



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISUMU

E & L CASE NO. 782 OF 2015

MUNICIPAL COUNCIL OF KISUMU.....PLAINTIFF

VERSUS

TELEPOSTA PENSION SCHEME

REGISTERED TRUSTEES & 26 OTHERS.....DEFENDANTS

K-REP BANK LIMITED.....INTERESTED PARTY

JUDGMENT

1. The Municipal Council of Kisumu, the Plaintiff, commenced these proceedings through their re-amended further amended plaint dated the 29th May, 2013 against the 27 Defendants and one Interested Party as detailed herein above. The Plaintiff avers that it was at all material times the registered proprietor of a lease from the Government of Kenya for a term of 99 years of parcel I. R. 12663 the suit land measuring 7.72 acres or thereabout. That among the conditions in the lease was that the Plaintiff shall not sell, transfer, sublet or charge the land or any part thereof except with the prior consent in writing of the President of the Republic of Kenya or the 3rd Defendant. That sometimes in 1958, the Government of Kenya requested the Plaintiff to surrender a portion of 0.0996 of an acre to be excised from the suit land for road extension. That the surrender instrument dated the 2nd August, 1968 was executed and the original grant handed over to the 2nd Defendant. That the 2nd Defendant in breach of the earlier understanding and undertaking purported to convert the Plaintiff's title that was under the Registration of Titles Act into the **Registered Lands Act, Chapter 300 of Laws of Kenya** and caused the 3rd Defendant to register it on the 27th September, 1975 as L. R. No. Kisumu Municipality/Block 9/1 without the Plaintiff's knowledge or authorization. That sometimes on or about 11th February 1980, the 2nd and 3rd Defendants purported to register a surrender of lease of L. R. Kisumu Municipality/Block 9/1 using a fake and fraudulent instrument without the Plaintiff's knowledge or authorization. That the 2nd and 3rd Defendants then purported to create a lease registered as Kisumu Municipality/Block 9/329 measuring 2.835, hectares out of the Plaintiff's original title I. R. 12663/1, and purported to register it in favour of the Government of Kenya on or about 4th February, 2007. That thereafter, they proceeded to lease it to Kenya Posts & Telecommunications Corporation vide lease dated 7th September, 2001 for a period of 99 years from 1st May, 1980. That by a surrender of lease dated the 31st December 2002, the 1st Defendant's predecessor purported to surrender the lease of Kisumu Municipality/Block 9/329. That by legal notice No. 154 of 5th November 1999, the 27th Defendant purported to transmit to the 1st Defendant L. R. Kisumu Municipality/Block 9/1 measuring 7.400 acres which did not exist. The Plaintiff set out the particulars of fraud and illegalities attributed to the Defendants, specifically the 1st, 2nd, 3rd and 27th Defendants, at paragraphs 8 and 11B of the said Plaint. The Plaintiff further avers at paragraph 10 of the said Plaint that the 1st Defendant proceeded to subdivide the suit land into 103 parcels, and caused the 3rd Defendant to register the resultant portions as numbers Kisumu Municipality/Block 9/335 to 439 which it sold to the **"25th Defendant or some of them."** The Plaintiff therefore seeks for the following prayers:

"(a) A declaration that the conversion of it land Title No. I. R. 12663 to L. R. No. Kisumu Municipality/Block 9/1 and the registration by the 2nd Defendant of the 1st Defendant and/or its predecessors as proprietor of the original L. R. N. Kisumu Municipality/Block 9/1 or of L. R. No. Kisumu Municipality/Block 9/329 was fraudulent, illegal, irregular and therefore null and void.

(b) A declaration that Gazette Notice No. 154 of 5th November, 1999 was false, fraudulent, illegal and of no legal effect.

*(c) An order directing the 2nd and 3rd Defendants jointly and severally to cancel the registration, if any, of the 1st defendant as proprietor of the original L. R. No. KISUMU MUNICIPALITY/BLOCK 9/1 or of L. R. NO. KISUMU MUNICIPALITY/BLOCK 9/329 and of all titles arising from its subdivision and restitution of I. R. No. 12663 under the **Registration of Titles Act, Cap. 281, Laws of Kenya** and to transfer the same to the Plaintiff. And to return physically the original title document for I. R. No. 12663 to the Plaintiff.*

(d) An order directing the 3rd Defendant to cancel the subdivision of the original L. R. No. Kisumu Municipality/Block 9/1 or of L. R. No. Kisumu Municipality/Block 9/329 into the many parcels curved out of it as particularized in paragraph 10 of the Plaint and of titles themselves and to restore the said original title back to the register.

(e) In the alternative, an order directing the 3rd Defendant to transfer to the Plaintiff all the parcels that were curved out of the original L. R. Kisumu Municipality/Block 9/1 or of L. R. No. Kisumu Municipality/Block 9/329 as particularized in paragraph 10 of the register hereof.

(f) A permanent injunction restraining the Defendants whether by themselves, their agents or servants from selling, disposing of or otherwise parting possession with any of the parcels curved out of the original L. R. No. Kisumu Municipality/Block 9/1 or of L. R. No. Kisumu Municipality/Block 9/329 or I. R. No. 12663.

(g) General damages for trespass to property as against the Defendants in possession.

(h) In the alternative but without prejudice to the foregoing, and order directing the 1st Defendant to provide on account in respect of any of the properties so far sold and Judgment against the 1st Defendant for any amounts received on account of the sale of the properties in question, revocation of titles still in the name of the 1st Defendant and rectification of the register to reflect the Plaintiff's name as proprietor.

(i) An order directing the 4th Defendant to ensure that the orders sought herein against the 2nd and 3rd Defendants are complied with.

(j) Costs of this suit and interest on such costs from the date of filing sit until full payment.”

2. The Teleposta Pension Scheme, the 1st Defendant, opposed the Plaintiff's claim through their Amended Statement of Defence dated 18th May, 2012. They maintained that the surrender of Kisumu Municipality/Block 9/329 by their predecessor, vide surrender of lease dated 31st December, 2002 and the transmission by the 27th Defendant of Kisumu Municipality/Block 9/1, through Legal Notice No. 154 of 5th November, 1999 were regular and the transmitted land existed. The 1st Defendant denied the particulars of the alleged fraud and illegalities attributed to it and or its predecessor and insisted that it legally acquired the suit lands. The 1st Defendant conceded subdividing the land into the parcels disclosed in the plaint and that it sold some to the “**co-defendants or some of them**”. The 1st Defendant further denied that the Plaintiff is the proprietor of Kisumu Municipality/Block 9/1 and or that the conversion and subdivision of Kisumu Municipality/Block 9/329, and the subsequent creation of the resultant titles were fraudulent and irregular. That the suit is statute time barred by virtue of **Sections 7 and 9(1) of the Limitation of Actions Act** and the suit should be dismissed with costs.

3. The 2nd to 4th Defendants filed a joint statement of defence dated the 25th February, 2010 through the Senior Litigation Counsel in opposition to the Plaintiff's claim. They deny that the Plaintiff was the registered proprietor of the suit land. They further aver that if the Plaintiff surrendered any land to the Government, then the same was done voluntarily and without conditions. That after the surrender, the suit property vested in the Government absolutely, as the Plaintiff's interests were extinguished by the surrender. That the suit land was allocated to the defunct Kenya Posts & Telecommunications Corporation with the consent and notice of the Plaintiff, and subsequently transferred legally to the 1st Defendant. That the subsequent subdivision of the suit land could not have been planned and executed without the Plaintiff's knowledge and consent. That the Plaintiff's suit violates **sections 13A of the Government Proceedings Act, Section 3 of the Public Authorities Limitation Act and Section 136(1) and (2) of the Government Land Act** and should be dismissed with costs.

4. The 8th, 9th, 13th, 15th, 16th, 24th and 26th Defendants opposed the Plaintiff's claim through their individual statements of defence dated the 7th August 2009, 6th January 2011, 7th August 2009, 18th January 2011, 23rd April 2011, 7th August 2009 and 24th March 2010 respectively filed through M/s Moses J. A. Orengo Advocate, averring among others that they had acquired land parcels Kisumu Municipality/Block 9/369, 368, 427, 345, 358 and 374 respectively, regularly and legally and had been paying rates to the Plaintiff.

5. The 5th, 6th, 7th, 17th and 22nd Defendants also opposed the Plaintiff's claim through their joint statement of defence dated 30th March, 2010 filed through M/s Odongo Awino & Company Advocates averring that they are innocent purchasers of their parcels and have been paying rates to the Plaintiff.

6. The 21st Defendant opposed the Plaintiff's claim through the statement of defence dated the 21st July, 2009 filed through M/s S. O. Madialo & Company Advocates averring that land parcel Kisumu Municipality/Block 9/352 was acquired from the 1st Defendant on a willing seller willing buyer basis, and has been paying the rates to the Plaintiff.

7. The K-Rep Bank Limited, the Interested Party, filed their statement of defence dated 8th February, 2012 through M/s Mulondo, Oundo, Muriuki & Company Advocates denying any fraud and illegality in the process of the 11th Defendant acquisition of Kisumu Municipality/Block 9/380 from the 1st Defendant. They also denied that the use of the title of the said parcel as security for a loan by the 11th Defendant from the Interested Party, and its attempt to realize the security after default, can be faulted.

8. The 25th Defendant filed Amended Statement of Defence dated 6th June, 2012 through M/s Odongo Awino & Company Advocates averring that it acquired Kisumu Municipality/Block 9/438 and 439 from the legal allottee and by dint of **Section 39 of the Registered Land Act**, their title is valid and indefeasible in law. That it had obtained the Plaintiff's clearance for the transaction upon paying the rates and being issued with the Rates Clearance Certificate.

9. The other Defendants did not enter appearance, file defence or participate in the proceedings.

10. The Plaintiff called Stephen Sule, the County Government of Kisumu City planning Assistant, who testified as PW1. He told the court that he joined the Municipal Council of Kisumu in 1994 as head of the Planning department whose duties included processing development applications, preparing development plans and control among others. It was his testimony that the County Government of Kisumu is the Successor to the defunct Municipal Council of Kisumu. PW1 adopted the contents of his witness statement filed on the 15th March, 2018 as his evidence. The summary of his evidence is that L. R. 2663/1 was granted to the Municipal Council of Kisumu, hereinafter referred to as the Plaintiff in 1956. The parcel measured 7.72 acres. That the property was meant for the African Social Centre. That later, a portion of 0.0996 acres was requested for by the Government for expansion of Jomo Kenyatta Highway and the Plaintiff approved. That subsequently, the Plaintiff surrendered the grant and executed the surrender document which was signed by both the Mayor and the Clerk, and sealed. That the surrender document was registered with the Registrar of Titles on 2nd August 1968. It was the evidence of PW1 that after the surrender of the 0.0996 acres, the Commissioner of Lands was to prepare a new title for the remaining portion of the land for the Plaintiff but did not do so. That the Plaintiff made visits and wrote letters to the Commissioner of Lands for the title document without success. That the Plaintiff then wrote to 3rd Defendant on 30th September, 2004 who responded through their letter dated the 11th October, 2004 indicating that several plots had been created from the title. That the Plaintiff then conducted searches and obtained copies of the register for Kisumu Municipality/Block 9/1 measuring 3.0838 acres, which they learnt was the portion of the land that remained after the earlier surrender. The copy of the register showed that the parcel was registered on the 27th September, 1975 and that on the 11th February, 1980, the Plaintiff had surrendered that parcel. The witness faulted the document of surrender signed by one John Mwangi Nderi who was the then Clerk to the Commission running the Plaintiff, as it did not have the signature of the Chairman of the Commission and seal. The witness disputed the 1st Defendant's claim that Kisumu Municipality/Block 9/329 was a subdivision of Kisumu Municipality/Block 9/1 and that it was vested to it vide L. N. No. 154 of 5th November, 1999 as there was no Part Development Plan (PDP) duly approved by the relevant offices including the Plaintiff. That the Plaintiff conducted a Search on Kisumu Municipality/Block 9/329 and it shows it was registered with the Government of Kenya on the 4th July, 2002.

The witness further testified that on Kisumu Municipality/Block 9/1 stands several blocks of flats on a portion of the land which were developed by the then Kenya Posts & Telecommunications Corporation with approval of the Plaintiff. The witness indicated that he had not traced written approval on the development. The Plaintiff had further established that Kisumu Municipality/Block 9/329 had been subdivided into 103 plots and as there was no confirmation whether the Plaintiff was involved in the exercise, the revenue department was directed not to receive rates payments over the plots. The 1st Defendant filed *Nairobi High Court Misc. Application No. 9 of 2008* to compel the Plaintiff to receive the rates payments but the matter was dismissed on the 9th November, 2009. That the Defendants who had acquired the plots continued paying the rates even after the court matter was dismissed due to the time it took for the Plaintiff to know of the decision. That the County Government of Kisumu is ready to refund the said rates payments received by it if so required. The witness was cross examined and he disclosed that though the Plaintiff used to take crucial decisions through Minutes of relevant Committees and full Council, he had not traced any on what the Council had decided to do about the suit land after the 1968 surrender, or upon finding that part of the suit land had been allocated to the 1st Defendant or on the decision to file this suit. That the suit land is needed by the County Government of Kisumu for the hawkers to trade on, even though he had not seen Minutes on that decision. That though he could not tell the acreage of the land occupied by the block of flats constructed by Kenya Posts & Telecommunications Corporation with the Plaintiff's approval, the Plaintiff now want the whole land returned to it. That his office did not previously have any role in rate payment processes but since the County Government came into being, his office was now verifying the title documents and the physical locations of the plots before allowing the payment and collection of rates. That the 27th Defendant was sued for issuing the notice that vested the land then held by Kenya Posts & Telecommunications Corporation to the 1st Defendant even though there was no evidence of inducement found. That the Plaintiff has no evidence of fraud attributed to the Defendants who bought parcels of land from the 1st Defendant, but they are sued because they benefitted from the land that was unlawfully obtained. PW1 stated that he could not tell whether John Mwangi Nderi, the Commission Secretary then running the Plaintiff when the suit land was reportedly surrendered, had been contacted about this case.

11. The 1st defendant called Peter Kipyegon Rotich, the administrator and Secretary of the board of the 1st Defendant, who testified as DW1. He adopted the contents of his statement dated the 2nd May, 2011. He testified that the 1st Defendant came into being on the 1st July, 1999 to serve the retirees of the Kenya Posts & Telecommunications Corporations, and the employees of the three entities that were created after the split of the Corporation on 30th June, 1999 being Telkom Kenya Limited, Postal Corporation of Kenya and Communication Corporation of Kenya. That the 1st Defendant was allocated assets by the Government of Kenya from which it was to generate income to meet its obligations, in addition to the monthly contributions from the active staff members. That the assets were allocated and transferred through Legal Notices Numbers 154 of 5th November, 1999 and another of September, 2001. That in 2001, Telkom Kenya Limited subsidiary known as Safaricom Limited, Communication Commission and Postal Corporation wanted to establish their own pensions schemes, and the 1st Defendant's assets were valued and some given to the new schemes. That the 1st Defendant remained taking care of all the retirees of the former Kenya Posts & Telecommunications Corporation and the three entities created from it up to the date of the split of the scheme, and the active staff members of Telkom Kenya Limited. That the Scheme, however, was closed on the 30th November, 2007 upon privatization of Telkom Kenya. That effective 30th November 2007, the 1st Defendant only serve those of members who had made contributions to it up to that date, and therefore do not have active members. That to get money to meet its obligations, the 1st Defendant relies on rent collected from its various properties, proceeds from sale of properties and government securities.

That the land parcel Kisumu Municipality/Block 9/1 over which the Plaintiff has sued them has their nine blocks of flats which were allocated to it under Gazette Notice Number 154 of 5th November, 1999. That the 1st Defendant had title to eight of the nine blocks of flats. That the title for the ninth block of flats was reportedly encroaching on the road and therefore, the title could not be issued. The witness produced among others the letter of allotment for Block 9/1 (Part) for the portion upon which the eight blocks, each containing 14 (fourteen) houses, are situated. The witness told the court that they obtained titles for each of the houses and had the vacant land surveyed and subdivided into 49 parcels and sold 26 of the parcels.

12. The 5th, 25th, 8th, 9th, 13th and 26th Defendants testified as **DW2, DW3, DW4, DW5, DW6** and **DW7** respectively and they told the court how they obtained the various parcels of land from the 1st Defendant for value. Then the Land Registrar, Kisumu [3rd Defendant] testified as

PW9. He testified that the suit land was first registered under the Registration of Titles Act as I. R. 12663/1 with the Plaintiff. That on 2nd August 1968, the Plaintiff surrendered a portion of 0.0996 acres of the land to the Government of Kenya. That the surrender document that was registered indicated that the whole parcel had been surrendered and not just the portion of 0.0996 acres. That another surrender of 11th February, 1980 was executed by the Plaintiff and registered surrendering the lease for Kisumu Municipality/Block 9/1, measuring 3.0838 hectares, which was the reference of the suit land after conversion from **Registration Act of Registration of Land Act, Cap. 300 of Laws of Kenya** to Government of Kenya. That by that surrender, the Plaintiff relinquished all its rights over the suit land. That through the letter of 11th October 2004, the Plaintiff wrote to the Land Registrar on the Kisumu Municipality/Block 9/1 that was initially I. R. 12663 measuring 7.72 acres and upon checking the records the 3rd Defendant responded that the land had been registered with the 1st Defendant and subdivided into several parcels and that further details could be obtained from the Commissioner of Lands. That the suit land was procedurally surrendered to the Government of Kenya and therefore was available for allocation to the any party by the Commissioner of Lands. During cross examination, DW9 testified that John Mwangi who signed the second surrender for the whole suit land, then described as Kisumu Municipality/Block 9/1, was the Secretary to the Commission then running the Plaintiff. That the available records show that Kenya Postal and Telecommunication Corporation of Kenya was allocated Kisumu Municipality/Block 9/1, (Part) measuring 2.93 hectares as shown in the Plan No. 53589/127/1 by the Commissioner of Lands. That the lease was registered in the Chief Registrar's Office, Nairobi where the subsequent subdivisions were also processed without involving the Kisumu Land Registrar's office. That the demand letter by the Plaintiff at paragraphs 2, 3 and 4 indicated that the Council had surrendered the lease for Kisumu Municipality/Block 9/1 for curving out the portion surrendered for the road and that the remaining portion was thereafter subdivided into 103 parcels by the 1st Defendant. That in the subdivision of leasehold properties like the suit land, the offices involved are that of the Surveyor and the Physical Planning and that the latter works with the Local Authority who approves the plan before the Surveyor executes it.

13. That one Noah Otieno Orua had started testifying as **DW8** on behalf of the 16th Defendant but upon objection by the Counsel for the Plaintiff due to lack of power of Attorney, he was dropped as a witness.

14. That at the close of the oral testimonies, the learned Counsel for the Parties participating in the proceedings agreed to file and exchange written submissions. That consequently, Mr. David Otieno Advocate filed the Plaintiff's submissions dated 6th August, 2019 and 18th September, 2019 while M/s Kale Maina & Bundotich Advocates filed that of the 1st Defendant dated 4th September, 2019. M/s Odongo Awino & Company Advocates filed the submissions for 5th, 6th, 7th, 22nd and 25th Defendants dated 3rd September, 2019 while Mr. Moses J. A. Orenge Advocate filed that for 8th, 9th, 13th, 14th, 15th, 16th, 24th and 26th Defendants dated 3rd September, 2019. M/s Sara A. M. Aliongo, Senior Litigation Counsel for the Attorney General filed written submissions dated 4th September, 2019 for the 2nd, 3rd, 4th and 27th Defendants while M/s S. O. Madialo & Company Advocates and M/s Mulondo & Company Advocates filed the submissions dated 10th September, 2019 and 5th September, 2019 for the 21st Defendant and Interested Party respectively.

14. The following are the issues for the Court's determinations;

(a) Whether there is a relationship between land parcel Kisumu Municipality/Block 9/1 and Land reference number 1148/9/XII under Grant I.R. 12665 and if so who the initial registered proprietor was.

(b) Whether the parcels described in (a) above were lawfully surrendered to the Government of Kenya by the Plaintiff.

(c) Whether the conversion of L. R. 1148/9/XII [I.R. 12665], under Registration of Titles Act (repealed), to Kisumu Municipality/Block 9/1, that is under Registration of Land Act (repealed), was fraudulently done.

(d) Whether the allocation of Kisumu Municipality/Block 9/1 to Kenya Posts and Telecommunication Commission was fraudulently done.

(e) Whether Kisumu Municipality/Block 9/329 has a relationship with Kisumu Municipality/Block 9/1.

(f) Whether the subdivision of Kisumu Municipality/Block 9/329 and the registration of the parcels created thereof in the name of the 1st Defendant was fraudulently done.

(g) Whether the Plaintiff is entitled to the prayers or any of the prayers sought.

(h) Who pays the costs?

15. The court has carefully considered the pleadings filed, the oral and documentary evidence presented, the detailed submissions by the learned Counsel as detailed above, and the superior court's decisions cited thereon and come to the following findings;

(a) That all the parties herein were in agreement that land parcel described as L. R. No. 1148/9/XII[12663] particularized on Land Survey Plan No. 46572 measuring 7.72 acres was allocated to the Kisumu Municipal Board, the predecessor to the Plaintiff, from 1st January 1956 for a period of 99 years to be used for purposes of an African Social Centre, by the Governor and Commander in Chief of The Colony and Protectorate of Kenya, on behalf of Her Most Gracious Majesty Queen Elizabeth the Second, the predecessor of the Government of Kenya. The Plaintiff produced the copy of the Grant as exhibit P1, and annexed to it is a plan No. 46572 by the Director of Surveys dated 7th May, 1956.

(b) That it is also not disputed that the Plaintiff surrendered to the Government of Kenya vide document dated 2nd August, 1968 and produced as exhibit P2, 0.0996 acres out of Title Number I. R. 12663 delineated on Survey Plan No. 85174 that is annexed to the surrender document for road extension. The last sentence of paragraph 2 of the said surrender document reads that **"...the**

surrender as beneficial owner HEREBY SURRENDERS ALL its right title and interest in the hereinbefore described piece of land unto the said Government of Kenya.” That it is the case of the Plaintiff that they expected the Government of Kenya was to prepare the title document for the portion left after excising the portion for road reserve and register it with them but that was not done.

(c) That the parties are further in agreement that after the 2nd August 1968 surrender, there was a second surrender of 11th February, 1980 to the Government of Kenya of the parcel Kisumu Municipality/Block 9/1 measuring 3.0838. That second surrender document was signed by one John Mwangi who was the secretary to the Commission then running the affairs of the Plaintiff. That though the Plaintiff's case is that the said John Mwangi had no authority of the Plaintiff or the Commission to execute the said surrender, the Defendants, especially the 1st Defendant, have insisted that the surrender cannot be faulted. The 1st Defendant's position is especially supported by the Land Registrar, 3rd Defendant, who testified as DW9. That the provisions of **Sections 107 of the Evidence Act Chapter 80 of Laws of Kenya** required of the Plaintiff to tender evidence to prove that John Mwangi was not authorized, or was without authority of the Commission or the Plaintiff to execute the surrender document of 11th February, 1980 in favour of the Government of Kenya. That such proof could have been through the resolutions of the Commission or the Council, either before the execution of the document or anytime after the surrender during which the agenda was discussed. That other than the plaintiff's pleadings and the testimony of PW1, there are no Minutes presented to the court to show or suggest that the said John Mwangi, Secretary to the Commission, was without capacity and authority to execute the surrender document of 11th February, 1980. The court therefore finds that the Plaintiff had willingly and lawfully surrendered, not just Land Reference No. 1148/9/XII [I.R. 12665] on 2nd August, 1968, but also Land Reference No. Kisumu Municipality/Block 9/1 on 11th February, 1980 to the Government of Kenya. That had the process of the second surrender been fraudulent, then the Plaintiff could have lodged an appropriate agenda before the relevant departmental committee soon thereafter, or at least in year 2004 when they wrote the letter Ref. TE/G/86 dated 30th September, 2004 which is noted in the Land Registrar's Kisumu letter dated 11th October, 2004. That when PW1 testified, he stated that he had not seen any such Minutes and to his knowledge, no action had ever been taken by the Council (Plaintiff) against the said John Mwangi.

(d) That by the time the Commissioner of Lands allocated Kisumu Municipality/Block 9/1 (Part) measuring 2.98 hectares to Kenya Posts and Telecommunication vide the letter of allotment dated 30th October 1985, the said land was free for alienation having been surrendered by the Plaintiff on the 11th February, 1980 as shown in (c) above. The letter of allotment particularized the land allocated as the portion edged in red in plan No. 53589/127/1 that is attached. That though the parties did not provide the court with documents to confirm how the Land described in the letter of allotment as Kisumu Municipality/Block 9/1 (Part) was registered after surveying process, the 1st Defendant's list of documents contains a copy of a lease for Kisumu Municipality/Block 9/329 measuring 2.835 hectares in favour of Kenya Posts and Telecommunication Corporation and Certificate of Lease dated 5th July, 2002. The court takes the parcel described thereon to be the reference of the land allocated to Kenya Posts and Telecommunications Corporation under the letter of allotment dated 30th October, 1985, after surveying and registration.

(e) That DW1 told the court how the 1st defendant was created and vide Legal Notice No. 154 of 5th November, 1999, the then Minister for Finance transferred several assets that vested in Kenya Posts & Telecommunication Corporation to the 1st Defendant. The properties (assets) transferred included Kisumu Municipality/Block 9/1 under the powers confirmed upon the Minister by **paragraph 5(6) of the Third Schedule to the Kenya Communications Act, 1998**. That the Kenya Posts and Telecommunication Corporation then surrendered the lease over Kisumu Municipality/Block 9/329 back to the Government vide the document registered on the 15th January, 2003.

(f) That the 1st Defendant then proceeded to subdivide Kisumu Municipality/Block 9/329 into parcels 334 to 436 following the approval of the proposed subdivision by among others, the Town Engineer with the Plaintiff on the 2nd March, 2003. The copy of the proposed subdivision duly signed (approved) by the Engineer, letter dated 7th July, 2006 by the District Physical Planning Officer, Nyando to the Director Physical Planning, letter by the Director Surveys to the Commissioner of Lands dated 2nd October, 2002 and Certificate of Compliance by the Director of Physical Planning No. 02825, all documents related to the said subdivision of the said land are attached to the 1st Defendant's list of documents and confirms that the process was done with the active involvement of offices within the Plaintiff. That further, the Part Development Plan for the said land was advertised vide Gazette Notice No. 10157 of 16th December, 2005 calling for objections and apparently none was received even from the Plaintiff, as confirmed by the District Physical Planning Officer in their letter dated 7th July, 2006. That in the absence of Minutes from the Plaintiff confirming that the matter was discussed and resolutions to the contrary made, the available evidence leads to the conclusion that the subdivision by the 1st Defendant of land parcel Kisumu Municipality/Block 9/329 was procedurally done after the necessary approvals were obtained from among others the Plaintiff.

(g) That the certified true copy of the white card [register] for Kisumu Municipality/Block 9/1 produced as exhibit 4 shows that it was opened on the 27th September, 1975 and registered under entry number 1 in the name of the Plaintiff. That the land measures 3.0838 hectares on the document produced by DW9. That from the evidence of PW9, that was the acreage of the land that had remained after excising 0.0996 hectares after the surrender of 2nd August, 1968 from the original acreage of 7.72 acres. That the foregoing findings therefore confirms the relationship between L. R. No. 1148/9/XII [I.R. 12665] and Kisumu Municipality/Block 9/1.

(h) That flowing from the finding in (c) above, it is clear the Plaintiff had divested itself of all rights and interests over land parcel Kisumu Municipality/Block 9/1, that was the part that remained after the 2nd August, 1968 surrender of 0.0996 hectares from the initial title L. R. No. 1148/9/XII [I.R. 12663], upon the surrender of 11th February, 1980. That there is no evidence tendered before the court to show that the Plaintiff had raised any complaints with the 2nd Defendant after the land that remained following the excisions of 0.0996 hectares was registered as Kisumu Municipality/Block 9/1 on the 27th September, 1975 upto the 11th February, 1980 when they surrendered it to the Government of Kenya. That it is therefore too late for the Plaintiff to claim that there was fraud

in the process of converting the title of the portion that remained after excision of 0.0996 hectares from Registration of Titles Act to Registration of Land Act when it is clear there was no loss of acreage occasioned.

(i) That as already held above, land parcel Kisumu Municipality/Block 9/1 (Part) was allotted to Kenya Posts & Telecommunication Corporation and after surveying the parcel was registered as Kisumu Municipality/Block 9/329 measuring 2.835 hectares **[see the lease and certificate of lease in the 1st Defendant's list of documents]**. The map attached to the letter of allotment dated 30th October, 1985 indicated a portion of 0.27 hectares had been left out from the part allocated under the allotment. That when the acreage of 0.27 hectares of that Plot is added to 2.835 hectares of Kisumu Municipality/Block 9/329, the total comes to about 3.045 hectares which multiplied by 2.47 acres comes to about 7.52115 acres. That when 0.0996 acres that were excised upon surrender of 2nd August, 1968 for the road expansion is added, the acreage comes to 7.62075 acres which is a little shy of the 7.72 acres of the parent title acreage. The parties including the 3rd Defendant [DW9] did not offer any explanation or details on the relationship between the 0.27 hectares plot and Kisumu Municipality/Block 9/329, the suit land.

(j) That further, the fact that the Plaintiff received and continued to receive the payment for rates in respect of Kisumu Municipality/Block 9/329 and or the subdivisions thereof, and to issue demand notices for the same as evinced in the copies in the various defendants' lists of documents, goes to show that the Plaintiff has all along been aware of the transactions revolving around the suit land.

(k) That from the foregoing, it is not disputed that land parcel Kisumu Municipality/Block 9/329 was subdivided by the 1st Defendant into 103 parcels and offered for sale. That some of the other Defendants obtained parcels from the 1st Defendant or those that had initially bought them, and as the 1st Defendant has not disputed the process, it was upon the Plaintiff to prove that there was fraud in the process of acquisition for the court to order the cancellation of the titles. The provision of **section 80 of the Land Registration Act No. 3 of 2012** empowers the court to order rectification of the register by directing cancellation or amendment where it is satisfied that any registration was obtained, made or omitted by fraud or mistake and that the proprietor had knowledge of the omission, fraud or mistake or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default. That the Plaintiff has failed to tender evidence to prove omission, fraud, mistake, or knowledge or participation by any of the defendants who have acquired the suit land, or any of the parcels subdivided from it. The burden of prove lay at all the times on the Plaintiff and the standard is above balance of probabilities as confirmed in the case of **Richard Oduol Opolo Vs Commissioner of Lands & 2 Others [2015] eKLR**, where the case of **Gudka Vs Dodhia Civil Appeal No. 21 of 1980** was cited that –

“the respondent was in effect being accused of fraudulent conduct and allegations of fraud must be strictly proved. The fraudulent conduct must be strictly proved more than mere balance of probabilities as required in R. G. Patel Vs Lalji Makanji [1957] E.A. 314”.

(l) That the Plaintiff's witness, PW1 confirmed during cross examination that the Defendants who bought parcels subdivided from the suit land by the 1st Defendant cannot be faulted which the court takes to be an indication or admission that the Plaintiff had no evidence of fraud, attributable to them upon which their interests over the respective parcels could be impugned under **Section 26 of the Land Registration Act No. 3 of 2012**. Those Defendants who bought the parcels from the 1st Defendant may be taken to be bonafide purchasers as under **Section 39(1) of the Registered Land Act (repealed)**, a person dealing or proposing to deal for valuable consideration with a proprietor of land was not obligated to inquire or ascertain the circumstances under which that proprietor was registered with the land. That the threshold for one to be considered a bonafide purchaser were set down in the case of **Katende Vs Haridar & Company Limited (2008) 2 E.A. 173** as follows:

“...it suffices to describe a bonafide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bonafide doctrine, (he) must prove that;

- a. he holds a certificate of title;***
- b. he purchased the property in good faith;***
- c. he had no knowledge of the fraud;***
- d. he purchased for valuable consideration;***
- e. the vendors had apparent valid title;***
- f. he purchased without notice of fraud;***
- g. he was not party to any fraud.***

A bonafide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

That as the decision to sell the subdivided properties was made by the 1st Defendant Board of Trustees and offers advertised vide notice dated the 16th February, 2004 and the 1st Defendant has not challenged the acquisitions of the parcels by the other Defendants, and in view of the admission by PW1 that he cannot fault their acquisitions, the court finds and holds that their defence of *bonafide* purchasers has been established.

(m) That the Plaintiff has not shown what damages or loss if any, was suffered through the Defendants' acquisition and dealing with the suit land. That in any case it was admitted by PW1 that the Plaintiff had allowed the development by Kenya Posts & Telecommunications Corporation of the flats that are on a portion of the suit land years before 1st Defendant acquired title. The prayer for damages is therefore not established and none is granted.

(n) That the Plaintiff having failed in all its prayers should pay costs of the suit. That the provision of **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya** empowers the court not to order costs even to a successful party for good causes or reasons. That in view of the fact that the 2nd, 3rd, 4th and 27th Defendants are public offices in the Government of Kenya and the Plaintiff is also a public body as the County Government of Kisumu, each will bear their own costs. That the 21st Defendant and the Interested Party did not call witnesses but had Counsel on record, who either participated in being present in court during the hearing and or filing submissions and are entitled to costs. The same with all the other Defendants who testified in court and or were represented by Counsel who attended court during the hearing and or filed written submissions as shown in paragraphs 2 to 8, 11, to 13 above.

16. That for the reasons set out above, the court finds that the Plaintiff has failed to prove its claim against any of the Defendants and its case is dismissed with costs as detailed in 15(n) above.

Orders accordingly.

Dated and signed at Eldoret this 20th day of November, 2019.

S. M. KIBUNJA

JUDGE

Delivered and signed this 20th day of November, 2019.

A. OMBWAYO

JUDGE

Judgment read in open court in the presence of:

Mr. Otieno for Plaintiff.

No appearance for 1st Defendant.

No appearance for 2nd, 3rd, 4th and 27th Defendants.

No appearance for 5th, 6th, 7th, 22nd and 25th Defendants.

Mr. Oremo for 8th, 9th, 13th, 14th, 15th, 16th, 24th and 26th Defendants.

No appearance for Interested Party

M/s Joanne: Court Assistant