

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ELC NO. 89 OF 2015

THE REGISTERED TRUSTEE MOI UNIVERSITY PENSION SCHEME.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

THE DIRECTOR OF SURVEYS..... 2ND DEFENDANT

COUNTY LAND REGISTRAR, UASIN GISHU.....3RD DEFENDANT

FRESH ‘N’ NICE.....4TH DEFENDANT

DOROTHY JEMUTAI YATOR..... 5TH DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff filed a suit against the Defendants in which it claimed the following reliefs:

- i. A declaration that the Plaintiff is the bonafide owner of all that parcel of land known as Eldoret Municipality Block 7/304 as shown in the original survey of the plot and which parcel of land known as Eldoret Municipality Block 7/320 and further the purported subdivision/excision of the latter parcel from the former without the knowledge or consent of the Plaintiff who is the owner is unjust, illegal, null and void.**
- ii. A declaration that the excision of a portion of the Plaintiff’s land Eldoret Municipality Block 7/304 and thereby create Eldoret Municipality Block 7/320 and the granting of the same (later) to the 3rd Defendant was done through fraud, misrepresentation, illegally, unprocedurally and or through a corrupt scheme.**
- iii. An injunction do issue restraining the 3rd Defendant whether by itself, successors or assigns or any one of them from trespassing,**

disposing of, leasing, charging or dealing with the portion of land that has been renamed Eldoret Municipality Block 7/320.

- iv. The 3rd Defendant be ordered to rectify the register of land by cancelling the sub division and or allocation of that portion of land that has been renamed Eldoret Municipality Block7/320 and that the same do revert to the Plaintiff so as to form an undivided parcel known as Eldoret Municipality Block 7/304 measuring 0.36 hectares.**
 - v. Costs of the suit.**
2. The 1st to 3rd Defendants filed a defence against the Plaintiff's claim and raised a counterclaim in which they sought the following reliefs:
 - a. Dismissal of the Plaintiff's suit with costs**
 - b. A declaration that the registration of Eldoret Municipality Block 7/304 in Dorothy Jemutai Yator's name and subsequent transfer to the Plaintiff was procured irregularly and fraudulently contrary to existing land laws and the same ought to be cancelled forthwith.**
 3. The 4th Defendant filed an amended defence and raised a counterclaim in which it sought the following reliefs:
 - a. The Plaintiff's suit be dismissed with costs.**
 - b. A declaration be issued that the 4th Defendant is the lawful owner of all the parcel of land Eldoret Municipality/Block 7/320.**
 - c. A permanent injunction be issued to restrain the Plaintiff, its servants and/or agents from fencing, entering upon, putting up structures or in any other way interfering with the 4th Defendant's lawful ownership, use and occupation of land parcel number Eldoret Municipality/Block 7/320.**
 - d. An order of eviction be issued to remove the Plaintiff, its servants and or agents from the 4th Defendant's land parcel number Eldoret Municipality Block 7/320.**

- e. **An order be issued that the Plaintiff is a trespasser on the 4th Defendant's parcel of land number Eldoret Municipality/Block 7/320 general damages for trespass and mesne profits.**
- f. **Costs of the suit and the counterclaim to the 4th Defendant.**

Background

4. The genesis of this dispute can be traced to a letter of allotment dated 10th June, 1997 in which the 5th Defendant was allotted an unsurveyed residential plot measuring approximately 0.3 hectares. The plot was subsequently surveyed and a certificate of lease was issued in the name of the 5th Defendant on 20th September, 2002 under Eldoret Municipality/Block 7/304. On 19th August, 2009, the 5th Defendant sold the plot to the Plaintiff at a consideration of Kshs.11,000,000/=. The Plaintiff took possession of the purchased plot and fenced it as per the boundaries which existed on the ground.
5. In or around 2013, the 4th Defendant offered to sell to the Plaintiff a plot known as Eldoret Municipality/Block 7/320. This offer aroused the curiosity of the Plaintiff who instructed their lawyers to investigate the issue because plot Eldoret Municipality/Block 7/320 was said to be within Eldoret Municipality/Block 7/304. The said plot had no beacons on the ground. Investigations further revealed that the 4th Defendant had been allotted residential plot measuring approximately 0.1 hectares on 23rd April, 1998 and had gone ahead to process certificate of lease for Eldoret Municipality/Block 7/304 which was issued on 27th March, 2013. The acreage on the certificate of lease was shown as 0.25 hectares whereas the ground measurement and the measurement on the letter of allotment as well as sale agreement is 0.36 hectares. This is what prompted the Plaintiff to file a suit against the Defendants.

Plaintiff's Case

6. The evidence of the Plaintiff was given by PW1 Charles Sanganyi Nyameino, the Pension scheme manager and Samwel Kiptala Chemelil, a

valuer. The Plaintiff purchased Eldoret Municipality/Block 7/304 from the 5th Defendant on 19th August, 2009 at a consideration of Kshs.11,000,000/=.

According to the sale agreement, the plot measured 0.36 hectares.

7. The Plaintiff took possession of the property which they fenced. In 2013, the 4th Defendant offered to sell its land which was said to be within plot number Eldoret Municipality/Block 7/304. The offered plot was Eldoret Municipality/Block 7/320. The offer by the 4th Defendant prompted the Plaintiff to carry out investigations which revealed that plot number Eldoret Municipality/Block 7/320 had been created out of Eldoret Municipality/Block 7/304 belonging to the Plaintiff.
8. The investigation further revealed that whereas the acreage in the certificate of lease for the Plaintiff was 0.25 hectares, the ground acreage was 0.36 hectares which was the acreage purchased in the sale agreement and which was the acreage in the letter of allotment issued to the 4th Defendant who sold the plot to the Plaintiff.
9. The Plaintiff engaged the services of Highland valuers Limited who valued the plot. In the course of the valuation, the valuer found that whereas the certificate of lease indicated that Eldoret Municipality Block 7/304 was 0.25 hectares, the plot on the ground was actually 0.903 of an acre which is equivalent to 0.36 hectares.
10. The Plaintiff's case is that the 4th Defendant has never taken possession of the purported Eldoret Municipality/Block 7/320 measuring 0.1 hectares and that there are no beacons marking the said plot on the ground. The Plaintiff had engaged the services of a surveyor called Kennedy Kubasu who confirmed that the property which it purchased was measuring 0.36 hectares on the ground.
11. When it was noticed that there was an error between the acreage on the certificate of lease and the ground, the advocate who was conducting the conveyance assured the Plaintiff that the error was capable of being rectified in the title to reflect the measurement on the ground.

12. The Plaintiff's case is that what they purchased pursuant to the sale agreement of 19th August, 2009 is what they are occupying on the ground and that the 4th Defendant colluded with the 2nd, 3rd and 4th Defendants to create plot number Eldoret Municipality/Block 7/320 from parcel Eldoret Municipality/Block 7/304.

The 1st, 2nd and 3rd Defendants' Case

13. The evidence on the part of the 1st to 3rd Defendants was given by DW1 Christine Ndwiga a surveyor attached to Uasin Gishu Lands Office. The witness produced survey plan in respect of Eldoret Municipality/Block 7/304. The survey plan is number 540/120 which was certified on 16th February, 2013. It was her evidence that according to the survey plan, parcel 304 is 0.247 hectares and its dimensions are 45.96 meters x 54.48 x 38.46 x 46.98.

14. The witness further stated that the allotment which gave rise to the survey plan is dated 10th June, 1997 and the acreage thereon is 0.36 hectares. The allotment was made to Dorothy J. Yator and the RIM reference number is 189/4.

15. The witness also produced survey plan number 522/18 which was certified on 6th September, 2011. The survey plan was in respect of letter of allotment dated 23rd April, 1998 where the acreage is shown to be 0.1 hectares. The dimensions for parcel 320 are 54.48 metres x 19.37 x 15.00 x 33.47 x 16.37. The parcel measures 0.1154 hectares. The witness produced the RIM for block 7 which was certified as a true copy by Director of Surveys on 26th January, 2024.

The 4th Defendant's case

16. The evidence of the 4th Defendant was given by its director, DW2 Mustafa Abdi Aman. He testified that the 4th Defendant is the registered owner of Eldoret Municipality/Block 7/320 which was as a result of allotment issued on 23rd April, 1998. The plot measures 0.1154 hectares and its survey was

carried out on 6th September, 2011 and a certificate of lease was issued on 27th March, 2013 after following due process.

17. The 4th Defendant states that its plot was the first to be created and that the plot by the Plaintiff was created later on 22nd February, 2013. The 4th Defendant stated that the certificate of lease which is purported to have been issued on 20th September, 2002 to the 5th Defendant who subsequently sold the land to Plaintiff was obtained unprocedurally as no survey had been carried out by then. The 4th Defendant stated that the Plaintiff has fenced its plot measuring 0.25 hectares which fencing has encompassed its plot measuring 0.1154 hectares in a bid to grab it. The 4th Defendant blames the Plaintiff for purchasing plot No. 304 thinking that it was 0.36 hectares and now seeks to annex plot No. 320 to make it 0.36 hectares whereas at the time of purchase, the certificate held by the 5th Defendant showed that parcel 304 was 0.25 hectares.

18. The 4th Defendant stated that parcel 320 was the first one to be surveyed and that parcel 304 was surveyed much later. The 4th Defendant therefore claims parcel 320 which is occupied by the Plaintiff.

The 5th Defendant's Case

19. The 5th Defendant testified that she was allotted an unsurveyed residential plot vide letter of allotment dated 10th June, 1997. The plot was measuring 0.36 hectares. On 19th August, 2009, the 5th Defendant sold parcel 304 to the Plaintiff. The sale agreement clearly showed that she sold 0.36 hectares. However in the certificate of lease which she obtained on 20th September, 2002, the acreage was shown as 0.25 hectares. However on the ground, she took possession of plot 304 which was 0.36 hectares. Even before she sold the plot to the Plaintiff, the Plaintiff had engaged both a surveyor and a valuer who both found that plot 304 was 0.36 hectares on the ground.

20. The 5th Defendant was surprised when the 4th Defendant claimed that he had parcel 320 which was within parcel 304. She stated that as at the time she was allotted parcel 304 and took possession, there was no parcel No. 320.

21. The 5th Defendant called DW4 Patrick Opiyo Adero. He testified that he is the one who prepared Survey Plan No. 150 Folio 198 which was certified on 19th October, 1989. He is the one who prepared the final co-ordinates and computations. According to the survey plan, parcel 304 has three access roads and it only neighbours parcel 209.

Parties Submissions

22. The parties were directed to file written submissions. The Plaintiff filed submissions dated 15th August, 2025. The 1st, 2nd and 3rd Defendants filed submissions dated 1st December, 2025. The 4th Defendant filed submissions dated 18th September, 2025. The 5th Defendant filed submissions dated 1st December, 2025.

Plaintiff's Submissions

23. The Plaintiff identified issues for determination which were submitted on. The first is whether at the time the Plaintiff purchased parcel 304, the said property had been surveyed and had fixed co-ordinates and dimensions. The second issue was whether parcel 320 was excised and or hived off from parcel 304. The third issue was whether parcel 304 was unalienated government land which was available for allocation to the 4th Defendant. The Plaintiff submitted that according to the evidence of PW1, PW2, the 5th Defendant, DW1 and DW5 as well as DW2, parcel No. 304 had its co-ordinates and dimensions set out and that it measured 0.36 hectares.

24. It was further submitted that as at 1995, land parcel No. 320 existed as per the Part Development Plan (PDP) produced by the 4th Defendant. This parcel 320 bordered parcel 222, 238 and 303. It was submitted that there is no way another parcel 320 would have been created on the same Block 7. It was submitted that parcel 320 which existed as at 1995 is far from the position where another parcel claimed by the 4th Defendant was purportedly created in 2011.

25. It was further submitted that parcel 320 was superimposed on parcel 304 after the Registry Index Map (RIM) was amended in 2013 through survey plan No. FR540/120.
26. The Plaintiff submitted that parcel 304 which measured 0.36 hectares as per the letter of allotment in favour of the 5th Defendant having been allotted to the 5th Defendant, the land was not available for allocation to the 4th Defendant. The Plaintiff relied on the case of **Registered Trustee of the Kenya Railways Staff Retirement Benefits Scheme & Another –vs- Higher Educations Loans Management Board & 2 others (2024) KEELC 572 (KLR)**. The Plaintiff further relied on the case of **Nairobi Civil Appeal No. 441 of Cabin Crew Investment Limited –vs- Kenya Medical Training College & 4 Others**.
27. The Plaintiff further relied on the case of **Nakuru Civil Appeal No. 34 of 2021 as consolidated with Civil Appeal No. 200 of 2021 and 55 of 2023 between Haron Chepkilot Kipsang T/A Heldo Foodstuff –vs- Daudi Kiptugen & Others**.
28. The fourth issue identified by the Plaintiff is whether the excision or hiving off of parcel 304 was invalid, null and void. The Plaintiff submitted that the registration of the 4th Defendant as owner of parcel 320 is impeachable. The Plaintiff relied on Section 26(1) of the Land Registration Act on grounds upon which a registered owner's title can be impeached.
29. The Plaintiff also submitted that the root title of parcel 320 is impeachable. Reliance was placed on the case of **Munyu Maina –vs- Hiram Gathiha Maina (2013) eKLR**. The Plaintiff also relied on **Appeal No. E004 of 2023 Luka Kotut –vs- Richard Ruto Kotut**.
30. The Plaintiff also submitted that it is the one which has been in possession of the land. The 4th Defendant has never been in possession. The Plaintiff relied on the case of **Benja Properties Ltd –vs- Syedna Mohammed Burhanuddin Sahed & 4 Others (2015) eKLR**.

31. The Plaintiff finally submitted that the title held by the 4th Defendant was amenable to cancellation as it was obtained by fraud. Reliance was placed on Section 80(1) of the Land Registration Act which provides as follows:

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake”.

32. The 1st to 3rd Defendants identified five issues for determination as follows:

- a. Whether or not the 5th Defendant’s purported acquisition of Eldoret Municipality Block 7/304 was/is unlawful and or unprocedural.*
- b. Whether parcel Eldoret Municipality Block 7/304 measured 0.36 Ha or 0.25 Ha at the time of purchase by the Plaintiff.*
- c. Whether Plaintiff is protected by the doctrine of bonafide purchaser.*
- d. Whether the parcel Eldoret Municipality Block 7/320 was hived from Eldoret Municipality Block 7/304.*
- e. Whether or not the parties are entitled to the reliefs they are seeking.*

33. On issue (a), the 1st to 3rd Defendants submitted that the 5th Defendant did not procedurally acquire parcel 304 which she could have lawfully passed on to the Plaintiff by way of sale. The 1st to 3rd Defendants relied on the case of **Dina Management Ltd -vs- County Government of Mombasa & 5 Others (2023) KESC 30 (KLR)**.

34. On issue (b), the 1st to 3rd Defendants submitted that the acreage which the Plaintiff purchased was 0.25 hectares and not the 0.36 hectares which was indicated in the sale agreement. Reliance was placed on the case of **Torino Enterprises Limited –vs- Hon. Attorney General Petition No. 5 (E006) of 2022**.

35. On issue (c), the 1st to 3rd Defendants submitted that the Plaintiff was not a bonafide purchaser for value. Reliance was placed on the case of **Lawrence Mukiri –vs- Attorney General & 4 Others (2013) eKLR**.

36. The 1st to 3rd Defendants submitted that the Plaintiff was part of the fraudulent sale and registration of parcel No. 304. The 1st to 3rd Defendants further relied on the case of **Kipsirgoi Investment Ltd –vs- Kenya Anti-Corruption Commission CA No. 288 of 2010 (unreported)**.

37. The 1st to 3rd Defendants conveniently avoided to submit on issue (d) as will come out during the analysis of the evidence.

38. On issue (e), the 1st to 3rd Defendants submitted that no injunction can be issued against an officer of government. Reliance was placed on Section 16 (2) of the Government Proceedings Act which states as follows:

“The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government”.

The 4th Defendant’s submissions

39. The 4th Defendant identified nine (9) issues upon which submissions were made. They are as follows:

- i. Whether or not the land parcel number Eldoret Municipality/Block 7/304 and Eldoret Municipality/Block 7/320 are distinct and separate parcels of land.**
- ii. Whether land parcel number Eldoret Municipality/Block 7/320 was hived off land parcel number Eldoret Municipality/Block 304.**
- iii. What is the acreage of land parcel number Eldoret Municipality/Block 7/320?**
- iv. Whether there was any fraud or illegality committed by the Defendants in the creation of land parcel number Eldoret Municipality/Block 7/320 and issuance of certificate of lease to the 4th Defendant.**
- v. Whether the 4th Defendant is the lawful owner of land parcel number Eldoret Municipality/Block 7/320.**

- vi. **Whether the Plaintiff's a trespasser on land parcel number Eldoret Municipality/Block 7/320 and if so is the 4th Defendant entitled to damages and how much.**
- vii. **Whether the Plaintiff is entitled to the orders sought in the Plaint.**
- viii. **Whether the Defendants are entitled to the orders sought in their respective defences and respective counterclaims.**
- ix. **What orders should be made on costs?**

40. The 4th Defendant submitted on issue (i) and (ii) together. It was submitted that the evidence of DW1 a Land Surveyor answered the two issues. It was submitted that the evidence showed that neither parcel 304 nor parcel 320 was a subdivision of another. It was submitted that the two parcels were distinct from one another and the survey plans were prepared on different dates and separate titles issues.

41. On issue number (iii), it was submitted that the certificate of leases in respect of parcel 304 and parcel 320 show that the acreage of parcel 304 is 0.25 hectares, whereas that of parcel 320 is 0.1154 hectares. It was submitted that the evidence of DW1, the Land Surveyor confirmed so.

42. On issue number (iv), it was submitted that there was no fraud or illegality committed by the Defendants in the creation of parcel 320. Reliance was placed on the case of **Kinyanjui Kamau –vs- George Kamau 2015 (eKLR)**. Further reliance was placed on the case of **Gachinga Kibutha –vs- Carloine Nduku (2018) KEEL 3981 (KLR)**.

43. The 4th Defendant submitted that the Plaintiff did not prove any of the particulars of fraud attributed to the Defendants. Reliance was placed in the case of **Dr. Joseph Arap Ngok –vs- Justice Moiwo Ole Keiwua & 5 Others, Civil Appeal No. Nai 60 of 1997**.

44. The 4th Defendant submitted that the facts in this case are distinguishable from those which obtained in **Iten Environment and Land Appeal No. E004 of 2023 between Luka Kotut –vs- Richard Kuto Kotut**. Similarly, it was submitted **Nairobi Environment and Land case No. 59 of 2014 (2024)**

KEELC 572 (KLR), The Registered Trustee of the Kenya Railways Staff Retirement Benefits Scheme & Others –vs- Higher Education Loans Management Board & 2 Others is distinguishable in that the titles in this case are separate unlike in the case relied on by the Plaintiff where there was re-allocation of the same parcel of land.

45. On issue (v) the 4th Defendant submitted that it was registered as owner of parcel 320 which was based on the allotment issued to it in 1998. It was submitted that when the 5th Defendant received its certificate of title indicating that her parcel was 0.25 hectares, she did not make any complaint.

46. On issue (vi) it was submitted that the Plaintiff's witness admitted that they have fenced off the land including parcel 320 and therefore this confirms that there is trespass by the Plaintiff on to the 4th Defendant's land.

47. On issue (vii), the 4th Defendant submits that the Plaintiff is not entitled to any of the reliefs sought as it is a trespasser on parcel 320 and its suit ought to be dismissed with costs.

48. On issue (viii) and (ix), the 4th Defendant submits that it has proved its claim against the Plaintiff which ought to be allowed in terms prayed (a) (b) (c) (d) (e) and (f). The 4th Defendant asks for general damages for trespass in the sum of Kshs.2,000,000/= as well as costs.

The 5th Defendant's Submissions

49. The 5th Defendant filed similar submissions as those of the Plaintiff perhaps because their case is joined at the hip. I need to repeat the submissions herein.

Analysis and Determination

50. I have carefully considered the evidence adduced by the Plaintiff and that of the Defendant. I have also considered the submissions by the parties. What culminated in the filing of this suit against the Defendants is the contention by the Plaintiff that the 4th Defendant in concert with the 2nd and 3rd Defendants carved out parcel number 320 from its parcel number 304 and fraudulently had parcel 320 registered in 4th Defendant's name. In the initial

plaint dated 30th March, 2015 and filed in court on 31st March, 2015, the Plaintiff had sued four Defendants.

51. On 2nd March, 2020 the Plaintiff filed an application seeking to join a fifth Defendant. This application was allowed on 30th June, 2020 and it brought in the 5th Defendant. It is after this amendment that the 4th Defendant amended its defence and raised a counterclaim.

52. There is no contention that Eldoret Municipality/Block 7/304 (parcel 304) was allotted to the 5th Defendant on 10th June 1997. According to the allotment letter, parcel No. 304 was measuring 0.3 hectares. There is also no contention that it is the 5th Defendant who sold parcel 304 to the Plaintiff vide a sale agreement dated 19th August, 2009. The agreement stated that the interest being sold was 0.36 hectares.

53. The uncontroverted evidence is that the 5th Defendant took possession of the entire parcel which was allotted to her. After she sold the land to the Plaintiff, the Plaintiff took possession of the entire parcel purchased and fenced it. There is also no contention that the 4th Defendant has never taken possession of Eldoret Municipality/Block 7/320 (parcel 320) since it alleges to have been allotted the same on 23rd April, 1998.

54. The following are the issues which emerge for determination:

- a. **What was the acreage of parcel 304 at the time of allotment?**
- b. **Was there any land available for allocation to the 4th Defendant after allocation of parcel 304?**
- c. **Was parcel 320 hived off from parcel 304 and if so was the hiving lawful.**
- d. **Was the title which was obtained by the 5th Defendant obtained lawfully?**
- e. **Is the Plaintiff and the Defendants entitled to their respective claims?**
- f. **Which order should be made on costs?**

a. **What was the acreage of parcel 304 at the time of allotment?**

55. The letter of allotment which was issued to the 5th Defendant clearly indicated that what became to be parcel 304 was 0.3 hectares. This is the allotment letter whose basis a certificate of lease was issued to the 5th Defendant on 20th September, 2002. Though the certificate of lease shows that parcel 304 is 0.25 hectares, the position on the ground shows that parcel 304 is 0.36 hectares. This is the acreage which the 5th Defendant occupied upon allocation. It had its boundaries fixed on the ground.

56. Before the Plaintiff purchased parcel 304, they engaged a valuer who prepared a report on 31st January, 2009. In this report, the valuer who testified before court observed that though the certificate of lease showed that parcel 304 was 0.62 of an acre the actual measurement on the ground was 0.903 of an acre.

57. PW1 Charles Sanganyi Nyameino the pension manager of the Plaintiff testified that when this anomaly was noticed, they instructed their conveyancing advocate to process rectification. It is around this time that the 4th Defendant approached the Plaintiff with an offer to sell parcel 320 to them which parcel was actually within parcel 304.

58. DW4 Patrick Opiyo Adero during the hearing stated that where the acreage on the ground does not tally with the acreage in the title, the title acreage can be amended to reflect what is on the ground. The 5th Defendant was allotted 0.36 hectares and she sold 0.36 hectares to the Plaintiff. This is what the 5th Defendant had been occupying since allotment and this is what she sold to the Plaintiff and this is what the Plaintiff is occupying to date. I therefore find that parcel 304 is 0.36 hectares.

b. Was there any land available for allocation to the 4th Defendant after allocation of parcel 304

59. The Commissioner of Lands having allotted the whole of parcel 304 to the 5th Defendant on 10th June, 1997, the same Commissioner could not again purport to allot parcel 320 to the 4th Defendant on 23rd April, 1998. In **Nairobi Civil Appeal No. 441 of 2019 between Cabin Crew Investment**

Ltd & Kenya Medical Training College & 4 Others (Supra) the Court of Appeal held as follows:

“On the second issue, the elephant in the room is whether the suit property was available for alienation when the same was allocated to the Appellant. In the circumstances, the Commissioner of Lands could not purport to deem the suit property as unalienated and purport to allocate the same to another party. This in our view is not a question as to which party held a more superior title to the suit property. It is not a question as to whether the title deed or grant issued to the Appellant superseded the letter to allotment issued to the 1st Respondent. The Appellant claims title over the suit property by virtue of an allotment letter dated 22nd August, 2000 and a resultant certificate of title issued on 23rd April, 2001. In our view by 22nd August, 2000 when the said letter of allotment was issued, the land was not available for alienation.

We need not belabour this issue. The crux of the matter is that the allocation of the suit property to the Appellant after the commissioner of lands had already validated the 1st Respondent’s allocation by accepting the requisite payment, and without revoking the allotment letter was invalid. Neither the letter of allotment dated 23rd April, 2001 nor the resultant certificate of title could confer good title of the suit property to the Appellant.

60. In the case of **Nakuru Civil Appeal No. 34 of 2021 as consolidated with Civil Appeal No. 200 of 2021 and 55 of 2023 between Hon. Chepkilot Kipsang t/a Heldo Foodstuff (Supra)** the Court of Appeal held as follows:

“Turning to the letter of allotment issued to Leah Jelagat on 13th March, 2000, it is on record that the said Leah Jelagat accepted the offer and paid the requisite fees to the Commissioner of Lands and has been paying land rent and rates. Subsequently, a lease was registered and a certificate of lease was duly issued in her name.

However, the suit land having been earlier allotted to Daudi and the offer having not been withdrawn and/or cancelled by the Commissioner of Lands, the suit land was not available for alienation to Leah Jelagat.....

The allotment and the subsequent registration of the suit land in favour of Leah Jelagat was therefore illegal, null and void, in view of the earlier allotment to Daudi.....

We associate ourselves with the views expressed by the learned judge that there was a lot of underhand and fraudulent dealings on the suit land by the Commissioner of Lands and/or the Lands Office. Indeed, the creation of three separate files over the same parcel of land is clear testimony of serious fraud and irregularity aimed at disenfranchising a legitimate owner of his property. In this case, whereas it is evident that an allotment over the suit land was made in favour of Daudi, the records in his correspondence file were tampered with to reflect that the allotment made in his favour was in respect of an unsurveyed plot No. B26.

This court is enjoined to protect the sanctity of the title acquired by Daudi pursuant to the provisions of Article 40 of the Constitution and Section 40 of the Constitution and Section 25 and 26 of the Land Registration Act. In Dr. Joseph Arap Ng'ok –vs- Justice Moiyo Ole Keiwua & 5 Others (Supra) this court categorically declared that:-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the Land Registration Act) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party.

Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over al it is our law and

law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity to title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.

61. Further in the case of **Registered Trustee of Kenya Railways Staff Retirement Benefits Scheme & Another (Supra)**, Justice Angote observed as follows:

“There can be no question that having been alienated as such, neither the suit property nor any portion thereto, was available for re-allocation to Paul Koinange t/a Hardy Playland or any other private entity.

62. Even if there was an error in the processing of title which left out a portion of what had been allotted to the 5th Defendant who sold it to the Plaintiff who had taken possession of the entire interest purchased, this did not give window to the Commissioner of Lands to allot parcel 320 to the 4th Defendant when he had allotted the whole of it to the 5th Defendant.

63. The 5th Defendant and later on the Plaintiff had taken possession of 0.36 hectares. In the case of **Benja Properties Ltd (Supra)**, the Court of Appeal held as follows:

“It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seized prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd Respondents being in possession of the suit land have a better right to the same as against the Appellant. The maxim is that possession is the ninth-tenths ownership. As was stated by the privy council in Ghan of Wuta-Ofel versus Danquah (1961) All ER 596 at page 600, the slightest amount of possession would be sufficient.

64. I therefore find that there was no land left within parcel No. 304 which was available for allocation to the 4th Defendant.

c. Was parcel 320 hived off from parcel 304 and if so, was the hiving off lawful

65. The evidence which was adduced during the hearing is that parcel 320 was non-existent as early as 1989 when Patrick Opiyo Adero carried out a survey of some properties in Block 7. He prepared survey plan No. 150 Folio 198 which was certified on 19th October, 1989. This survey plan was for parcel 208, 209 and 210. He produced this survey plan as exhibit. His evidence was that parcel 304 had access to three roads and only bordered parcel 209.

66. There was a RIM which was produced by the Plaintiff. This RIM clearly shows that parcel 304 bordered parcel 209. Parcel 320 was non-existent. The 4th Defendant produced a Part Development Plan which was duly approved by the Commissioner of Lands on 15th November, 1995. As at this date, the PDP shows that there existed 320 which was in between parcel 238 and 222. This is the same PDP which the 4th Defendant is using to claim parcel 320 within parcel 304.

67. During the hearing, Patrick Opiyo Adero stated that there is no way two same parcels can be within the same block in this case Block 7. He stated that if this be the case, then one of the two is fraudulent. As at 15th November, 1995, parcel 304 had not been allocated and the PDP produced by the 4th Defendant shows that it had not been assigned a number. Parcel 304 was allotted on 10th June, 1997.

68. The PDP which was approved on 15th November, 1995 indicates that the bold and shaded area which the 4th Defendant had registered in his name was proposed to be a residential plot and was within parcel 304. There is no way parcel 320 would have existed within parcel 304 when there was already another parcel 320 which was far away from what became parcel 320 which was hived from parcel 304.

69. The 1st to 4th Defendants claim that survey for parcel 304 was done on 16th February, 2013 and that of parcel 320 was done on 6th September, 2011. The Plaintiff was not involved when the alleged survey of 16th February, 2013

was done. This is the survey which reduced the Plaintiff's parcel 304 to 0.25 hectares and fraudulently purported to carve out parcel 320 whose survey was allegedly carried out on 6th September, 2011 which was earlier than the survey of parcel 304.

70. When the purported survey of parcel 320 and 304 was done, the 5th Defendant had title and had already transferred parcel 304 to the Plaintiff. DW1 the surveyor who testified on behalf of the 1st to 3rd Defendants in cross examination conceded that a title cannot be issued without first a survey being undertaken.

71. The green card which was part of the documents produced showed the date register for parcel 304 was opened. It contained the entries showing the Plaintiff who became registered as owner of parcel 304 upon purchase. The Land Registrar is the custodian of the records. He cannot feign ignorance of the existence of the title which the 5th Defendant had which she transferred to the Plaintiff.

72. The 2nd and 3rd Defendants clearly colluded with the 4th Defendant to hive off parcel 320 which was registered in the 4th Defendant's name. The 4th Defendant's root of title is tainted. Section 26 (1) of the Land Registration Act provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

73. In the case of **Munyu Maina (Supra)** the Court of Appeal held as follows:

“.....when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register”.

74. It is clear from the above analysis that parcel 320 was hived off from parcel 304. This hiving was as a result of a corrupt scheme between the 2nd and 3rd Defendants on the one part and the 4th Defendant on the other part. This corruption scheme was put on motion when it was discovered that though the Plaintiff was occupying more land on the ground, the title had less land and this explains why title to parcel 304 and 320 equals to what the 5th Defendant was allotted and that is what she sold to the Plaintiff.

75. The Plaintiff having unlawfully hived off parcel 320 from 304 offered to sell the same to the Plaintiff because its officials knew that it was the Plaintiff who was in occupation. There is evidence which was adduced that the dimensions of parcel of parcel 304 were altered in an amendment to the RIM. These alterations were being done when already there was title to parcel 304. The letter of allotment which was allegedly issued to the 4th Defendant on 23rd April, 1998 was only paid for after a period of over 10 years when it had long expired. As at the time of issuance of the letter of allotment to the 4th Defendant, the Plaintiff had already secured a title and was in occupation of 0.36 hectares on the ground. Even the neighbouring plots to parcel 304 that is parcel 208, 209 and 210 have the same size as parcel No. 304. There is no way two parcels would have been created in the

same block bearing number 320. It is therefore clear that parcel 320 was unlawfully hived off from parcel 304.

76. The Plaintiff listed particulars of fraud in paragraph 8 of the Plaintiff and went ahead to prove the same. In the case of **Kinyanjui Kamau –vs- George Kamau (2015) eKLR** the court stated as follows:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G&F) 742 wherein the court stated that:”....we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly beyond a reasonable doubt as in criminal case..... “In case where fraud is alleged, it is not enough to simply infer fraud from the facts”.

d. Was the 5th Defendant’s title obtained lawfully

77. The 1st to 3rd Defendants claimed that the title obtained by the 5th Defendant was not obtained lawfully and that she had no good title to pass to the Plaintiff. The 1st to 3rd Defendants particularised particulars of fraud against the 5th Defendant. One of the allegations is that the 5th Defendant did not have an allotment letter. Contrary to this allegation, the 5th Defendant produced an allotment letter which was issued to her on 10th June, 1997. Even their own witness testified that there was allotment letter in the file which was the basis of the survey carried.

78. The 5th Defendant was also accused of causing her title to overlap that of parcel 320. The evidence which emerged did not prove any overlap. Contrary to these allegations, it is the 4th Defendant who hived off parcel 320

from what was due to parcel 304. There was no evidence given that the 5th Defendant regularised her title through late filings.

79. There was a RIM which was prepared way back in 1989. The 5th Defendant did not mislead the Lands Officer on the ground. The evidence which came out clearly is that the 5th Defendant took possession of 0.36 hectares which she was allotted and this is what was sold to the Plaintiff who is in possession of the 0.36 hectares to date.

80. The 1st to 3rd Defendants deliberately avoided to make any adverse remarks against the 4th Defendant's acquisition of title because they were privy to what happened. The Land Registrar had the records on allotment of parcel 304 and all the records but they went ahead to amend the RIM and reduced the measurements of parcel 304 to illegally create parcel 320.

81. The particulars of fraud against the 5th Defendant were never proved to the required standards. The title by the 5th Defendant was lawfully obtained and she transferred to the Plaintiff all that was allotted to her.

e. Is the Plaintiff and the Defendants entitled to their respective claims

82. The evidence of the Plaintiff as supported by that of the 5th Defendant has clearly showed that the Plaintiff has proved that parcel 320 was unlawfully hived off parcel 304. The Plaintiff purchased and is occupying 0.36 hectares on the ground. There is need for the land Registrar to cancel parcel 320 so that the Plaintiff can pursue rectification of title to enable it acquire title for the entire portion occupied as per the beacons on the ground.

83. It is clear that there was a typing error in prayers (ii) and (iii) of the Plaintiff's plaint. The injunction was intended against the 4th Defendant who was also registered as owner of parcel 320. I therefore find that the Plaintiff has proved its case on a balance of probabilities.

84. The 1st to 3rd Defendants wanted the title issued to the Plaintiff cancelled on the ground that the 5th Defendant had no good title to pass to it. As I have found herein the 1st to 3rd Defendant's counterclaim was not proved to the

required standards. It is the 1st to 3rd Defendants who were alleging fraud and the burden of proof lay on them. They did not discharge it.

85. The 4th Defendant was claiming for a declaration that it is the lawful owner of parcel 320, an injunction against the Plaintiff, an order of eviction, general damages for trespass as well as costs. It has been demonstrated hereinabove that parcel 320 was unlawfully hived off from what was due to parcel 304. The 4th Defendant has never occupied the unlawfully hived off portion. There is therefore no basis of injuncting or evicting the Plaintiff from what lawfully belongs to it. Consequently no damages can be awarded for trespass as the Plaintiff cannot be a trespasser on what was unlawfully taken from it.

Disposition

86. From the above analysis, I find that the Plaintiff has proved its case against the 1st to 4th Defendants. Consequently, I allow the Plaintiff's claim against the 1st to 4th Defendants as follows:

- 1. A declaration that the Plaintiff is the bonafide owner of Eldoret Municipality/Block 7/304 as shown in the original survey.**
- 2. A declaration that the excision of what belonged to Eldoret Municipality/Block 7/304 without the Plaintiff's knowledge is unjust, illegal, null and void.**
- 3. A declaration that the creation of parcel Eldoret Municipality Block 7/320 which was granted to the 4th Defendant was done through fraud, misrepresentation, illegally, unprocedurally and or through a corrupt scheme.**
- 4. An injunction do issue restraining the 4th Defendant whether by itself, successors or assigns or anyone of them from trespassing, disposing of, leasing, charging or dealing with the portion of land that has been renamed Eldoret Municipality/Block 7/320.**
- 5. The 3rd Defendant is hereby ordered to rectify the register by cancelling title to Eldoret Municipality/Block 7/320 and reverting**

back to the Plaintiff so as to form an undivided parcel known as Eldoret Municipality/Block 7/304 measuring 0.36 hectares.

6. Costs of the suit.

87. On the other hand, I find that the 1st, 2nd, 3rd and 4th Defendants have failed to prove their respective counterclaims which are hereby dismissed with costs to the Plaintiff.

.....

HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF APRIL, 2026.

IN THE PRESENCE OF:

Mr. Koriri for Plaintiff

Mr. Keter for 4th Defendant

Mr. Songok for 5th Defendant

Mr. Kwame for 1st to 3rd Defendants

Court assistant – Steve Musyoki