defendant herein was actively participating in proceedings in Nairobi ELC 167 of 2007.

83. From the evidence tendered before Court, it is not in dispute that there was indeed the sale of the suit land through public auction, which was sanctioned by the Court due to the two decisions against the 6<sup>th</sup> Defendant. Further, it is the Court that issued the 3<sup>rd</sup> Defendant with the warrants to conduct the auction. The 3<sup>rd</sup> Defendant advertised the sale of the suit land and adhered to the proper legal process in accordance with the *Auctioneers Act*, Rules and Regulations. DW3 who was the Auctioneer confirmed that the Plaintiff paid the full purchase price for the suit land and thereafter a transfer was effected to it. PW3 who was the Plaintiff's Advocate explained the process she adhered to, to ensure the Plaintiff purchased the suit land. Further, she confirmed that at no point was there any Order barring the Plaintiff from purchasing the said land as the subsisting restrictions on the title had been removed through Consents by the respective advocates involved in the two suits. She further demonstrated how she paid the purchase price. DW3 also admitted that he allowed the Plaintiff an extension of 90 days to pay the balance of the purchase price after the auction. It further emerged that a balance of the purchase price of Kshs. 12 million was paid to the 6<sup>th</sup> Defendant's Advocates messrs Njeru Nyaga & Company Advocates.
84. Although the 6<sup>th</sup> Defendant through DW2 disputes receipt of the purchase price nor instructing messrs J W Wambua & Company Advocates and messrs Njeru Nyaga & Company Advocates, it has not denied that the proceeds from the auction was used to settle the decretal amounts in the two suits, which were against it. Further, DW2 was even at pains to explain that the 6<sup>th</sup> Defendant never took any action against these two law firms nor against the Auctioneer who conducted the sale of the suit land. Even though the 1<sup>st</sup> and 2<sup>nd</sup> Defendants contend that the Plaintiff cannot be deemed to be a bona fide purchaser for value as it proceeded to purchase the suit land yet there were two pending suits, hence the sale offended the doctrine of *lis pendens*, I note none of the Defendants herein have confirmed that they indeed informed the Plaintiff that there was a suit challenging the mother title where the suit land emanated from.
85. It is worth noting that the 2<sup>nd</sup> Defendant despite actively participating in Nairobi ELC 167 of 2007 during the period of auction and transfer of suit land to the Plaintiff, proceeded to issue a Certificate of Search confirming that the 6<sup>th</sup> Defendant owned the said land. I further note that in Nairobi ELC 167 of 2007, the Court found that the 2<sup>nd</sup> Defendant was actually negligent as it has issued two titles for the mother title.
86. From this analysis of the evidence presented, I find that the Plaintiff indeed legally purchased the suit land as there was no order blocking the auction. I further find that the 2<sup>nd</sup> Defendant made negligent misrepresentations in the transaction leading to the sale of the suit land to the Plaintiff because it failed to divulge proper information to the Plaintiff to stop it from purchasing the said land.



**Whether the Plaintiff is entitled to statutory indemnity /compensation under the Land Registration Act, of Kshs.395, 000,000.00 or Kshs. 67, 402, 140.00/= and the extent of the Defendants' liability.**

87. The Plaintiff claims compensation as per the valuation reports produced by PW1 on the basis that it conducted due diligence before purchasing the suit land and that it relied on the 2<sup>nd</sup> Defendant's records which had glaring misrepresentations. It insists that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are hence liable to indemnify it for the loss and damage suffered. It contends that the 6<sup>th</sup> Defendant is also liable because it was found to have participated in the fraud surrounding the acquisition of the mother title by the Court in Nairobi ELC No. 167 of 2007.
88. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants argue that the Plaintiff cannot wholly lay blame on the 2<sup>nd</sup> Defendant for the loss allegedly suffered. Further, that Section 81(2) of the Land Registration Act bars indemnity in circumstances where title was derived from a person who caused or substantially contributed to the damage. On his part, the 3<sup>rd</sup> Defendant contends that he executed the Order for sale of the suit land issued in Machakos HCCC No. 105 of 2010, lawfully. Further, that he is offered protection under Section 6 of the Judicature Act. He gave an account of the proceeds of sale of the suit land. The 6<sup>th</sup> Defendant argued that the Plaintiff is not entitled to reliefs sought as it orchestrated the subject auction with the 3<sup>rd</sup> Defendant with an intention to defraud it and that it proceeded with the purchase of the suit land despite knowledge that it was encumbered. I however beg to disagree with this argument since the sale of the suit land was mandated by the Court due to the pending Decrees against the 6<sup>th</sup> Defendant in the two suits.
89. On compensation and statutory indemnity, Section 81 of the Land Registration Act provides that:
- (1) Subject to the provisions of this Act and of any written law relating to the limitation 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 or in a copy of or extract from any document or plan certified under this Act, 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 bona fide for valuable consideration, from a person who caused or substantially contributed to the damage.”
90. In the case of *Gikoi v Kahiu & 4 others* [2025] KEELC 686 (KLR), it was held that:
- “ 58. As against the 3<sup>rd</sup> and 4<sup>th</sup> defendants, the 2<sup>nd</sup> defendant needed to clearly set out the particularized basis upon which she sought indemnification from the duo and invite them to respond to the particularized pleadings. In the absence of clear pleadings and pleaded particulars, it would not be proper to condemn the Kenyan tax payer to bear the burden of indemnification.59. For the above reasons, the court finds that there is a proper basis for requiring the 1<sup>st</sup> defendant, as the architect of the loss which the 2<sup>nd</sup> defendant finds herself in, to indemnify the 2<sup>nd</sup> defendant. The indemnification is hereby assessed at the sum of Kshs 4,600,000 which is the purchase price which the 1<sup>st</sup> defendant received from the 2<sup>nd</sup> defendant..”



91. In the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] KECA 816 (KLR), where the Court of Appeal while dealing with the issue revolving around the mother title where the suit land emanated from, observed as follows:

‘As regards complicity by the Commissioner of Lands, the trial court found the officials at the land Registry, who are the custodians and issuers of Titles to have allowed the existence of two different Titles on the same property with all endorsements made thereon, which on its own was participation in the forgery. It observed that the Ministry of Lands kept the master record of all land and the registered owners, under a system which guarantees a land title certificate to be full, valid and indefeasible Title. The Commissioner of Lands failed to explain in this case how two land Title certificates on the same land could exist and which one was genuine. The responsibility to ensure accuracy of the register and authenticity of Titles lay with the Government, which is by law required to pay compensation for any fraud or other errors committed during registration. It was on that basis that the Commissioner of lands was found to have been privy to the forged entries during registration and issuance of the title.....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. The upshot is that the decision of the trial court was right in principle and correct in law and we uphold it. We also uphold the various orders issued by that court.’

92. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants insist that the Plaintiff is responsible for its fate as it purchased the suit land despite knowledge of the encumbrance. However, DW1 admitted that the Plaintiff purchased the suit land but does not have a title. Further, that in 2007, the office of Commissioner of Lands and Attorney General were aware of Nairobi ELC 167 of 2007, whose fulcrum revolved around the mother title where the suit land emanated from. While being taking through the proceedings from the said case, DW1 noted that actually the Commissioner of Lands had been requested to place a restriction on the said mother title but he failed to do so. He further confirmed that Plaintiff was not informed of judgement in Nairobi ELC 167 of 2007 hence the Land Registrar acted negligently in failing to maintain proper records.
93. It is worth noting that by the time the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were issuing the Plaintiff with a provisional title, it was a party to the Nairobi ELC 167 of 2007 where the Court had even found them complicit. How then do they expect the Court to exonerate them from misrepresenting the facts to the Plaintiff?
94. In *Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Muthara (deceased) & 5 others* (2013) eKLR, the Court of Appeal stated as follows;

“...the Registration of Titles Act is entirely a product of the Torrens System of registration. The word “Torrens” is derived from Sir Robert Torrens, the third premier of South Australia and pioneer and author of a simplified system of land transfer which introduced in 1958. This system emphasizes on the accuracy of the land register which must mirror all currently active registrable interest that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of government compensation...”

95. From the evidence tendered in this Court, while associating myself with the decisions quoted, I find that the 2<sup>nd</sup> Defendant cannot escape liability and should also be directed to indemnify the Plaintiff.



96. The Plaintiff has sought for statutory indemnity /compensation of Kshs.395, 000,000.00 which I find exorbitant. However, in the alternative it has sought for Kshs.67,402,140.00/= from the Defendants. I note at the point of purchase of the suit land, PW2 admitted that since title is a leasehold which was issued in 1930, there was only six years left of unexpired leasehold interest. Further, they had never applied for extension of the lease nor taken possession of the suit land. PW1 who was the valuer admitted that despite undertaking two valuations, however the remaining period in a leasehold indeed affected the value. I note the government valuer accepted the value of the suit land being Kshs.60 million for purposes of payment of stamp duty. Further, the Plaintiff also paid Kshs.60 million to purchase suit land, at the auction. It is my considered view that the Plaintiff cannot hence claim compensation for the valuation done by PW1.

97. In *Sampa Investments Limited v Summer Properties Co Ltd & 2 others; Chief Land Registrar Kwale & another (Third party)* [2025] KEELC 885 (KLR), the Court stated that:

“ 95. It is submitted that the Plaintiff suffered loss as a consequence of nullification of title to the suit properties which was not in the hands of the Defendants but the 1<sup>st</sup> and 3<sup>rd</sup> party as the custodian and guarantor of all documents and records in the land registry. My understanding of the above provisions is that such indemnity is only available to an innocent party. The Defendants were not innocent and they were part of the whole scheme that resulted into the cancellation of the titles. The rectification was by order of court and cannot be termed as an error either. DW1 testified in cross examination that it was not the mistake of Sampa Investments that caused the cancellation. Even if we were to look at the Plaintiff as the innocent party, to look away at the actions of the Defendants would be to go against the very spirit of the above provisions that frown upon fraudulent actions. 96. I have already pointed elsewhere in this judgement that amidst the fraudulent actions highlighted in my discussions there is no way the Defendants can escape liability by shifting the blame to the third parties. DW1 acknowledged that the land registrar receives documents for registration from the people who are transacting. He conceded he sold the land to the Plaintiffs and who gave him their money. He agreed that there was a profit margin of Kshs. 29 million Summer Properties made. He agreed his name stood out in all the transactions. To me it would be a travesty of justice to let the Defendants Scott free and this would be unjust enrichment. I would also be constrained to shift this burden to the taxpayer knowing very well this money ended up in the pockets of private individuals. Let those who benefitted carry their cross.”

98. Based on the facts as presented while relying on the legal provisions cited and decisions quoted, I find that the Plaintiff is entitled to a refund of the monies it paid as purchase price including interest from the date of payment. Further, it is entitled to a refund of the stamp duty and other costs it paid which included rates and rate. However, I note PW3 admitted that the Auctioneer already paid her law firm Kshs. 4,250,000/= as refund for the rates, land rent and consents and I will hence not award this amount. I further find that the Plaintiff has not demonstrate her claim for indemnity against the 4<sup>th</sup>, and 5<sup>th</sup> Defendants and will exonerate them from the same. From the evidence before me, I find that the parties entitled to indemnify the Plaintiff are the 2<sup>nd</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants as well as pay general including exemplary damages as well as costs of the suit. However, the liability between the said parties cannot be equal.



99. In the foregoing, I will award the Plaintiff Kshs.60,000,000/= as refund of the purchase price paid; Kshs.2,402,140/= being refund from the 2<sup>nd</sup> Defendant for the Stamp duty and registration fees paid; Kshs.2,000,000 as general including exemplary damages to be borne by the 2<sup>nd</sup> Defendant for being complicit and misrepresenting facts to the Plaintiff and Kshs.8,000,000 as general including exemplary damages to be borne by the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants. I find that the Plaintiff is also entitled to costs of this suit and interest.

### **Whether the 3<sup>rd</sup> Defendant is liable to account for monies received from the Plaintiff**

100. The Plaintiff has sought for the 3<sup>rd</sup> Defendant who was the Auctioneer who conducted the sale to provide a statement of accounts on how the proceeds of auction were utilized. The 3<sup>rd</sup> Defendant contends that he executed the Order for sale of the suit land issued in Machakos HCCC No. 105 of 2010, lawfully. Further, that he is offered protection under Section 6 of the *Judicature Act*. I note PW2 and PW3 also admitted that they had no issue with the auctioneer.

101. In *Muchiri t/a Raphan General Contractors v Kinja t/a Blue Access Ltd; Tsusho Capital Kenya Limited (Objector); Rutere t/a Giant Auctioneers (Applicant) (Civil Case 8 of 2017) [2024] KEHC 12446 (KLR) (17 October 2024) (Ruling)*, it was stated as follows on the duties of an auctioneer;

“..Under Section 23 of the *Auctioneers Act*, he has certain statutory duties. The section provides that the auctioneer has a triple duty: to act in a manner befitting an officer of the court; to act in accordance with the rules prescribed when repossessing, attaching, storing or selling any property; and to maintain appropriate books of accounts.”

102. Since there is a dispute on how the monies were utilized with the 6<sup>th</sup> Defendant denying receipt of the balance of the proceeds of sale, insofar as I exonerate the 3<sup>rd</sup> Defendant from any wrongdoing, I opine that as per the *Auctioneers Act* and Rules, he is expected to render the accounts and will direct him to do so within sixty (60) days, post judgement.

103. I hence find that the Plaintiff has proved its case on a balance of probability and will proceed to enter judgement in its favour in the following terms:

- a. A declaration be and is hereby issued that the 2<sup>nd</sup> Defendant acted negligently and recklessly in failing to place warnings and restrictions in dealings on LR No. 7149/115, Mavoko, Machakos County.
- b. The Plaintiff be and is hereby awarded Kshs. 60,000,000/= being the refund of the purchase price paid for the suit land to be wholly borne by the 6<sup>th</sup> Defendant.
- c. Kshs.2,402,140/= being refund from the 2<sup>nd</sup> Defendant for the Stamp duty and registration fees paid.
- d. General, exemplary and aggravated damages be and is hereby awarded to the Plaintiff for loss of bargain from the 2<sup>nd</sup> Defendant in the sum of Kshs.2,000,000/= for being complicit and misrepresenting facts to the Plaintiff.
- e. General, exemplary and aggravated damages be and is hereby awarded to the Plaintiff for loss of bargain from the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants in the sum of Kshs.8,000,000/=.
- f. The 3<sup>rd</sup> Defendant to render statement of accounts from the auction within sixty (60) days from the date of judgement and in the event of any balances, the same to be paid to the 6<sup>th</sup> Defendant.



- g. Interest on (b) above at court rates, to be calculated from the date of full settlement of purchase price until payment in full.
- h. Interest on (d) and (e) above at court rates from the time of filing this suit until payment in full.
- i. Costs of this suit is awarded to the Plaintiff to be borne by the 2<sup>nd</sup> 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants; out of which the 2<sup>nd</sup> Defendant is to bear 10% of the taxed costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JANUARY, 2026**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of:

Faith Seleke for Plaintiff

Ms. Awori holding brief for Ombati for 3<sup>rd</sup> Defendant

Ms. Munene for 6<sup>th</sup> Defendant

Court Assistant: Joan

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