



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 188 OF 2011 (OS) MULTI – TRACK

IN THE MATTER OF THE ESTATE OF JOSEPH KIARIE MBUGUA (DECEASED)

AND

**IN THE MATTER OF ALL THAT PARCEL OF LAND KNOWN AS LAND REFERENCE NUMBER 209/1627 THIKA ROAD,
NAIROBI**

BETWEEN

FLORENCE WAIRIMU MBUGUA (Suing as the

Administrator of the Estate of JOSEPH KIARIE MBUGUA

Also known as JOSEPH KIARIE MBOGWA.....PLAINTIFF/APPLICANT

VERSUS

TRIPPLE EIGHT PROPERTIES LIMITED.....1ST DEFENDANT/RESPONDENT

STEPHEN KAHUGU KINYANJUI.....2ND DEFENDANT/RESPONDENT

COMMISSIONER OF LANDS.....3RD DEFENDANT/RESPONDENT

JUDGMENT

By an amended Originating Summons filed on 5th May, 2017 the Plaintiff/ Applicant seeks for the following orders against the Defendants/ Respondents:

1. An order of injunction restraining the Defendants whether by themselves, their servants and/or agents or anyone acting for or through them or otherwise from interfering with the Plaintiff's right of possession and ownership of all that parcel of land known as LR. No. 209/1627 Thika Road, Nairobi and/or evicting the Plaintiff and her tenants from the said piece of land or in any other manner whatsoever committing acts of waste and/or abuse of the said property pending the full hearing and determination of this Originating Summons.
2. An order declaring that the Grant No. IR. 125768 for Land Reference Number 209/ 1627 Nairobi, issued to the 1st Defendant by the 3rd Defendant on 29th September, 2010 was irregular, unlawful, null and void and the said Grant and all the entries made subsequent thereto be cancelled forthwith.
3. An order declaring that the Plaintiff herein, being the Administratrix of the Estate of Joseph Kiarie Mbugua (deceased) is entitled to an extension of Lease for a period of 99 years for property known as LR. No. 209/1627, Nairobi with effect from the date of Judgment or such other date that this Honourable Court may deem fit and just.
4. An order directing the 3rd Defendant to issue forthwith a fresh Grant for a term of 99 years to the Plaintiff in accordance with prayer (3) hereinabove.
5. Compensation to the Plaintiff by way of damages against the Defendants jointly and severally for:-
 - i. Depriving the Plaintiff of her right to occupy and enjoy the suit property

ii. The loss of income from the suit property with effect from 1st January, 2001 upto and including the date of issuance of a fresh Grant to the Plaintiff.

iii. Value of the demolished portion of her property, which demolition was undertaken by the 1st and 2nd Defendants before this Honourable Court issued orders for maintenance of status quo on 11th May, 2011.

iv. Interest on costs and damages at Court rates.

6. Costs of this suit.

7. An order directing the 3rd Defendant/ Respondent to cancel the Grant issued to the 2nd Defendant and in lieu thereof reinstate the registration of the Plaintiff/Applicant herein being the Administrator of the estate of JOSEPH KIAIRIE MBUGUA.

The Application is premised on various grounds and supported by the affidavit of FLORENCE WAIRIMU MBUGUA. In the grounds which are summarized hereunder, the Plaintiff claims the husband was the owner of the suit parcel no. LR 209/1627 hereinafter called the 'suit property'. The Lease to the said property expired on 1st January, 2001. The 1st Defendant was fraudulently allocated the suit property by the 3rd Defendant. Further, the 1st Defendant colluded with the 2nd Defendant to sell suit property to him to defeat Plaintiff's claim. She disputed the process the 1st Defendant adhered to, to obtain the Letter of Allotment in respect of the suit property and the documents purportedly used to process the said Lease.

The 1st Defendant PETER WANJOHI KARANJA opposed the Originating Summons and filed a replying affidavit where he deposes that he is the director to the 1st Defendant Company. He explains that he applied to the Commissioner of Lands to be allocated land, vide its letter dated the 30th July, 2010 after establishing that the said land was available for allocation as the lease to the previous owner had expired in 2001. He avers that the Commissioner of Lands considered the 1st Defendant's application and approved it. Further, by the allotment letter dated 14th September, 2010, he allocated the suit property to 1st defendant subject to its acceptance of certain terms, which it accepted vide its letter dated the 15th September, 2010 after which it forwarded to the said Commissioner of Lands, the requisite payment of Kshs. 629, 430/=. He contends that the Commissioner of Lands processed the title in respect of the suit property in the name of the 1st Defendant and issued the same on 27th September, 2010. He states that the 1st Defendant disposed of the suit property in early December, 2010 to the 2nd Defendant for valuable consideration, vide an agreement dated the 3rd December, 2010. Further, that prior to the transfer to the 2nd Defendant, the 1st Defendant obtained a consent to transfer from the Commissioner of Lands. He further states that the 1st Defendant paid all the outstanding Land Rent including Rates and obtained the Rent Clearance Certificate from the Commissioner of Lands. He claims that the suit property was subsequently transferred to the 2nd Defendant who obtained possession by getting a tenant who acknowledged him as the Landlord. He insists the entire transaction was in accordance with the laid down procedures and processes at the Ministry of Lands and denies the allegations of fraud. He reiterates that the Director of Surveys confirmed that the term 'extension of lease' appearing on the Deed Plan is common in all re – allocation and did not mean extension of the lease to the former lessee. He further insists that the Plaintiff never applied for extension of the lease which expired in 2001 and the same could not have been extended in 2007 as there would have been nothing to extend. Further, that from the indenture annexed to the Plaintiff's affidavit, the lease expired in 2001. He denies that the 1st Defendant had any dealings with messrs Ndungu & Company Advocates. Further, that the suit is fatally defective, as the Plaintiff has no locus to institute it. He reaffirms that the Plaintiff has no proprietary or other right to the suit property and Registration of Title in favour of the 2nd Defendant rested in the 2nd Defendant's absolute proprietary rights under the Registration of Titles Act (repealed). He further contends that the Plaintiff has not demonstrated by way of any evidence that the late JOSEPH KIAIRIE MBUGUA had any registered interest in the suit property capable of being transmitted at the time of his death in the year 2006. He sought for the suit to be dismissed with costs.

The 2nd Defendant STEPHEN KAHUGU KINYANJUI opposed the application and filed a replying affidavit where he deposes that he is the registered proprietor of the suit property, which he purchased pursuant to an Agreement dated the 3rd December, 2010 between the 1st Defendant/ Respondent as vendor and himself as purchaser. He claims prior to executing the said Agreement, through his Advocate, he conducted an official search at Nairobi District Land Registry to ascertain ownership as well as confirm authenticity of subject title and the Certificate of Official Search dated 23rd November, 2010 indicates the 1st Defendant was then the registered proprietor of the suit property. He confirms that vide a transfer dated the 7th February, 2011 presented for registration on 18th February, 2011, the suit property was transferred into his name. He insists that upon payment of the full purchase price and registration of transfer, he has conducted himself as the bona fide purchaser and more so on the basis of the title document, which is valid and legal. Further, he has entered into an agreement with the tenant who is now paying him Kshs. 20,000/=. He reiterates that all procedures of registration were adhered to, where parties executed and acquired all the instruments, to wit letter of consent, valuation, transfer including payment of stamp duty as well as registration, as provided for by the law. He avers that the validity and/or legality of the Plaintiff's purported indenture is suspect ab initio as it is expired with no evidence of extension. Further, contrary to the Plaintiff's allegation, the alleged demolition of part of the suit property was done by the Nairobi City Council on their own motion claiming that the premises was inhabitable. He denies the allegations of fraud by the Plaintiff and that the transfer including issuance of the title was founded on an illegal and fraudulent acts. He further denies connivance with the 1st and 3rd Defendants and avers that the allegations by the Plaintiff are presumptuous, fallacious, scandalous and based on conjectures. He reaffirms that he is an innocent purchaser for valuable consideration and the Plaintiff has not established a prima facie case to warrant the orders sought. Further, the suit is bad in law and the Plaintiff's purported claim that the suit property belonged to her late husband are untrue and unfounded as she has not exhibited a valid title/grant and not even an official search to confirm her allegations.

The 3rd Defendant/Respondent opposed the application and filed a replying affidavit sworn by SILAS KIOGORA MBURUGU who is the Chief Land Administration Officer with the Department of Lands, Ministry of Lands where he confirms being aware that the suit property was assigned to JOSEPH KIAIRIE MBUGUA by an Indenture dated 3rd August, 1977 from Kartar Singh son of Hiram Singh by which he acquired the unexpired term of 99 years from 1st January, 1902 for a consideration of Kshs. 500,000/=. He deposes that the 99 years term lease acquired by JOSEPH KIAIRIE MBUGUA over the suit property expired on 1st January, 2001 by effluxion of time. He claims the said JOSEPH KIAIRIE MBUGUA never applied for extension of the lease as required by law. Further, by operation of law, on 1st January, 2001,

the leasehold interest of JOSEPH KIARIE MBUGUA over the suit property expired and his interest in the said land utterly extinguished hence the said property reverted back to the government as the radical landlord. He states that the 3rd Defendant has no knowledge of the allegations at paragraph 16 of the supporting affidavit and denies that the annexure therein is in their records. He insists the Plaintiff has no locus standi to institute this suit. He explains that the suit property having reverted back to the government on 1st January, 2001, since the Commissioner of land received an application from the 1st Defendant to be allocated the suit property for development, he accepted the same and issued a Letter of Allotment dated the 14th September, 2010 setting out the conditions of allotment and stating the requisite fee to be paid. He reiterates that the 1st Defendant by its letter dated the 15th September, 2010 accepted the terms of allotment and forwarded payment of the requisite charges of Kshs. 629, 430/= and was duly issued with a receipt. He avers that in December, 2010 the 1st Defendant applied for consent to transfer the leasehold to the 2nd Defendant which application was granted and a transfer by the 1st Defendant to the 2nd Defendant was lodged in the Land Registry accompanied by the requisite documents including fees with the Lease being duly registered in favour of the 2nd Defendant. He states that the entire process of transmission of the suit property from the Plaintiff to the 1st Defendant and eventually to the 2nd Defendant was in accordance with the laid down procedures. He denies that the 3rd Defendant participated in or condoned fraud of any kind. He reaffirms that the title issued to the 1st Defendant and subsequently transferred to the 2nd Defendant is valid in accordance with their procedures.

The matter proceeded for hearing where the Plaintiff called one witness. Each of the Defendants also had one witness each.

Evidence of the Plaintiff

The Plaintiff as PW1 contends that she is the owner of the suit property, which had initially belonged to her late husband. She confirms that the lease to the suit property expired on 1st January, 2001 and the husband was in the process of renewing the same. It was PW1's testimony that the husband had applied for renewal of the said lease through Ndungu Advocate but never adhered to certain requirements stated in a letter dated 9th November, 2006 which required the husband to surrender the existing title; submit a new Deed Plan approved by Director of Surveys; Pay Kshs. 5000 approval fees and pay enhanced rent. She averred that she is in possession of the suit property and that the Defendants especially the 3rd Defendant had fraudulently registered the 1st Defendant as owner of the said property using her Deed Plan yet she still had in her custody the original indenture. Further, that the 1st Defendant fraudulently proceeded to transfer the suit property to the 2nd Defendant. She disputed the Sale Agreement, 2nd Defendant's title, Receipts from the 3rd Defendant as well as the process the 1st Defendant used to acquire suit property. She stated in Court that she lodged a complaint with the National Land Commission (NLC) in 2017 during the pendency of this suit and the said Commission revoked the 2nd Defendant's title. She however confirmed in Court that she sent her security to serve the summons from NLC to the Defendants but the Defendants never attended the hearing. She produced various documents including the Kenya Gazette Notice No. 6865 of 17th July, 2017; Grant of Letters of Administration dated 6th August, 2007; Indenture made on 3rd August, 1977; Schedule of Owners Properties dated 21st May, 2010; Deed Plan; Grant for 1st Defendant dated 6th August, 2007 and Letter from the Ministry of Lands dated 9th November, 2006 as her exhibits.

Evidence of the Defendants

The 1st Defendant as DW1 confirmed that he applied vide letter dated 30th July, 2010 to be allocated the suit property by the 3rd Defendant who approved his application. It was his testimony that he paid Kshs. 629, 430 through banker's cheque No. 000176 and was issued with a receipt. He further testified that the Commissioner of Lands processed the title and issued it to them on 27th September, 2010. Further, that it sold suit property to the 2nd Defendant for Kshs. 50 million vide a Sale Agreement dated the 3rd December, 2010. It stated in court that prior to the transfer to the 2nd Defendant, they obtained consent from the Commissioner of Lands and paid all outstanding Land Rent including Rates and obtained the Rent Clearance Certificate from the said Office. He produced various documents including Letter dated 30th July, 2010; Letter of Allotment dated 14th September, 2010; Letter dated 15th September, 2010; Receipt for Kshs. 629, 430; Certificate of Title for Grant Number I.R 125768 dated 27th September, 2010; Sale Agreement dated 3rd December, 2010; Letter of Consent to Transfer dated 10th December, 2010; Rent Clearance Certificate dated 10th February, 2011 and Rate Clearance Certificate dated 8th February, 2010 as exhibits in Court.

The 2nd Defendant who testified in court as DW2 confirmed that he purchased the suit property vide Sale Agreement dated the 3rd December, 2010. He initially paid Kshs. 5 million at the time of executing the agreement and later paid the remaining Kshs. 45 million as purchase price. He confirmed in court that after paying the purchase price transfer of the suit property was effected to him on 18th February, 2011. It was his testimony that he undertook due diligence before purchasing suit property which revealed that the 1st Defendant was its proprietor. Further, that he took possession and put a tenant therein. He denied participating in any fraud to acquire suit land and insisted he was a purchaser for value without notice. He produced various documents including Sale Agreement dated 3rd December, 2010; Grant Registered on IR No. 125768 in respect of LR No. 209/1627; Official Search in Respect of IR No. 125768 dated 23rd November, 2010; License to occupy premises dated 30th March, 2011; Copy of Consent to transfer dated 10th December, 2010; Copies of Land Rent Clearance Certificate dated 15th December, 2010 & 10th February, 2011; Copies of Land Rates Clearance Certificate dated 3rd December, 2010 & 8th February, 2011; Copy of City Council Enforcement Notice dated 4th April, 2011; Transfer dated 7th February, 2011 and Official Search in respect of IR No. 125768 dated 5th April, 2011 as exhibits.

The 3rd Defendant's testimony was given by DW3 who is a Principal Land Administrator at National Land Commission but previously worked in the office for the Commissioner of Lands. He testified that the lease to the Plaintiff expired in 2001 and disputed the letter dated 9th November, 2006, which was produced by the plaintiff, stating that there was folio number 96 in the Suit property file yet the letter stated so. He insisted that the plaintiff never sought for extension of the lease. It was his testimony that as per the records with the 3rd Defendant, there was no extension of lease in favour of the Plaintiff. He contended that there were no records in the suit property file of the Plaintiff's complaint to the National Land Commission. It was his testimony that the letter where 1st Defendant was applying for allotment refers to plot 209/1627 and it is dated 20th April, 2010 and it is at folio 38. DW3 confirmed in court that the 1st Defendant complied with all the conditions

of allotment and made requisite payments to the 3rd Defendant that issued title to it which was genuine as well as authentic. He was categorical that in 2010 it is the 3rd Defendant who used to allocate land. He denied existence of fraud and insisted that procedure was done above board. He produced various documents including ; Letter of Allotment dated 14th September, 2010 and Letter dated 15th September, 2010 as their exhibits.

All the parties filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the materials presented herein including pleadings, exhibits, testimonies from the witnesses and parties submissions, the following are the issues for determination:

- Whether the Letter of Allotment and Grant issued to the 1st Defendant by the 3rd Defendant was valid and lawful.
- Whether the transfer of the suit property from the 1st Defendant to the 2nd Defendant is valid and lawful.
- Whether the Plaintiff is entitled to the orders sought in the Amended Originating Summons.
- Who should bear the costs of the suit.

As to whether the Letter of Allotment and Grant issued to the 1st Defendant by the 3rd Defendant was valid and lawful. The Plaintiff/Applicant contended that the Letter of Allotment and Grant issued to the 1st Defendant by the 3rd Defendant was invalid, null and void. They submitted that the said Letter of Allotment and Grant were issued when the office of the 3rd Defendant had ceased to exist. In her submission, she relied on Article 62 of the Constitution; and Supreme Court Advisory Opinion Reference No. 2 of 2014 and reiterated that the body mandated to issue the said Letter of Allotment was the National Land Commission. She further relied on the provisions of Part III of the Government Lands Act (Disposal of Land within townships) and in particular sections 9, 12 and 13 of the said Act. She also relied on the cases of **Henry Muthee Kathurima V Commissioner of Lands & Another (2015) eKLR** and **Kenya Industrial Estates Limited V Anne Chepsiror & 5 others (2015) eKLR** to buttress her argument on the invalidity of the Letter of Allotment issued to the 1st Defendant. The Plaintiff submitted that no evidence was tendered to demonstrate that the 1st and 3rd Defendants complied with the provisions of the Government Land Act (Part III) and hence the Letter of Allotment and Grant was not legitimate and should be cancelled forthwith. The Plaintiff further contended that having been in continuous occupation of the suit property, had developed it, she had legitimate expectation that the lease would be extended. The 1st Defendant submitted that since the lease to Kiarie Mbugua (deceased) expired on 1st January, 2001, the said property hence escheated to the government. He admitted that it was an inadvertent mistake for the 1st Defendant to produce the wrong application of LR No. 209/1635 instead of the one dated 30th July, 2010 which was in respect of the suit property. The 1st Defendant insists it adhered to all the processes and was issued with the Letter of Allotment in respect of the suit property. The 1st Defendant submitted that the office of the Commissioner of Lands continued to be functional until the establishment of the National Land Commission in May 2012. It referred the Court to the Transitional Clauses at Article 2(4) of the Sixth Schedule of the Constitution to support this argument. It relied on the cases of **Serah Mweru Muhu Vs Commissioner of Lands & 2 others (2014) eKLR** to oppose the Plaintiff's claim. It further submitted that the authorities the Plaintiff relied upon were out of context. The 2nd Defendant submitted that the Plaintiff's averments that the office of the 3rd Defendant ceased to exist on the date of promulgation of the Constitution is misconceived as well as unfounded as it flies in the face of the Transitional Clauses within the Constitution. He relied on the case of **Serah Mweru Muhu Vs Commissioner of Lands & 2 others (2014) eKLR** to support the argument that the 3rd Defendant had power to manage public land.

The 3rd Defendant opposed the Plaintiff's claim and submitted that the allocation of suit property to the 1st Defendant was lawful as it adhered to the legal processes. He relied on the case of **Suleiman Murunga V Nilestar Holdings Limited & Another (2014) eKLR** to support this argument. He insisted that the 3rd Defendant had the legal capacity to allocate the suit property and claimed that the Plaintiff could not rely on the Land Act including the National Land Commission Act which had not come into force at that time.

I note that the 1st Defendant was issued with the Letter of Allotment and Grant on 27th September, 2010 while the Plaintiff's husband's lease had expired on 1st January, 2010 through effluxion of time. The Plaintiff averred that it was unlawful for the 3rd Defendant to allocate the suit property to the 1st Defendant. DW3 who previously worked at the 3rd Defendant's office testified that as per the Records in respect of the suit property, the Plaintiff never sought for extension of the Lease. DW3 proceeded to dispute the letter dated the 9th November, 2006, which the Plaintiff had produced as an exhibit to confirm approval of extension of the lease and insisted there was no folio 96 in the Suit property file as indicated therein. It was his testimony that as per the records, there was no Lease extended to the Plaintiff. DW3 further confirmed in court that the 1st Defendant applied to the 3rd Defendant for allotment of plot No. 209/1627 and the said letter is contained at folio 38. It was DW3's testimony that the 1st Defendant also complied with all the conditions of allotment and made requisite payments to the 3rd Defendant that issued title to it, which was genuine as well as authentic. His evidence was in tandem with evidence of DW1 who confirmed applying for allotment of suit property, adhered to the terms set by the 3rd Defendant vide their letter dated the 14th September, 2010, paid Kshs. 629,430 and other fees and was issued with the Letter of Allotment including Grant on 27th September, 2010. PW1 actually admitted in Court that the husband had not complied with the conditions set out for them in a letter dated the 9th November, 2006 addressed to Ndungu & Co. Advocates, before their lease could be renewed. In the said letter the Lawyer was directed to surrender existing title; submit a new deed plan; pay Kshs. 5000; and enhanced land rent. The Plaintiff stated that the 1st and 3rd Defendants failed to adhere to the relevant provisions within the Government Land Act (repealed) when the suit land was being allocated to the 1st Defendant. However, I note that since the Lease to the Plaintiff's husband had expired by effluxion of time and the suit property reverted to the government as the radical landlord, the government was at liberty to renew the lease or issue a fresh one to a third party. This position was well stated in the case of **Suleiman Murunga v Nilestar Holdings Limited & another [2014] eKLR** where Justice Mutungi stated thus: ' **On expiry of the period fixed for the lease the lease lapses because of effluxion of the term such that the lease automatically comes to an end at the expiration of the agreed period. Thus the lease in favour of the 1st Defendant came to an end on 31st December 2009 and the radical title of the suit property reverted to the state. Upon expiry of the lease the Government can extend and/or renew the lease in favour of the previous holder or it can decline to do so and allocate the property to any other person.**'

I note the Letter of Allotment was issued to the 1st Defendant on 27th September, 2010 after promulgation of the Constitution and this is the Plaintiff's bone of contention that the office of the 3rd Defendant had then ceased to exist as it did not have capacity to issue any fresh Letter of Allotment on public land.

Article 2 (4) of the 6th Schedule to the Constitution provides that: **'Article 62 (2) and (3) is suspended until the National Land Commission is established.'**

Further, **Article 62 (2) and (3) of the Constitution provides that: ' (2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under— (a) clause (1)(a), (c), (d) or (e); and (b) clause (1)(b), other than land held, used or occupied by a national State organ. (3) Public land classified under clause (1)(f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission. '**

I note that the date of commencement for the National Land Commission Act was 2nd May, 2012 while the Date of Assent was 27th April, 2012. This in essence means that the National Land Commission was established in 2012 and I take judicial notice of this based on the Transitional Clause within the Constitution, which required the Commissioner of Lands to manage the transition. In the case of **Serah Mweru Muhu Vs Commissioner of Lands & 2 others (2014) eKLR** Justice Majanja held that: **'As I conclude, I note that following the overhaul of land management in the country following the promulgation of the Constitution and the establishment of the National Land Commission, the office of the Commissioner of Lands ceased to have overall responsibility over land management in the country. I also take judicial notice that it was not until 20th February 2013 that the Commission's members were gazetted. Thus, the Commissioner was at all material times the office responsible for the matters at hand.'**

Based on the evidence before me and relying on the cited legal provisions and associating myself with this decision, I find that the 3rd Defendant legally issued a letter of allotment and Grant in respect of the suit property to the 1st Defendant. I further opine that by the 1st Defendant accepting the offer of the allotment and paying all the requisite fees demanded by the 3rd Defendant, it indeed acquired proprietary interest over the suit property.

The Plaintiff alleged fraud on the part of the Defendants' especially the 1st and 3rd Defendant. She claimed that they colluded to fraudulently register the suit property in the 1st Defendant's name. It emerged in evidence that by the time the suit property was being registered in the 1st Defendant's name, it was 10 years after the expiry of the lease. The Plaintiff as PW1 had claimed the husband commenced the process of renewing the same but died before it was renewed. PW1 stated that her husband died in December, 2006 which was still 6 years after the lease had expired. As regards standard of proof of fraud, the law is quite clear. In **R. G. Patel v. Lalji Makanji [1957] EA 314** the former Court of Appeal for Eastern Africa stated thus:

"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

In the current scenario, insofar as the Plaintiff alleged fraud, I find that she failed to prove the said allegations on the part of the defendants. It is against the foregoing that I find that the Letter of Allotment and Grant issued to the 1st Defendant by the 3rd Defendant as valid and lawful.

As to whether the transfer of the suit property from the 1st Defendant to the 2nd Defendant is valid and lawful. DW1 who was the 1st Defendant's witness confirmed in court that they entered into a Sale Agreement dated the 3rd December, 2010 with the 2nd Defendant for the sale of the suit property for Kshs. 50 million. He confirmed in court that the 2nd Defendant paid the full purchase price after which it obtained consent from the 3rd Defendant to transfer the suit property to the 2nd Defendant. The 1st Defendant further paid the pending rates and obtained the Rate as well as Rent Clearance Certificates after which the 2nd Defendant was issued with a Letter of Allotment and Grant. DW2 also confirmed in court that he paid Kshs. 50 million for the suit land. He stated that he undertook due diligence in 2010 as evidenced by the Certificate of Official Search which he produced in Court and by then, it is the 1st Defendant who was the proprietor of the suit property. The Plaintiff disputed the Sale claiming it was fraudulent but from the evidence of DW1 and DW2 the Court finds that the 1st Defendant sold the suit property to the 2nd Defendant. In the circumstances, I hold that the Certificate of Title issued to the 2nd Defendant was conclusive evidence of ownership as envisaged under section 23(1) of the Registration of Titles Act (now repealed). I proceed to uphold the 2nd Defendant's title to the suit property.

As to whether the Plaintiff is entitled to the orders sought in the Amended Originating Summons.

The Plaintiff sought for orders of injunction against the Defendants in respect of the suit property; declaration that the Grant issued to the 1st Defendant by the 3rd Defendant on 29th September, 2010 was irregular, unlawful, null and void and the said Grant and all the entries made subsequent thereto be cancelled forthwith. Further, that as the Administratrix of the Estate of Joseph Kiarie Mbugua (deceased) she was entitled to an extension of Lease for a period of 99 years for the suit property with effect from the date of Judgment or such other date that this Honourable Court may deem fit and just; Compensation by way of damages against the Defendants jointly and severally for depriving the Plaintiff of her right to occupy and enjoy the suit property, loss of income from the suit property with effect from 1st January, 2001, value of the demolished portion of her property, costs and interest. It seems the Plaintiff had legitimate expectation to have the lease in respect of the suit property renewed and failure of which culminated in this suit. Her claim is pegged on an expired Indenture, which was yet to be renewed at the time of the deceased demise. It is worth noting that from 2006 despite the fact that the Plaintiff had been directed to fulfill certain conditions before the lease could be renewed as in indicted in the letter dated 9th November, 2006 which was disputed by the 3rd Defendant, as at 2010, she was still yet to fulfill the said conditions. From the evidence in court it emerged that the lease held by the Plaintiff's husband had expired on 1st January, 2001 while the 1st Defendant was issued with a Letter of Allotment in 2010. The Plaintiff's husband died in December, 2006 before the renewal of the lease in his name. This in essence means that at the time of the deceased demise,

since the suit property had reverted to the government as the radical landlord, it was hence not available as part of the deceased estate in accordance with the provisions of the Law of Succession Act. The Plaintiff confirmed in court that she has been in possession of the suit property but the 1st and 2nd Defendant's proceeded to demolish part of it. However, DW2 denied this allegation and stated that it is the County Government who had demolished the property as it found it inhabitable. He produced the Enforcement Notice as an exhibit to confirm this averment. The Plaintiff has claimed damages from 2001 when the lease expired and yet she claims to have been in possession of the suit property as the 2nd Defendant only managed to get access to it briefly after purchase. I find this claim untenable. The Plaintiff as PW1 confirmed in court that the 1st Defendant's title to land was revoked by the National Land Commission vide a Gazette Notice No. 6865 of 17th July, 2017 which she produced as an exhibit.. She however was at pains to explain that she had lodged a complaint at the National Land Commission during the pendency of this suit but could not confirm if she served the Defendants or not. She insists that the 2nd Defendant's lease stands revoked since he never challenged the same in a judicial review. In the case of **Suleiman Murunga v Nilestar Holdings Limited & 4 others [2015] eKLR** the Court held that '**The National Land Commission in my view could not purport to rely on the order of 4th February 2011 to revoke the letter of allotment made to the plaintiff which the court had ruled the Commissioner of Lands was perfectly entitled to make in the circumstances of the matter the lease of the property having expired on 31st October 2009 and not having been renewed and/or extended in favour of the Defendants. The National Land Commission would further not properly be entitled to deal with a matter that was pending before the court unless the parties by mutual agreement agreed to have the matter referred to the Commission to deal with.**'

I note that the National Land Commission proceeded to gazette the revocation of the title to the suit property held by the 1st Defendant and revert it to the Plaintiff. However, I note as per the Land Records, the 2nd Defendant was actually the leaseholder from February 2011 and not the 1st Defendant. Further, that in 2017, I note cancellation of titles to private land was governed by section 80 of the Land Registration Act and it is the Court that was mandated to do so. The law on cancellation of title requires a party seeking for the same to prove fraud, on the part of the titleholder, which to me the Plaintiff has failed to do on the part of the 2nd Defendant. I opine that the NLC did not have capacity to deal with a matter that was already in court for determination especially bearing in mind that the Defendants were not summoned before it. It seems the NLC proceeded to condemn the parties unheard contrary to the provisions of the Constitution. Based on my analysis and the evidence before me, I find that the Plaintiff is hence not entitled to the orders sought in the originating summons.

As to who should bear the costs of the suit.

It is trite law that costs generally follow the cause and I proceed to award the Defendants the costs of the suit.

It is against the foregoing that I find that the Plaintiff has failed to establish her case on a balance of probability and will proceed to dismiss the Amended Originating Summons filed in Court on 5th May, 2017 with costs to the Defendants.

Dated and Delivered in Ngong this 25th day of September, 2019

CHRISTINE OCHIENG

JUDGE