



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 1311 OF 2014

HARCHARAN SINGH SEHMI.....1ST PLAINTIFF

HARBHAJAN SINGH SEHMI.....2ND PLAINTIFF

JASWARAN SINGH.....3RD PLAINTIFF

VERSUS

ROSPATECH LIMITED.....1ST DEFENDANT

TARABANA COMPANY LIMITED.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR, NAIROBI.....3RD DEFENDANT

THE NATIONAL LAND COMMISSION.....4TH DEFENDANT

THE INSPECTOR GENERAL OF POLICE.....5TH DEFENDANT

THE ATTORNEY GENERAL.....6TH DEFENDANT

JUDGEMENT

1. This dispute relates to the ownership of the parcel of land known as land reference number 209/2759/9 (I.R. No. 12263) (“the Suit Property”). The Plaintiffs were registered as tenants in common in equal shares of the Suit Property pursuant to a transfer registered on 7/12/1968. The Plaintiffs occupied the Suit Property from 1968 until 2/10/2014 when they were forcefully evicted from the Suit Property. After evicting the Plaintiffs, the 1st and 2nd Defendants entered the Suit Property and occupied it, which the Plaintiffs claim was to their detriment since they still hold a lease over the Suit Property. At the time the Plaintiffs were evicted, the 1st and 2nd Defendants produced another title for the same plot bearing a different I.R. number, being 122963. The Plaintiffs gave particulars of fraud against the 1st to 3rd Defendants.

2. In the Amended Plaint filed in court on 15/2/2017, the Plaintiffs seek a permanent injunction to restrain the 1st and 2nd Defendants from dealing with the Suit Property. They also seek an order that the entry on the proprietorship section of the land register of the Suit Property with the names of the 1st and 2nd Defendants is fraudulent and illegal, and should be registered in favour of the Plaintiffs. They therefore seek to be registered as the rightful owners of the Suit Property, vacant possession and eviction of the 1st and 2nd Defendants from the Suit Property. Additionally, they seek general damages; exemplary or punitive damages; special damages for loss of use of the property at the rate of Kshs. 1,000,000/= per month from 2/10/2014 until payment in full; special damages for the demolished house and business items which got lost during the unlawful eviction, and costs. They seek these prayers against the 1st and the 2nd Defendants.

3. The 1st Defendant denied the Plaintiffs’ claim. It averred that after the expiry of the Plaintiffs’ lease, the Suit Property reverted to the Government of Kenya and that it applied and was allocated the Suit Property on or about 2010. It stated that the Plaintiff’s lease was for 59 years from 1/10/1942 and it therefore expired on 1/10/2001. The 1st Defendant denied evicting the Plaintiffs from the Suit Property while maintaining that they were lawfully evicted by the City Council of Nairobi in accordance with the Physical Planning Act. The 1st Defendant stated that it had transferred the Suit Property to a different party and denied engaging in any fraud or collusion as the Plaintiffs alleged.

4. The 2nd Defendant, in its Amended Defence and counterclaim filed in court on 2/3/2017 denied the Plaintiff’s claim urging that the Plaintiffs neither resided on the Suit Property nor carried out any business there. It averred that the structures which were on the Suit

Property were derelict and inhabitable by human beings. The 2nd Defendant averred that it is a purchaser for value having acquired the Suit Property from the 1st Defendant. The 2nd Defendant stated that it carried out investigations and ascertained that the Plaintiff's lease expired in 2001 and the 1st Defendant was registered as the proprietor of the Suit Property in 2009. The 2nd Defendant further averred that once the Plaintiff's lease expired, the Plaintiffs ceased to have any rights over the Suit Property which reverted to the lessor, who was at liberty to allocate it to any person. The 2nd Defendant averred that it had developed the Suit Property and is in occupation but the Plaintiffs have continued to harass and intimidate the 2nd Defendant on the land. In the counterclaim, the 2nd Defendant seeks a declaration that it is the rightful owner of the Suit Property and a permanent injunction to restrain the Plaintiffs from interfering with its quiet possession of the Suit Property.

5. The 3rd, 5th and 6th Defendants also denied the Plaintiffs claim in their defence filed in court on 24/4/2017. They denied that there was any collusion or fraud by the 3rd, 5th and 6th Defendants. They further denied that there was ever any extension of the lease in favour of the Plaintiffs.

6. The Plaintiff called five witnesses. The 1st and 2nd Plaintiff gave evidence. The 1st Plaintiff stated that he together with Upkar Singh, Harbhajan Singh, Jaswaran Singh and Rajinder Singh bought the Suit Property situated at Ngara, Mushindi Road Nairobi on 7/12/1968. It had a permanent building with offices and a garage which they used as a base for their family businesses. They used to operate a long distance haulage transport business under the name Desai Carriers and their head office was on the Suit Property. The Lease was for 59 years from 1/10/1942 until 1/10/2001. He stated that they had dutifully paid ground rent and rates to the relevant authorities until 2017. Before the lease expired, they applied for its extension and the Ministry of Lands wrote a letter dated 13/7/2001 seeking the comments of the Director of Physical Planning and the Director of Surveys on the proposed extension of the lease. The Director of Physical Planning had no objection to the extension and gave his approval vide a letter dated 17/12/2011 while the Director of Surveys gave his approval in his letter dated 15/11/2007.

7. The 1st Plaintiff was following the extension of the lease over the Suit Property with the assistance of his friend Mr. Vijay Veera who has since died. He then sought the assistance of Mr. Kenneth Muchoki Njuguna of Two Ems in pursuing the extension of the lease over the Suit Property but unfortunately Mr. Njuguna also died on 22/9/2011. Before Kenneth Njuguna died, someone went to the Suit Property in April 2011 claiming to be the owner of the land and threatened to evict the Plaintiffs' workers. Mr. Harcharan Singh claimed that he went to the Chief's Office in Ngara accompanied by Kenneth Muchoki Njuguna and his wife Florence Nyaguthii Muchoki where they were informed that Martin Njuguna Ngugi was the new owner of the land.

8. He came to learn later that Martin Njuguna Ngugi was the director of the 1st Defendant. Kenneth Muchoki Njuguna informed the 1st Plaintiff that at some point he had sought the assistance of Martin Njuguna Ngugi in processing his lease when Kenneth fell ill. Martin Njuguna and Florence Muchoki were assisting Kenneth pursue the extension of the lease over the Suit Property. He would send the two of them to the lands office and other government offices. Later in the year when he visited City Hall he noted that the owners name had changed to Rospatech Limited. He was unable to do a search at the lands office as the file had gone missing. He stated that Martin Njuguna did not return to the Suit Property until 2/10/2014 when he went there accompanied by a mob of goons, the area Chief, the Officer Commanding Pangani Police Station and several police officers, and forcefully evicted the Plaintiff's employees from the Suit Property in the presence of the 2nd Plaintiff. They demolished the building which was on the land and destroyed the Plaintiff's machinery and their valuable documents. He stated that during the demolition, an injector pump calibration machine, several spare parts for injector pumps, heavy goods vehicles injector pumps, various office equipment, cabinets with records, lorry spares for their previous transportation business and several tools and mechanical equipment were destroyed.

9. He came to learn that at the time the building was demolished the title over the Suit Property had been transferred to the 2nd Defendant. He stated that the demolition was done without notice or a court order. The 2nd Defendant proceeded to construct a multi-storeyed building on the Suit Property knowing very well that a suit had been filed in court. When he did a search, he noted that a deed plan attached to the 2nd Defendant's title was endorsed with the remarks "extension of lease" yet the 1st Defendant had no lease to extend. The 1st Plaintiff questioned the manner in which the 1st Defendant's deed plan was issued. He maintained that they had never transferred or surrendered the Suit Property. He confirmed that the Plaintiffs were not issued a new title for the extended lease and stated that they were informed that the file was missing at the lands office. He stated that the I.R. Number on the Defendant's title was different from the Plaintiffs'. He challenged the transfer of the Suit Property from the 1st Defendant to the 2nd Defendant citing the disparity in the consideration, in which the sale agreement mentions Kshs. 24,000,000/= while the transfer lodged at the lands office stated that it was Kshs. 12,500,000/=. He confirmed that he moved to the United Kingdom in 2001 and confirmed that they applied for extension of the lease in July 2001.

10. He produced evidence of payment of rates to the Nairobi City Council for 2010, 2011, 2008 and February 2017 and the rates clearance certificate issued in February 2017. He also produced evidence of the payment of land rent. He produced a copy of the certificate of death for Kenneth Muchoki Njuguna and the certificate of title over the Suit Property confirming that the Plaintiffs purchased it in 1968. The enforcement notice dated 20/4/2011 gave the particulars of the development that contravened the city laws as construction of permanent and temporary structures which were illegal and occupation of a dilapidated structure. The notice indicated that the owner of the land was required to stop further construction, vacate the land and remove or demolish the structures on the land. The notice from the Public Health Department of the City Council of Nairobi dated 18/4/2011 asked the landlord, the 1st Defendant to stop occupation and use of the premises until the conditions set out were complied with. Some of the conditions were repairing the damaged and broken toilets doors and repairing the perimeter wall. The letter dated 13/5/2011 from the City Council of Nairobi requested the District Commissioner to provide security for the demolition operation. He attached written authority to sell property dated 2/6/2011 which was signed by Martin Njuguna Ngugi tasking Florence Nyaguthii and Joseph Rono to scout for buyers. The brief description of the property stated that it was located within Ngara, Mshindi Road and was granted to Rospatech for 99 years after the previous lease expired. He also produced a copy of the 1st Defendants letter dated 15/5/2011 written by Martin Njuguna Ngugi to Kenneth Muchoki Njuguna agreeing to pay Mr. Kenneth Muchoki Njuguna Kshs. 1,000,000/= after the successful sale of the Suit Property.

11. The notification of approval of development permission dated 17/3/2011 was given by City Council of Nairobi to the 1st Plaintiff and it confirmed that the Plaintiff's application dated 28/2/2011 seeking extension of lease over the Suit Property had been approved by the City

Council of Nairobi. The Ministry of Lands through the Commissioner of Lands, wrote to the Director of Physical Planning and Director of Surveys on 22/3/2011 seeking their comments on the proposed extension of lease over the Suit Property. He gave evidence of the complaint he made to the Director of Criminal Investigations and Nairobi City Council about the grabbing of the Plaintiffs' land.

12. He placed a lot of reliance on the letter written on behalf of Commissioner of Lands on 13/7/2001 to the Directors of City Planning and Architecture, Physical Planning and Surveys which made reference to the extension of the lease. J. M. Gitau who signed the letter stated that he had received an application for the extension of the over the Suit Property and was therefore seeking the comments of the Directors of City Planning and Architecture, Physical Planning and Surveys. The letter was copied to the 1st Plaintiff and asked him to pay inspection fee to the Nairobi City Council and the Director of Physical Planning and to contact Mr. Gitau for a site inspection.

13. The letter dated 16/10/2009 from the Ministry of Lands sought the comments from the Directors of Surveys and of Physical Planning on the extension of the lease. It stated that the writer had received a notification of approval of development permission from the Director of City Planning with respect to the extension the lease over the Suit Property. The letter was copied to Two Ems and Associates. He produced a copy of the receipts issued by the Director of Physical Planning on 24/10/2009 acknowledging payment of Kshs. 3,000/= on account of extension of lease over the Suit Property.

14. The 2nd Plaintiff gave evidence along the same lines as the 1st Plaintiff. He confirmed that he went to the Chief's office in April 2011 when somebody went to the Suit Property claiming that the land was his. He stated that Martin Njuguna Ngugi was the one laying claim to their land. He increased the number of watchmen at the plot. Martin called him on 28/8/2014 to inform him that the plot was now his. He reported the matter to the police. His driver called him on 2/10/2014 and informed him that the Suit Property had been invaded by many armed people who were accompanied by police officers and that they were demolishing the building on the plot using tractors and bulldozers. He rushed to the plot and found the demolition going on. He tried to stop the demolition and got injured in the course of it. He went to Pangani Police Station to report the incident but the police declined to assist him. He met Martin Njuguna at the police station who gave his driver 3,000/= to meet his lodging expenses and asked him to vacate his plot immediately. He confirmed that there was a multi-storey structure on the Suit Property. He maintained that the Suit Property was grabbed in 2014 and that when they purchased the Suit Property it had a building on it which they were using for the transport and storage business. He stated that they were claiming loss of business of Kshs. 1,000,000/= per month and was emphatic that they applied for extension of the lease in 2001. He denied being served with an enforcement notice. He further stated that they were up to date with the payment of rates to the Nairobi City County.

15. Florence Nyaguthii Muchoki gave evidence and confirmed knowing the 1st Plaintiff and Martin Njuguna Ngugi who is a director of the 1st Defendant. He came to know them through her late husband, Kenneth Muchoki Njuguna who died in 2011. She stated that her late husband used to discuss with her the assignments he was undertaking. He informed her in 2007 that the 1st Plaintiff had tasked him to process the extension of the lease over the Suit Property whose lease had expired in 2001. By then, the Plaintiffs had obtained approval for the extension of the lease from the Ministry of Lands, Director of Surveys and Nairobi City Council. She stated that her late husband engaged Martin Njuguna Ngugi to assist him in processing the extension of lease for the Plaintiffs. She stated Martin disagreed with her late husband when Martin informed her husband that they should process the title under their name instead of the Plaintiffs' names. Following the disagreement with Martin, her husband started sending her to follow up the on the extension of the lease in City Hall, the Lands Office and the 1st Plaintiffs' home since his health was deteriorating. She confirmed that when she started work on the matter, the file was available at the lands office. However, she started experiencing difficulties at the Lands Office when the file could not be traced. She was surprised in April 2011 when the 1st and 2nd Plaintiffs went to her home and informed her and her husband that there were people claiming that the plot belonged to them. She stated that they went to Suit Property and were informed by the caretakers that the person who was claiming the plot had introduced himself as Martin. They went to the Chief's office and were informed by the Chief that Martin Njuguna Ngugi had been to the Chief's office and presented documents of ownership of the plot. The Plaintiffs reported the matter to the police.

16. Martin Njuguna Ngugi started looking for her trying to convince her that the plot was now his since he had already transferred it to his name both at the lands office and the Nairobi City Council. Martin went to see her husband and promised to pay him Kshs. 1,000,000/= after the sale of the Suit Property following which they signed the commitment letter dated 15/5/2011. On 2/6/2011 Martin signed an authority for her to sell the plot for Kshs. 20,000,000/= at 2% commission and gave her copies of the enforcement notice dated 20/4/2011 to confirm that the plot belonged to him and that he had authority to demolish the structures on it. Her husband died in September 2011 without being paid the commission by Martin. She had not found a buyer for the plot by the time her husband. Martin stopped communicating with her and she later came to learn that the Plaintiffs' building on the Suit Property was demolished on 2/10/2014 and a new development was built on it. She stated that there was a garage and a caretaker's house on the Suit Property made of stones. There were iron sheet structures from which charcoal was being sold. She confirmed that the 1st Defendant gave her instructions to sell the suit plot. Her late husband was a broker. The witness was able to identify Martin Njuguna and pointed him out in court. She stated that Martin showed her the letter of allotment and the title to confirm that he was the new owner of the Suit Property. She stated that Martin told her he had transferred the suit land and asked her to leave the Indians alone and help him get a buyer.

17. Wilson Sazaka Mukoyoni gave evidence. He was employed as a driver by the Plaintiffs and used to live on the Suit Property. He had worked for the Plaintiff since 1958 and moved to the Suit Property in 1973. He lived there until he was evicted on 2/10/2014. He first met Martin Njuguna Ngugi in April 2011 when he went to the suit land and claimed ownership while asking the witness to vacate the land. Martin did not go back to the Suit Property until 2/10/2014 when he went there with armed goons, police officers, the area Chief and the OCS Pangani with lorries and bulldozers which they used to demolish the building on the plot. While the demolition was going on, he could see Martin giving instructions and having discussions and consultations with the area chief and the police. He went with the 1st and 2nd Plaintiffs to report the matter at the Pangani Police Station. The police declined to record the complaint and dismissed the Plaintiffs' title as colonial. Martin gave him 3,000/= to go and rent another house and asked him to vacate his land immediately. He only managed to salvage his bed, mattress, bicycle and radio. Everything else on the plot was destroyed. He stated that there were many machines, spare parts, injector pumps and office cabinets with very important documents which were destroyed or vandalised during the demolition. He produced evidence of payments he made for the lodging after the demolition. He stated that there was a workshop for spare parts and that there were lorries at the back of the plot. He stated that the workshop was made of stones.

18. Corporal Gilbert Okello, a police officer attached to the Directorate of Criminal Investigations, Land Fraud Unit gave evidence. He

produced a copy of his report done on inquiry number 132 of 2017. The findings he made were that the correspondence file in the letter of allotment was changed from 34031 to 272940. The IR number was also changed from 6477 to 122963. The other notable finding was that the land officer known Isaac Atandi Machuka had disowned the letter of allotment issued to the 1st Defendant. The investigator also raised concerns in his report about the directorship of the 1st Defendant at the time the transactions took place while noting that Martin Njuguna Ngugi acted without the knowledge of the other director Hon. Mpuri Aburi. He made recommendations that Martin Njuguna Ngugi and Isaac Atandi Machuka were to be charged with offences relating to the registration of Defendant as proprietor of the Suit Property. He confirmed that the signature appearing on the letter of allotment was Mr. Muchuka's. He visited the Suit Property after the building on it had been demolished. He did not get a response from the land registrar regarding the deed file, and was told the file was missing. He stated that he had preferred charges based on the evidence gathered. He charged Mr. Atandi Machuka based on the fact that he had no authority to sign the letter of allotment on behalf of the Commissioner of Lands.

19. The 4th Defendant called Antipas Nyanjwa, its Deputy Director Investigations and Forensic Services. Mr. Nyanjwa received instructions in May 2016 from the 4th Defendant to investigate the transfer and issuance of lease over the Suit Property to the 1st Defendant following a complaint and request for the review of that grant. He visited the Suit Property and received the lease certificate and correspondence showing the Plaintiffs had applied for extension of the lease sometime in July 2001. He confirmed the application for extension of the lease was missing from the file. Another file reference number 27240 was attached to file number 34031 at the lands office. A letter of allotment was issued to the 1st Defendant over the Suit Property on 30/10/2009 in file number 27240. He interviewed Mr. Isaac Atandi Machuka who denied signing the 1st Defendant's letter of allotment over the Suit Property and clarified that at the time the allotment was issued, he was not assigned to deal with matters within Nairobi area. He also confirmed that he was unable to find the application made by the 1st Defendant for the allocation of the Suit Property. He stated that the 4th Defendant concluded that in light of the fact that the Plaintiffs applied to have their lease extended and they did not receive any correspondence to the contrary from the concerned authorities, the Suit Property ought not to have been offered to a new allottee. He maintained that the issuance of the lease to the 1st Defendant was irregular. He confirmed that he interviewed Mr. Machuka during the investigations whom it is claimed allocated the Suit Property to the 1st Defendant. His other finding was that file number 272940 was opened unprocedurally, and being a temporary file was also the one used by the 1st Defendant to pay the money demanded in the letter of allotment. He maintained that the initial file was not lost. He further stated that Mr. Machuka denied that he visited the Suit Property. He stated that the process of extending a lease takes time and the Plaintiffs' application was underway when the 1st Defendant acquired its lease over the Suit Property. He maintained that the process of extension of the Plaintiffs' lease was hijacked by the 1st Defendant. Some documents had been plucked out of the file at lands. He clarified that he was not carrying out a criminal investigation on the matter, but that his inquiry was to assist the 4th Defendant in its review and determination of the propriety of the grant of the land to the 1st Defendant.

20. Martin Njuguna Ngugi gave evidence and confirmed that he was a director of the 1st Defendant. He stated that the 1st Defendant was allotted the Suit Property by the Government of Kenya vide the letter of allotment dated 30/10/2009 and that it paid the sum of Kshs. 74,140/= demanded in the letter. He averred that the 1st Defendant was issued a certificate of lease over the Suit Property sometime in 2010 after it had obtained all the necessary approvals and paying the requisite fees. It then started paying rates to the relevant authorities. The 1st Defendant entered into an agreement for the sale of the Suit Property to the 2nd Defendant in March 2014 and the land was transferred to the 2nd Defendant. He maintained that the 1st Defendant obtained title to the Suit Property lawfully and that it dutifully paid land rent and rates.

21. He stated that the 1st Defendant wrote to the Plaintiffs to vacate the suit premises and remove the structures erected on it but they refused to do so. He maintained that the Plaintiffs were lawfully and legally evicted from the Suit Property by the City Council of Nairobi in accordance with the Physical Planning Act. Further, that the eviction and demolition of the structures on the Suit Property was legally done. He stated that the 1st Defendant applied for allocation of the Suit Property in 2009, although he did not have a copy of the application. He stated that the 1st Defendant had written a letter to the Commissioner of Lands asking for plots whose leases were expiring. He did not have copies of the letters. He stated that the Commissioner of Lands told them of three plots which included the Suit Property.

22. He denied working with Kenneth Muchoki and stated that he came to know him later. He confirmed that the 1st Defendant applied for allocation of the land but not extension of the lease. He stated that he did not participate in evicting the Plaintiffs from the Suit Property. He stated that when he went to the Suit Property in 2010 there were structures made of iron sheets and one dilapidated building on the land which had been condemned by the City Council of Nairobi. He confirmed that they sold the Suit Property to the 2nd Defendant for Kshs. 24,000,000/= but indicated the value as Kshs. 12,500,000/= in the transfer. He did not produce evidence of the current shareholders and directors of the 1st Defendant.

23. He maintained that he did not know the Suit Property but was only made aware by officers from the Ministry of Lands that there was a plot. On cross examination, he stated that the Commissioner of Lands, Mr. Mabea called him and told him there was an available plot for allocation in Ngara. Mr. Mabea told him to apply for the plot and that there were three plots. He maintained that the 1st Defendant fulfilled the conditions in the letter of allotment and that also accepted the offer of allocation. He did not know why the deed plan attached to the Suit Property was written on extension of lease. When they attempted to take possession of the Suit Property the hawkers who were there chased them away. He maintained that he had nothing to do with the payment of the stamp duty on transfer of the Suit Property to the 2nd Defendant and that that was within the purview of the purchaser who was the 2nd Defendant. He surmised that the 1st Defendant got the lease over the Suit Property properly after following due process.

24. Charles Kiri Thube gave evidence for the 2nd Defendant. He stated that the 2nd Defendant is a family business and he and his wife are directors of the 2nd Defendant. He stated that he was made aware in 2014 that the Suit Property was up for sale. He met Martin Njuguna who informed him that he owned the Suit Property. He also met the company's lawyer. He was shown a copy of the letter of allotment and the receipt showing the payment made when he inquired about how Martin Njuguna became proprietor of the suit land. He was given documents and did due diligence before purchasing the Suit Property. He entered into a sale agreement with the 1st Defendant over the Suit Property on 24/3/2014. The Suit Property was transferred to his company after the company had paid the full purchase price. He had no reason to believe that the property had not been acquired lawfully by the 1st Defendant and stated that despite agitations, tantrums and shenanigans by the

Plaintiffs he believed they had no legal right in the Suit Property.

25. He maintained that the Suit Property was properly acquired by the 1st Defendant and he acquired it for valuable consideration. He attached documents showing he had charged the property to Prime Bank Limited to secure a loan. He took a further charge on it on 11/2/2016. He maintained that there was no evidence showing that the Plaintiffs' lease was extended prior to its expiry and the property therefore reverted to the Government on 2/10/2001 when the Plaintiffs ceased being lessees. After purchasing the Suit Property, the 2nd Defendant constructed a mixed commercial and residential building on the suit land. He stated that since he came into possession of the Suit Property he had not had peace from the Plaintiffs who were trying to get possession of the land. Further, that he had invested heavily in the Suit Property and the rent he collects from the Suit Property is applied towards repaying the loan from Prime Bank Limited. He urged the court to allow his counterclaim and bar the Plaintiffs from interfering with his occupation of the Suit Property. He stated that he purchased the Suit Property for Kshs. 24,000,000/=.

26. He had an office in Ngara. A broker went to his house and informed him that there was a plot for sale in February 2014. He developed interest in the land and made a verbal offer. He did due diligence and understood that the 1st Defendant would give him vacant possession of the plot under the terms of the sale agreement. He met Martin Njuguna in his lawyer's office sometime in February 2014. He stated that there was no building on the suit land in 2014. He further claimed that there was no demolition in October 2014 since he was already on site having taken possession of the Suit Property earlier in March. Further, that the Plaintiffs came to court after he had commenced construction on the suit land. The Plaintiffs disrupted his use of the land in 2015. He further stated that he got possession of the Suit Property in 2014 after making substantial payment.

27. He maintained that he did not participate in processing the 1st Defendant's title or evicting the Plaintiffs from the land. He stated that he began construction on the land in May 2014. He was not aware that the Plaintiffs had applied for extension of their lease because the search he carried out confirmed that the 1st Defendant was the owner of the Suit Property. He confirmed that the broker who went to inform him about the property was called Mr. Mwangi and stated that he did not pay the broker any commission because this was to be paid by the seller. He completed the building in February 2015. He proceeded with the construction after learning of the existence of this suit. He maintained that no court order stopping construction on the Suit Property was ever served on him.

28. Gordon Odeka Ochieng a Senior Assistant Director Land Administration in the Department of Lands gave evidence. He confirmed that the Plaintiffs previously held the Suit Property as tenants in common in equal shares from 1/10/1942 until 1/10/2001 when the lease expired. He stated that correspondence file number 34031 containing the correspondence touching on the Suit Property was not available in the lands office and so he could not tell whether the proposed extension of the lease in favour of the Plaintiffs was ever granted. He confirmed that the suit land was allocated to the 1st Defendant through the letter of allotment with reference 34031 dated 30/10/2009. The 1st Defendant accepted the offer and made the necessary payments on 16/12/2009.

29. Deed plan number 303598 was issued by the Director of Surveys and a grant was processed and signed by the former Commissioner of Lands, Mr. Zablon Mabea on 8/2/2010, and it was registered on 7/4/2010 as I.R. N. 122963. The Suit Property was transferred to the 2nd Defendant in June 2014. He averred that the Plaintiffs would have been entitled to pre-emptive rights to be allocated the land when the lease expired if the land was not required for public purposes and only if the property was developed in accordance with the conditions of the lease.

30. He confirmed that he had not seen the application made by the 1st Defendant to be allocated the Suit Property. He confirmed that the Suit Property had two files and that file number 34031 was missing and was the file containing the correspondence between the Ministry of Lands and the Plaintiffs. When the land was re-allocated by the Commissioner of Lands to the 1st Defendant, it was assigned a new file number 272940. He explained that when ownership is changing or a file goes missing, you can have two files opened for the same piece of land. He stated that the file in respect of the Plaintiff's lease will be closed if it is found. On being asked how come the letter of allotment issued to the 1st Defendant was made in file number 34031 which had the Plaintiffs' documents, he stated that it may have been available at the time.

31. He confirmed that he knew Isaac Atandi Machuka, that he was not the Commissioner of Lands and that for Mr. Machuka to allocate land, he needed the authority of Commissioner of Lands. He confirmed the allotment to the 1st Defendant was for a new grant hence the deed plan should have indicated that it was a new grant and not an extension of lease. He stated that the Suit Property reverted to the Government when Plaintiffs' lease expired in 2001. He added that where property is not developed, pre-emptive rights do not apply. He stated that the Commissioner of Lands allocated government land and that the Suit Property was government land at the time it was allocated to the 1st Defendant. He added that they did not find any other procedure followed to issue a grant over the Suit Property to any other party other than the 1st Defendant. He confirmed that he had not seen the Plaintiffs' application for the extension of their lease over the Suit Property. He confirmed that the application for the extension of the lease by the Plaintiffs ought to have been in file number 34031 which was missing.

32. Edwin Munoko Wafula a Senior Land Registrar at the Ministry of Lands and Physical Planning gave evidence. According to the records held at the lands office, the current proprietor of the Suit Property was the 2nd Defendant who had charged it to Prime Bank Limited. From their records, the last entry in respect of the Plaintiffs' title was a discharge of charge registered on 16/4/1993. He took the court through the process of transferring private land. He stated that they only dealt with deed files in his department and not correspondence files which belong to the land administration department. He stated that they look at approvals before registering titles over land. He conceded that a new grant ought not to have a deed plan that is endorsed with the remarks "extension of lease" and that for a new grant, the deed plan is usually written "new grant". He stated that a new grant would also have a new I.R. Number and added that they could not have registered the land if the approvals were missing.

33. Parties filed submissions which the court has considered. The main issues for determination are whether the Plaintiffs' lease over the Suit Property was renewed and whether the Suit Property was lawfully allocated to the 1st Defendant. On one hand, the Plaintiffs and 4th Defendant contend that the Commissioner of Lands had a duty to renew or extend the lease over the Suit Property in favour of the Plaintiffs. On the other hand, the 1st, 2nd, 3rd, 5th, and 6th Defendants hold a contrary view that the Plaintiffs' lease expired and was never renewed. The

Plaintiffs relied on the case of **Anne Chepsiror and 5 others [2015] eKLR** which dealt with the issue of extension of a lease over government land. They submitted that neither the President nor the Commissioner of Lands allocated the Suit Property to the 1st Defendant and further contended that Isaac Atandi Machuka who issued the letter of allotment to the 1st Defendant had no authority delegated to him by either the President or the Commissioner of Lands to allocate the Suit Property. Further, that the Commissioner of Lands was required to follow the legal process set out under the repealed Government Lands Act in selling town plots which included putting up the plots for auction and selling such plots to the highest bidders. They submitted that the Commissioner of Lands could only have disposed of the Suit Property in accordance with Sections 12, 13 and 14 of the Government Lands Act.

34. The Plaintiffs submitted that as the previous owners of the Suit Property, they had a legitimate expectation that the lease over the Suit Property would be renewed in their favour. They maintained that contrary to the assertions by the Defendants, the Suit Property had developments on it and the Commissioner of Lands had no right to allocate it to another person since the Plaintiffs legitimately expected their lease over the suit land to be automatically renewed. The Plaintiffs argued that since they had not breached any of the terms of the lease, they expected their lease to be extended.

35. They relied on Section 9 of the Government Lands Act which sets out the procedure for disposing of land through a public auction. The Plaintiffs contended that based on the evidence of the 1st Defendant, it was not possible for stand premium to have been paid on 1/4/2010 and the title issued on 7/4/2010 without the 1st Defendant obtaining the other requisite clearances for rates and rent payment. They maintained that at the time the Suit Property was allocated to the 1st Defendant, the Commissioner of Lands was well aware that the Plaintiffs were interested in having their lease extended.

36. The Plaintiff's submitted that Martin Njuguna Ngugi, the Director of the 1st Defendant came to learn of the expiry of their lease through Kenneth Muchoki, who was assisting the Plaintiffs in extending their lease and that Martin Njuguna Ngugi colluded with officers in the lands office to process the lease in his own favour. They maintained that the Suit Property was developed. They took issue with the fact that the 1st Defendant did not take possession of the Suit Property in October 2010 when it got the title registered in its name but only went to the land in October 2014. They urged that the 1st and 2nd Defendants acted fraudulently when they stated a lower consideration in the transfer documents from the actual price paid for the land. They relied on Sections 24, 60 and 64 of the repealed Registered Titles Act, which empowered the courts to cancel titles obtained by fraud or mistake.

37. The Plaintiff's urged the court to grant them general damages of Kshs. 100,000,000/=, exemplary damages of Kshs. 100,000,000/= and special damages for loss of use of the Suit Property at Kshs. 1,000,000/= per month from 2/10/2014 until payment in full. They further sought special damages of Kshs. 20 million as fair compensation for the demolished house and 10,000,000/= for the destroyed machinery.

38. The 1st Defendant submitted that the Plaintiffs' lease was neither extended nor renewed and that it applied for and was allocated the Suit Property. It relied on the case of **Nairobi City Council v Chhagal Lala Divari w/o Chhagan Lala & 2 Others [2013] eKLR** in which the court observed that where a leasehold interest expires, the land reverts to public land. It relied on Section 23 of the repealed Registration of Titles Act on the indefeasibility of a title of a proprietor except on grounds of fraud or misrepresentation to which the person is proved to be a party. It further submitted that the Plaintiffs had only made allegations of fraud against it but had not proved these.

39. The 2nd Defendant also maintained in its submissions that the Plaintiffs' lease over the Suit Property expired and was never extended, and that the land was regularly allocated to the 1st Defendant who subsequently sold it to the 2nd Defendant. Both the 1st and 2nd Defendants relied on the decision in **Suleiman Murunga v Nilestar Holdings Limited & Another [2014] eKLR** in urging that after the expiry of the lease, there was nothing to renew and that the Government could only allocate the land afresh. The 2nd Defendant urged that not having developed the Suit Property in line with the conditions of its lease, the Plaintiffs could not have legitimately expected that their lease over the Suit Property would be renewed by the Government. It urged that it was an innocent purchaser for value and deserved the protection of the law.

40. The 3rd, 5th and 6th Defendants submitted that the Plaintiffs did not have any legal right to the Suit Property and that they had failed to establish that they applied for extension of their lease. They submitted that on expiry of their lease, the Suit Property reverted to the Government. The Defendants further urged that the Plaintiffs failed to comply with the conditions of the lease requiring them to develop the Suit Property and relied on the case of **Kenya Industrial Estates Limited v Anne Chepsiror & 5 Others [2015] eKLR** on this point. The dispute was over a vacant plot which had not been developed and the court observed that such a vacant plot had to be put through the auction process for the highest bidder to purchase it after the lease expired without it being developed. The 3rd, 5th and 6th Defendants urged that the 2nd Defendant's title over the Suit Property was indefeasible and protected by the law. Further, that the 3rd, 5th and 6th Defendants were not involved in any fraudulent activities.

41. The court has considered the evidence adduced and the submissions of parties. The letter dated 13/7/2001 from the Commissioner of Lands seeking comments from the Director of Physical Planning and Director of Surveys confirms that the Plaintiffs made an application for the extension of the lease before the lease expired on 1/10/2001. The letter was copied to the 1st Plaintiff and asked him to pay inspection fee to the Nairobi City Council and Director of Physical Planning, and to arrange a site inspection. The letter seeking comments on the extension of the Plaintiffs' lease would not have been written if indeed the Plaintiffs had not made any application for the extension of their lease over the Suit Property. The letters dated 22/10/2009, addressed to the Commissioner of Lands and 22/03/2011 from the Commissioner of Lands both of which made reference to the extension of lease and development permission demonstrate that by the time the Suit Property was allocated to the 1st Defendant in 2010, the Commissioner of Lands and other officials in the Ministry of Lands were well aware that the Plaintiffs had made an application for the extension of their lease and the Commissioner of Lands indicated in the letters that the Plaintiffs lease would be extended.

42. The witnesses for the 3rd, 5th and 6th Defendants stated that the lands file relating to the Plaintiffs lease could not be traced. The file reference for the file said to be missing is the same reference under which the letter of allotment to the 1st Defendant was issued. The endorsement on the deed which reads "extension of lease" as opposed to stating "new grant" further confirms that the lands officials were

seized of the matter relating to the extension of the Plaintiffs' lease over the Suit Property.

43. It is important to look into the manner in which the 1st Defendant was allocated the suit land. The application it made for allocation of the land was not produced in evidence. Florence Nyaguthii Muchoki, the Plaintiffs' witness together with the 1st Plaintiff confirmed that Martin Njuguna Ngugi, the 1st Defendant's director was roped in by Kenneth Muchoki Njuguna to assist in following up the extension of the Plaintiffs' lease. The letter dated 16/10/2009 written on behalf of the Commissioner of Lands to the Directors of Surveys and Physical Planning confirming that the Commissioner of Lands had received a notification of approval of development permission from the City Council was copied to Two Ems & Associates which the Plaintiffs' witnesses confirmed was the name under which Kennedy Muchoki Njuguna who was pursuing extension of the Plaintiff's lease was trading under. The court is persuaded that Martin Njuguna Ngugi was incorporated by Kennedy Muchoki Njuguna in the pursuit of the extension of the Plaintiffs' lease but along the way decided to pursue the allocation of the plot to himself. The acknowledgement Martin Njuguna Ngugi wrote on 15/5/2015 undertaking to pay Kennedy Muchoki Njuguna Kshs. 1,000,000/= on the sale of the Suit Property and the authority to sell property that he gave Florence Nyaguthii further confirm the two played a part in the Plaintiffs' endeavours to have their lease over the Suit Property renewed.

44. There was no mention in the correspondence from the Commissioner of Lands that the Plaintiffs were in breach of the conditions of lease and therefore their lease would not be extended. The letter dated 15/11/2007 from the Director of Surveys to the Commissioner of Lands stated that the Director of Surveys had no objection to the extension of the Plaintiffs' lease as long as the plot did not form part a disputed public utility land. The letter from the Commissioner of Lands office dated 22/03/2011 which was copied to the 1st Plaintiff sought the comments of the Director of Physical Planning and Director of Survey before the Commissioner of Lands could process the proposed extension of lease. The letters confirm that the process of extending the Plaintiffs' lease by the Commissioner of Lands was still ongoing long after the lease had expired.

45. Martin Njuguna Ngugi testified that Mr. Mabea, the Commissioner of Lands called him and informed him that there were three plots available for allocation. He did not give details of the other two plots. It is noteworthy that Mr. Mabea signed the 1st Defendant's grant over the Suit Property. The court agrees with the Plaintiffs' submission that if indeed the suit plot was available for alienation then the procedure set out in the Government Lands Act ought to have been employed in allocating the suit land to the 1st Defendant. There was no provision under the Government Lands Act which allowed the Commissioner of Lands to call individuals and ask them to apply to be allocated town plots whose leases had expired.

46. One would have expected Isaac Atandi who signed the 1st Defendant's letter to be called by the 1st, 3rd, 5th and 6th Defendants to give evidence and confirm that he had authority to allocate the Suit Property to the 1st Defendant in light of the contention by the 4th Defendant's witness that he lacked authority and further, that Isaac Atandi was charged with criminal offences in connection with the allocation of the suit land to the 1st Defendant. Corporal Gilbert Okello and Antipas Nyanjwa testified that Isaac Atandi had denied issuing the letter of allotment to the 1st Defendant. This invalidates the 1st Defendant's root of title.

47. The 2nd Defendant's Director confirmed that he had had no peace from the Plaintiffs after acquiring the Suit Property as they persisted in claiming the land still belonged to them. Nevertheless, the 2nd Defendant proceeded to construct a multi-storeyed structure on land in dispute and charged it to a bank. A prudent person would not undertake such ventures until such time as he has confirmed that the land he acquired is not being challenged and he can therefore invest massively in that land. In the court's view, the 2nd Defendant's recourse lies against the 1st Defendant.

48. The court finds that the Plaintiffs commenced the process of extending their lease over the Suit Property before the lease expired. The Plaintiffs continued to occupy the Suit Property from 2001 when their lease expired until 2010, when the plot was allocated to the 1st Defendant. The Plaintiffs had a legitimate expectation that their lease would be extended. The 1st Defendant did not take possession until 2014 when it evicted the Plaintiffs from the suit land. During this period, the Commissioner of Lands never brought up the issue of the Plaintiffs' failure to develop the suit land or any other breach of the lease terms which would have disentitled the Plaintiffs to the extension of the lease. The court is persuaded that there were permanent developments on the land based on the uncontroverted evidence that bulldozers were used to bring down the structures on the Plaintiffs' land. It is unlikely that bulldozers would be used if it were only temporary structures on the land as the Defendants contended. The 1st Defendant sold the land to the 2nd Defendant without developing it, perhaps because its director was what you would call a land broker who had no intention of using the land for the purpose stated in the grant.

49. The procedure for allocating town plots under the Government Lands Act was not followed when the Commissioner of Lands allocated the Suit Property to the 1st Defendant who subsequently sold it to the 2nd Defendant. No explanation was given for indicating the purchase price in the transfer as Kshs. 12,500,000/= as opposed to Kshs. 24,000,000/= in the sale agreement and one can only conclude that that the understatement of the consideration was intended to avoid paying higher stamp duty due on the transfer of the Suit Property. The understatement of the consideration for the transfer of the Suit Property from the 1st to the 2nd Defendant amounted to fraud as it was intended to evade payment of tax.

50. The court finds that the Plaintiffs have proved their claim to the Suit Property on a balance of probabilities and grants an order of injunction restraining the 1st and 2nd Defendants by themselves, their servants, agents, tenants or other persons claiming from them, from occupying, entering, charging, alienating or in any manner dealing with L.R. No. 209/2759/9 (I.R. No. 6477).

51. The proprietorship section of the land register for L.R. No. 209/2759/9 (I.R. No. 6477) is to be changed from the 2nd Defendant to reflect the Plaintiffs as the lessees of this land upon payment by the Plaintiffs of the requisite registration and other fees. The 2nd Defendant is directed to arrange to have the Suit Property discharged within 3 months of the date of this judgement to enable the 3rd Defendant register the Plaintiffs as proprietors of this land.

52. The 1st and 2nd Defendants and their agents, servants or tenants will be evicted by the Plaintiffs three months from the date of this

judgement. The eviction will be done in strict compliance with the law.

53. The Plaintiffs failed to prove the claim for special damages of Kshs. 1,000,000/= per month as mesne profits, the court declines to grant this prayer. In the court's view, general damages in the sum of Kshs. 25,000,000/= is reasonable to compensate the Plaintiffs for the loss they suffered when their structures on the Suit Property were demolished and their equipment destroyed by the 1st Defendant's agents. The court awards the Plaintiffs this sum against the 1st Defendant. The Plaintiffs are awarded the costs of this suit to be borne by the 1st Defendant.

54. The 2nd Defendant derived its title from the 1st Defendant whose title to the Suit Property has been successfully challenged in this suit. The 2nd Defendant's counterclaim has no merit. It is dismissed with no orders as to costs.

Dated and delivered at Nairobi this 22nd day of July 2019.

K. BOR

JUDGE

In the presence of: -

Ms. R. Wangui holding brief for Mr. K. Gichohi for the Plaintiffs

Mr. J. Kamau for the 1st Defendant

Ms. Fatma holding brief for Mr. Kamau for the 3rd, 5th & 6th Defendants

No appearance for the 2nd and 4th Defendants

Mr. V. Owuor- Court Assistant