



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 1239 OF 2005**

**MARTHA WAMBUI MUCHIRI.....LAINTIFF**

**VERSUS**

**KANAIRIO MIRITI.....1<sup>ST</sup> DEFENDANT**

**MARTIN NKONGE NJAGI.....2<sup>ND</sup> DEFENDANT**

**JOSEPH MACHARIA.....3<sup>RD</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI.....4<sup>TH</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction:**

The plaintiff brought this suit against the defendants on 13<sup>th</sup> October, 2005. In her plaint of the same date, the plaintiff averred as follows. On or about 7<sup>th</sup> February, 1992, the 4<sup>th</sup> defendant allocated to one, Elias Njoka Njagi (hereinafter referred to as “Njoka”) Plot No. 338 also known as L.R No. Nairobi/Block/63/457 (hereinafter referred to as “the suit property”). On 17<sup>th</sup> June 1997, Njoka with the knowledge of the 4<sup>th</sup> defendant sold to her the suit property. On 25<sup>th</sup> June, 1997, the 4<sup>th</sup> defendant issued her with a letter of allotment in respect of the suit property and she proceeded to take possession thereof. On 29<sup>th</sup> September, 2005, she paid to the 4<sup>th</sup> defendant annual ground rent and survey fees for the suit property and thereafter started clearing the property with a view to commencing construction thereon. On 3<sup>rd</sup> October, 2005, she found out that someone had trespassed on the property. This prompted her to conduct a search on the title of the suit property at the land registry which revealed that the suit property was registered in the name of the 3<sup>rd</sup> defendant as the proprietor thereof which registration took place on 29<sup>th</sup> July, 2005. She perused the register for the suit property and noted that suit property was initially registered in the name of the 1<sup>st</sup> defendant on 17<sup>th</sup> October, 2001. The 1<sup>st</sup> defendant transferred the property to the 2<sup>nd</sup> defendant on 15<sup>th</sup> July, 2005. The 2<sup>nd</sup> defendant thereafter transferred the suit property to the 3<sup>rd</sup> defendant on 29<sup>th</sup> July, 2005.

The plaintiff contended that the registration of the suit property in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants was illegal and fraudulent and that the 4<sup>th</sup> and 5<sup>th</sup> defendants were privy to the illegality and fraud that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants had perpetrated against her. The plaintiff averred that she suffered loss and damage as a result of the acts complained of. The plaintiff sought judgment against the defendants for:

- a. A declaration that she is the lawful owner of L.R No. Nairobi/Block/63/457(the suit property).
- b. An order for the rectification of the proprietorship section of the register for the suit property to indicate her name as the proprietor of the property.
- c. A permanent injunction restraining the 3<sup>rd</sup> defendant by himself, his servants, agents and/or employees from trespassing, constructing on or in any other way interfering with her possession of the suit property.
- d. Costs of the suit and interest.

The 1<sup>st</sup> defendant did not enter appearance. The 2<sup>nd</sup> defendant entered appearance through the firm of Kangethe & Company Advocates on 23<sup>rd</sup> August, 2007 but did not file a defence. I have not seen a copy on record. The 3<sup>rd</sup> defendant entered appearance on 25<sup>th</sup> October, 2005 and filed a statement of defence on 13<sup>th</sup> November, 2015. The 3<sup>rd</sup> defendant denied the plaintiff's claim. He stated that he was legally and lawfully registered as the proprietor of the suit property upon purchasing the same from the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant stated that his title to the suit property is indefeasible and that the plaintiff should be restrained from interfering with his ownership and possession of the suit property.

The 4<sup>th</sup> defendant entered appearance on 14<sup>th</sup> November, 2005. In its amended defence dated 6<sup>th</sup> July 2011, the 4<sup>th</sup> defendant admitted that it allocated the suit property to Elias Njagi Njoka (Njoka) and the plaintiff. The 4<sup>th</sup> defendant denied knowledge of registration of the suit property in favour of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants as proprietors thereof. The 4<sup>th</sup> defendant averred that the registration of the suit property in the name of the 1<sup>st</sup> defendant and subsequent transfers of the property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were based on fraudulent documents.

The 5<sup>th</sup> defendant filed a statement of defence dated 24<sup>th</sup> July, 2009 in which it denied the particulars of fraud pleaded against it in the plaint. In the alternative, the 5<sup>th</sup> defendant averred that the registration of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants as proprietors of the suit property was carried out lawfully, procedurally and was based on the honest belief that the documents accompanying the application for registration were proper and genuine.

#### The plaintiff's evidence:

The suit came up for hearing on 28<sup>th</sup> October, 2015 when the plaintiff (PW1) testified and closed her case. The plaintiff stated that she was the owner of the suit property which she purchased from Elias Njoka (Njoka) in 1997. She produced in evidence a copy of the letter of allotment that had been issued to Njoka on 7<sup>th</sup> February 1992 by the 4<sup>th</sup> defendant as P. Exhibit 1. She stated that the purchase price for the suit property was Kshs. 450,000/- of which she paid Kshs. 120,000/- on the execution of the agreement for sale. She stated that on 1<sup>st</sup> July, 1997, she paid Kshs. 301,000/- by a cheque and thereafter made a further payment of Kshs. 20,000/- in cash making a total of Kshs. 441,000/-. The plaintiff stated that the balance of Kshs 9,000/- was used to pay ground rent which had accrued. The plaintiff produced a copy of the agreement for sale dated 17<sup>th</sup> June, 1997 between her and Njoka as P. Exhibit 2.

The plaintiff stated that after making the said payment, Njoka wrote to the 4<sup>th</sup> defendant on 18<sup>th</sup> July, 1997 asking it to transfer the suit property to her following which letter, the 4<sup>th</sup> defendant issued her with a new letter of allotment dated 25<sup>th</sup> June, 1997. She produced the new letter of allotment as P. Exhibit 3. She also produced in evidence as P. Exhibit 4, the original receipt dated 27<sup>th</sup> February, 1997 that had been issued by the 4<sup>th</sup> defendant to Njoka for the payments he had made for the suit property when the same was allocated to him. The plaintiff told the court that in the year 2005, she visited the 4<sup>th</sup> defendant to collect her title and was asked to settle outstanding ground rent of Kshs. 46,000/- which she paid together with a further payment of Kshs. 15,000/- for survey fees. She produced in evidence receipts dated 29<sup>th</sup> September, 2005 for the said payments as P. Exhibit 5 and P. Exhibit 6 respectively.

The plaintiff stated that on 30<sup>th</sup> September, 2005, she visited the suit property with the 4<sup>th</sup> defendant's surveyor who pointed out to her the beacons. She was thereafter issued with a beacon certificate which she produced in evidence as P. Exhibit 7. She stated that she fenced the suit property and on 4<sup>th</sup> October, 2005, she carried out a search on the suit property which revealed that the property had been registered in the name of the 3<sup>rd</sup> defendant who had acquired the same from the 2<sup>nd</sup> defendant who was also indicated to have acquired the property from the 1<sup>st</sup> defendant. She produced in evidence copies of the certificate of official search dated 4<sup>th</sup> October, 2005, the register for the suit property, the certificate of lease that had been issued to the 3<sup>rd</sup> defendant and the lease agreement pursuant to which the said certificate of lease was issued as P. Exhibits 8, 9, 10 and 11 respectively.

The plaintiff stated that on 27<sup>th</sup> October, 2005 she conducted a search at the office of the Director of City Planning and was issued with a letter stating that the suit property was in her name. She produced the letter in evidence as P. Exhibit 12. The plaintiff also produced in evidence as P. Exhibit 13(a) and (b) respectively, copies of a memo and an updated list of allottees of plots in Jamhuri Phase II Scheme in which she was named as one of the allottees. The plaintiff also produced in evidence as P. Exhibit 14, a copy of a letter dated 1<sup>st</sup> November, 2005 by the 4<sup>th</sup> defendant stating that it had not issued any clearance certificate in respect to the suit property for the period of May – July 2005. She also produced in evidence as P. Exhibit 15, a receipt dated 12<sup>th</sup> September, 2005 for Kshs 4,777.50 that was paid by the 3<sup>rd</sup> defendant to the 4<sup>th</sup> defendant on account of rates after the property had been transferred to the 3<sup>rd</sup> defendant. The plaintiff stated that she continued to pay ground rent for the suit property up to the year 2014. She produced a bundle of receipts for the payments she made for the years 2011-2014 as P. Exhibit 16.

The plaintiff stated that she presented her building plans for approval and was issued with an approval letter dated 15<sup>th</sup> January, 2009 which she produced in evidence together with the building plan as P. Exhibits 17(a) and (b) respectively. The plaintiff also produced in evidence an approval for water connection dated 25<sup>th</sup> May, 2009 as P. Exhibit 18. The plaintiff stated that she was in possession of the suit property and had put up a block of flats in accordance with approved plans. The plaintiff stated that if the 5<sup>th</sup> defendant had conducted due diligence, it would have noted that the lease that the 1<sup>st</sup> defendant had presented to it for registration was fake. The plaintiff stated that on 12<sup>th</sup> October, 2010, the 3<sup>rd</sup> defendant's agents attempted to bring down her fence on the suit property. This move prompted her to file this suit in which she obtained an order of temporary injunction to restrain interference with her occupation of the suit property.

In cross-examination by the advocate for the 3<sup>rd</sup> defendant, the plaintiff stated that the title held by the 1<sup>st</sup> defendant in respect of the suit property was acquired fraudulently and as such the 1<sup>st</sup> defendant did not have a good title to pass to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. In cross-examination by the advocate for the 5<sup>th</sup> defendant, the plaintiff stated that she was issued with a letter of allotment in the year 1997. She stated that she had been paying ground rent to the 4<sup>th</sup> defendant and had not made any payment to the Ministry of Lands. She stated that upon

discovering that the suit property was registered in the name of the 3<sup>rd</sup> defendant, she registered a caution against the title.

#### The 3<sup>rd</sup> defendant's evidence:

In his evidence in chief, the 3<sup>rd</sup> defendant (DW1) stated that he purchased the suit property from the 2<sup>nd</sup> defendant in July, 2005. The 3<sup>rd</sup> defendant stated that he saw an advertisement in the Daily Nation Newspaper and called the telephone number that was given in the advertisement. The call was picked by the 2<sup>nd</sup> defendant who directed him to his office at Kileleshwa. He stated that after negotiations, they settled on a purchase price of Kshs.1.5 million from Kshs. 1.8 million that was initially being demanded by the 2<sup>nd</sup> defendant. After agreeing on the purchase price, he conducted a search on the title of the suit property which showed that the property was registered in the name of the 1<sup>st</sup> defendant and not the 2<sup>nd</sup> defendant. He raised the issue with the 2<sup>nd</sup> defendant who informed him that he had purchased the property from the 1<sup>st</sup> defendant. The advocate who was handling the transaction on behalf of the 2<sup>nd</sup> defendant, one Mr. Kibunja, also gave him assurance that he had lodged for registration the instrument of transfer of the suit property from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant.

The 3<sup>rd</sup> defendant told the court that he paid Kshs. 150,000/- being 10% of the purchase price upon the execution of the agreement for sale on 14<sup>th</sup> July, 2005 and that the balance of the purchase price was to be paid upon execution of the transfer in his favour. The 3<sup>rd</sup> defendant stated that on 15<sup>th</sup> July, 2015, the 2<sup>nd</sup> defendant called and informed him that a title deed had been issued in the 2<sup>nd</sup> defendant's favour. He conducted a search on the suit property which confirmed the same. On 22<sup>nd</sup> July, 2005, he received a call from the 2<sup>nd</sup> defendant and his advocate asking him to pay the balance of the purchase price. He thereafter issued the 2<sup>nd</sup> defendant with a cheque for Kshs. 1,350,000/- in the name of Animal World Safaris Ltd. as had been directed by the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant acknowledged receipt of the payment. The 3<sup>rd</sup> defendant stated that he was issued with a certificate of lease in respect of the suit property on 29<sup>th</sup> July, 2016.

The 3<sup>rd</sup> defendant stated further that; before purchasing the suit property, he visited the same in the company of the 2<sup>nd</sup> defendant. He found the property vacant. He employed a watchman to look after the property and prepared building plans for the purpose of putting up residential flats thereon. He lodged the said building plans with the 4<sup>th</sup> defendant for approval and paid approval fees of Kshs 3,360/-. He made additional payment of Kshs 47,777.50/- for land rates after which the said building plans were approved by the 4<sup>th</sup> defendant.

The 3<sup>rd</sup> defendant denied having acquired the suit property fraudulently. He stated that he followed the due process in acquiring the property. He contended that the 2<sup>nd</sup> defendant had a good title that was passed to him. He averred that he was an innocent purchaser for value without notice of any defect in the 2<sup>nd</sup> defendant's title. He produced in evidence as D. Exhibits 1 and 2 respectively, the bundles of documents that were filed in court on 29<sup>th</sup> October 2015 and 22<sup>nd</sup> April 2016 by his advocates. He stated that neither the 4<sup>th</sup> defendant nor the 5<sup>th</sup> defendant had alleged fraud against him.

The 3<sup>rd</sup> defendant stated that if there was any fraud, the same could only be attributed to the 1<sup>st</sup> defendant. He stated that if the court finds that the 1<sup>st</sup> defendant acquired the suit property fraudulently, he will be entitled to a refund of the money he used to acquire the suit property together with interest. He urged the court to find that he is the lawful owner of the suit property and to dismiss the suit and remove the caution placed against the title of the property by the plaintiff.

In cross-examination by the advocate for the plaintiff, the 3<sup>rd</sup> defendant stated that he entered into an agreement for sale with the 2<sup>nd</sup> defendant on 14<sup>th</sup> July 2005 before the property was registered in the name of the 2<sup>nd</sup> defendant. He stated that he bought the suit property on the understanding that it belonged to the 2<sup>nd</sup> defendant. He stated that he was not given the rates clearance certificate and the land rent clearance certificate by his advocate upon the completion of the transaction. He stated further that he could not recall the amount he paid as stamp duty.

The 3<sup>rd</sup> defendant stated that upon lodging his building plans for approval, the 4<sup>th</sup> defendant demanded rates which he paid on 12<sup>th</sup> September, 2005. He admitted that in the certificate of lease that was issued to the 2<sup>nd</sup> defendant, the 4<sup>th</sup> defendant was indicated as the lessor of the suit property, while in his certificate of lease the lessor was indicated as the Government of Kenya. He stated that he did not pay any land rent for the suit property since the suit herein was commenced immediately after he acquired the property. He stated that he did not know the 1<sup>st</sup> defendant and was not aware that he did not have a good title to the suit property.

In cross-examination by the advocate for the 4<sup>th</sup> defendant, DW1 stated that he did not follow up on the building plans he had lodged for approval since this suit was instituted soon after he had presented the plans to the 4<sup>th</sup> defendant. He stated that the plans had not been approved as at the time of the institution of this suit. DW1 stated that he purchased the property through an advocate and did not suspect that anything was wrong.

#### The plaintiff's submissions:

The 4<sup>th</sup> and 5<sup>th</sup> defendants closed their respective cases on 14<sup>th</sup> June, 2017 without calling evidence. After the close of evidence, the parties made closing submissions in writing. In her submissions dated 4<sup>th</sup> July, 2017 the plaintiff argued that she had proved that the suit property was initially allocated to Elias Njagi Njoka (Njoka) who later sold the same to her. The plaintiff submitted that no evidence was produced to show how the 1<sup>st</sup> defendant acquired the suit property. She submitted that the 3<sup>rd</sup> defendant's evidence was contradictory. She submitted that, the 3<sup>rd</sup> defendant had earlier presented a copy of the register for the suit property which showed that the same was opened on 17<sup>th</sup> October, 2001 and that the 1<sup>st</sup> defendant was registered as the owner of the property on 7<sup>th</sup> October, 2001. The plaintiff submitted further that the register for the suit property and certificate of lease held by the 3<sup>rd</sup> defendant differ as to identity of the lessor with the former indicating the 4<sup>th</sup> defendant while the latter is showing the Government of Kenya as the lessor.

The plaintiff submitted that her evidence was corroborated by the 4<sup>th</sup> defendant through its amended defence and witness statement signed by Abwao Erick Odhiambo. The plaintiff submitted that she is the lawful allottee of the suit property as evidenced by the letter of allotment that was issued to her by the 4<sup>th</sup> defendant as well as the list of allottees of Jamhuri Phase II Scheme that she produced in evidence.

The plaintiff submitted that the 4<sup>th</sup> defendant had in its amended defence denied the lease that was purportedly issued to the 1<sup>st</sup> defendant by the 4<sup>th</sup> defendant. She submitted that the evidence that she tendered to the effect that the 1<sup>st</sup> defendant's title was acquired fraudulently was not rebutted. She submitted that the 1<sup>st</sup> defendant had no valid title to pass to the 2<sup>nd</sup> defendant and that all subsequent registrations in respect of the suit property were *void ab initio*. The plaintiff submitted that since the 2<sup>nd</sup> defendant was registered as the proprietor of the suit property on 15<sup>th</sup> July, 2005 while the agreement for sale between the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was made on 14<sup>th</sup> July, 2015, the 2<sup>nd</sup> defendant had sold a non-existent property to the 3<sup>rd</sup> defendant. The plaintiff referred to sections 25(1) and 26(1) of the Land Registration Act, 2012 and Article 40(6) of the Constitution and submitted that she had demonstrated that the acquisition of the suit property by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants was irregular, unprocedural and undeserving of the protection accorded by law. The plaintiff argued that the non-production of documents including the rates clearance certificate, land rent payment certificate and stamp duty receipts was a demonstration that the said title was acquired unprocedurally.

In support of her submissions, the plaintiff relied on the case of M.A Koinange vs. Joyce Ganchuku & 2 others, [2015]eKLR, where the court stated that Article 40(6) and sections 26(1)(a) and (b) of the Land Registration Act, 2012 places responsibility on purchasers of titled land to ascertain the status of such land beyond the carrying out an official search. The court was further referred to the case of Munyuu Maina vs. Hiram Gathiha Maina [2013]eKLR, where the Court of Appeal stated that when a registered proprietor's root of title is under challenge, the registered proprietor must go beyond the instrument of title and prove the legality of how he acquired the title.

The plaintiff also referred the court to the cases of Lydia Wanjiku Nduba vs. Mary Wanjiru Kamau & another Nairobi HCCC No. 214 of 2004 and Omar Said Mwatayari vs. Bharat Kumar Nathalal Shah & another Mombasa HCCC No. 276 and 277 of 2004 and submitted that she had demonstrated with overwhelming evidence that she was the lawful owner of the suit property. The plaintiff submitted further that she had an overriding interest in the suit property arising from her possession of the suit property.

#### The 3<sup>rd</sup> defendant's submissions:

The 3<sup>rd</sup> defendant filed his submissions on 27<sup>th</sup> September, 2017. The 3<sup>rd</sup> defendant relied on the Ugandan Court of Appeal decision in Katende vs. Haridar & Company Ltd that was cited in Lawrence Mukiri vs. Attorney General & 4 others (2013)eKLR where the prerequisites for the application of the doctrine of bona fide purchaser were set out. The 3<sup>rd</sup> defendant submitted that his conduct throughout the entire transaction in question was above board and that he was a bona fide purchaser for value. The 3<sup>rd</sup> defendant submitted that he conducted due diligence by carrying out searches and that he even refused to pay to the 2<sup>nd</sup> defendant the purchase price when he discovered that the 2<sup>nd</sup> defendant was not the registered proprietor of the suit property. The 3<sup>rd</sup> defendant submitted that he proceeded with the transaction only after being convinced by the advocate who was handling the transaction that the transfer in favour of the 2<sup>nd</sup> defendant was underway. The 3<sup>rd</sup> defendant submitted that he had adduced overwhelming evidence to demonstrate that he was an honest person who genuinely intended to purchase the suit property in the manner outlined in the case of Katende vs. Haridar & Company Ltd. (supra).

The 3<sup>rd</sup> defendant referred to section 26(1) (a) of the Land Registration Act, 2012 and submitted that save for alleging fraud, the plaintiff did not adduce any evidence to prove the fraud alleged against the 3<sup>rd</sup> defendant. The 3<sup>rd</sup> defendant submitted that in the absence of evidence showing fraud on his part, his title was absolute and indefeasible. The 3<sup>rd</sup> defendant relied on the cases of Nancy Kahoya Amadiva vs. Expert Credit Ltd & another (2015), Vijay Morjaria vs. Nansingh Madhusingh Darbar & another (2000)eKLR and Central Kenya Ltd vs. Trust Bank & 4 others (1996) eKLR in support of his submission that fraud must be distinctly pleaded and proved and that the onus of proof is much heavier than in ordinary civil cases.

The 3<sup>rd</sup> defendant cited Article 40(3) of the Constitution and submitted that a registered title is superior to a letter of allotment. The 3<sup>rd</sup> defendant referred the court to the case of Satya Investments Ltd vs. J. K. Mbugua CA No. 164 of 2004 cited in Njuwangu Holdings Ltd vs. Langata KPA Nairobi & 5 others (2014)eKLR where the court stated that where there is a registered title and a letter of allotment over the same property in the absence of any fraud on the part of the party holding the registered title, a letter of allotment must of necessity give way.

In his further submission, the 3<sup>rd</sup> defendant argued that the 5<sup>th</sup> defendant had not denied the 2<sup>nd</sup> defendant's title. The 3<sup>rd</sup> defendant argued that like the plaintiff, the 5<sup>th</sup> defendant had failed to prove the fraud alleged against the 3<sup>rd</sup> defendant. The 3<sup>rd</sup> defendant submitted that he bought the suit property on the strength of the 2<sup>nd</sup> defendant's title issued by the 5<sup>th</sup> defendant and as such the 5<sup>th</sup> defendant could not absolve itself of the consequences of the actions of its registrars. The 3<sup>rd</sup> defendant argued that the plaintiff's remedy lies against the 5<sup>th</sup> defendant and not otherwise.

#### The 4<sup>th</sup> defendant's submissions:

The 4<sup>th</sup> defendant filed its submissions dated 19<sup>th</sup> September, 2017 on 20<sup>th</sup> September, 1997. The 4<sup>th</sup> defendant submitted that it is the one who allotted the suit property. The 4<sup>th</sup> defendant submitted that it allotted the suit property to Elias Njagi Njoka (Njoka) who transferred the property to the plaintiff. The 4<sup>th</sup> defendant submitted that it issued the plaintiff with a letter of allotment on 25<sup>th</sup> June, 1997. The 4<sup>th</sup> defendant submitted that Njoka and the plaintiff followed the laid down procedure in acquiring the suit property. The 4<sup>th</sup> defendant submitted that the suit property did not belong to the Government of Kenya and as such there was no way a lease in respect thereof could be issued to the 3<sup>rd</sup> defendant by the Government of Kenya as lessor. The 4<sup>th</sup> defendant submitted that since the 1<sup>st</sup> defendant acquired the title to the suit property through fraud, his title was not subject to protection of the law under section 26(1)(a) and (b) of the Land Registration Act, 2012. In support of this submission, the 4<sup>th</sup> defendant relied on the cases of Elijah Makeri Nyangwara vs. Stephen Mungai Njuguna & another, Eldoret

ELC No. 609B of 2012, Alice Chemutai Too vs. Nickson Kipkurui Korir & 2 others (2015)eKLR and Arthi Highway Developers Ltd vs. West End Butchery & 6 others, Nairobi CA No. 246 of 2013[2015] eKLR. The 4<sup>th</sup> defendant submitted that it never assisted the 1<sup>st</sup> defendant in the fraudulent and illegal acquisition of the title to the suit property.

The 4<sup>th</sup> defendant submitted further that the 3<sup>rd</sup> defendant could not claim to be an innocent purchaser since he failed to follow the laid down procedure while acquiring the suit property. The 4<sup>th</sup> defendant cited the case of Rachel Moraa Mochama vs. Paul Tirimba Machogu Kisii ELC No. 72 of 213 where the court stated that the right of a person in possession of land is an overriding interest within the meaning of section 30(g) of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed).

The submissions by the 5<sup>th</sup> defendant:

The 5<sup>th</sup> defendant filed its submissions dated 14<sup>th</sup> September, 2017 on 20<sup>th</sup> September, 2017. The 5<sup>th</sup> defendant referred to Article 40(6) of the Constitution, sections 26 and 80 of the Land Registration Act, 2012 and the case of Daudi Kiptugen vs. Commissioner of Lands (2015)eKLR and submitted that it was not enough to wave a lease or certificate of lease to assert a good title since the process of acquisition of title is material. The 5<sup>th</sup> defendant also cited the case of Rukaya Ali Mohamed vs. David Gikonyo Nambacha & another KSM HCCA No. 9 of 2004 and submitted that once land is allocated, it cannot be re-allocated unless the first allocation is validly and lawfully cancelled.

The 5<sup>th</sup> defendant submitted further that since the 4<sup>th</sup> defendant had disowned the lease on the basis of which the 1<sup>st</sup> defendant had been registered as the owner of the suit property as a forgery, the title that was acquired by the 1<sup>st</sup> defendant's in respect of the suit property and the subsequent titles were all tainted with fraud since the 1<sup>st</sup> defendant could not pass a good title. In support of this submission, the court was referred to Article 40(6) of the Constitution, section 26 of the Land Registration Act, 2012 as well as the case of Alice Chemutai Too vs. Nickson Kipkurui Korir & 2 others (2015)eKLR and Arthi Highway Developers Ltd vs. West End Butchery & 6 others(supra).

The 5<sup>th</sup> defendant argued that a registrar registers documents based on what is presented to his office. The 5<sup>th</sup> defendant argued that fraudulent acts carried out independent of the office of the 5<sup>th</sup> defendant cannot be blamed on the 5<sup>th</sup> defendant. The 5<sup>th</sup> defendant submitted that the plaintiff had not proved that the 5<sup>th</sup> defendant undertook any actions other than those in fulfillment of its statutory mandate and duty and therefore, that the 1<sup>st</sup> to 3<sup>rd</sup> defendants should indemnify it against any orders including costs that may be awarded against it herein.

Issues for determination:

The parties did not frame and agree on the issues for determination. From the pleadings and the evidence that was tendered by the parties, the following in my view are the issues that a rise for determination in this suit:

1. Who is the lawful owner of the suit property as between the plaintiff and the 3<sup>rd</sup> defendant?
2. Whether the plaintiff is entitled to the reliefs sought?
3. Who is liable for the costs of the suit?

The first issue:

As between the plaintiff and the 3<sup>rd</sup> defendant, I am persuaded on the evidence before the court that the plaintiff is the lawful owner of the suit property. The plaintiff's evidence on how she acquired the suit property was strong and unshaken. The plaintiff whose case was that she had acquired the suit property from Elias Njoka (Njoka) produced copies of; the letter of allotment that was issued to Njoka, the original allottee of the suit property by the 4<sup>th</sup> defendant; a receipt for Kshs. 21,600/- that was paid by Njoka to the 4<sup>th</sup> defendant for the allotment and a letter dated 18<sup>th</sup> June, 1997 by Njoka to the 4<sup>th</sup> defendant requesting it to transfer the suit property to the plaintiff. The plaintiff also tendered in evidence a copy of the agreement for sale of the suit property between her and Njoka. The plaintiff did not stop there. She also produced in evidence a copy of a letter of allotment that was issued to her by the 4<sup>th</sup> defendant following the successful transfer of the suit property from Njoka to her. The plaintiff also proved that she was in possession of and had developed the suit property. The plaintiff also proved that she was paying ground rent to the 4<sup>th</sup> defendant for the suit property. The 4<sup>th</sup> defendant supported the plaintiff's case although it did not tender any evidence. In its statement of defence, the 4<sup>th</sup> defendant admitted having allocated the suit property to Njoka and denied any knowledge of registration of the suit property in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

As I have stated above, the 3<sup>rd</sup> defendant's case was that he acquired the suit property from the 2<sup>nd</sup> defendant who had also acquired the same from the 1<sup>st</sup> defendant. He stated that he purchased the suit property at a consideration Kshs. 1.5 million. The 3<sup>rd</sup> defendant stated that he conducted due diligence on the title of the suit property before he purchased the same and was convinced that the 2<sup>nd</sup> defendant had a valid title to the suit property. The 3<sup>rd</sup> defendant contended that he was an innocent purchaser for value without notice of any defect in the 2<sup>nd</sup> defendant's title. The 3<sup>rd</sup> defendant submitted that no fraud had been alleged or proved against him and as such his title to the suit property was protected under section 26(1)(a) of the Land Registration Act, 2012 and Article 40(3) of the Constitution of Kenya, 2010. The 3<sup>rd</sup> defendant contended that in the absence of fraud on his part, his title to the suit property was absolute and indefeasible.

I am satisfied from the evidence that was tendered by the 3<sup>rd</sup> defendant that the 3<sup>rd</sup> defendant acquired the suit property from the 2<sup>nd</sup> defendant. What is disputed is whether the title that was acquired by the 3<sup>rd</sup> defendant from the 2<sup>nd</sup> defendant was a valid title. The 3<sup>rd</sup> defendant traces the root of his title to the 1<sup>st</sup> defendant who is said to have been allotted the suit property by the 4<sup>th</sup> defendant. The 1<sup>st</sup> defendant is said to have transferred the suit property to the 2<sup>nd</sup> defendant from whom the 3<sup>rd</sup> defendant acquired the suit property. The

plaintiff has contended that the suit property was allocated by the 4<sup>th</sup> defendant to Njoka and as such could not have been allocated again to the 1<sup>st</sup> defendant. The plaintiff has contended that the purported allotment of the suit property to the 1<sup>st</sup> defendant on the strength of which he was registered as the proprietor of the suit property was fraudulent and illegal. The 4<sup>th</sup> defendant who is said to have allocated the suit property to the 1<sup>st</sup> defendant has denied the alleged allotment. The lease which is purported to have been issued by the 4<sup>th</sup> defendant in favour of the 1<sup>st</sup> defendant in respect of the suit property has also been denied by the 4<sup>th</sup> defendant and termed fraudulent. The 1<sup>st</sup> and 2<sup>nd</sup> defendants did not defend the suit. All the allegations of fraud that were made against them were not controverted.

From the material on record, I am not satisfied that the 3<sup>rd</sup> defendant was an innocent purchaser for value without notice of the defect that was existing on the 2<sup>nd</sup> defendant's title. The 3<sup>rd</sup> defendant led evidence that he learnt that the suit property was on sale from a newspaper advertisement. When he called the telephone number that was given in the advertisement, the call was picked up by the 2<sup>nd</sup> defendant who claimed to be the owner of the suit property. He was taken to the suit property by the 2<sup>nd</sup> defendant with whom they negotiated and agreed on a purchase price. He thereafter entered into an agreement for sale with the 2<sup>nd</sup> defendant. By this time, he had not done an official search on the title of the suit property. When he did a search, he learnt that the property was not registered in the name of the 2<sup>nd</sup> defendant. A few issues arise here which should have put the 3<sup>rd</sup> defendant on his guard. Why did the 2<sup>nd</sup> defendant advertise the suit property for sale while the same was not registered in his name? Secondly, why did the 2<sup>nd</sup> defendant enter into an agreement for sale with the 3<sup>rd</sup> defendant while the property had not been transferred to his name? The 3<sup>rd</sup> defendant led evidence that even after realizing that the property was not registered in the 2<sup>nd</sup> defendant's name, he continued with the transaction on the assurance given by the 2<sup>nd</sup> defendant and his advocates that a title in the name of the 2<sup>nd</sup> defendant was being processed. Even before the property was transferred to his name, the 3<sup>rd</sup> defendant made the final payment of the purchase price on 22<sup>nd</sup> July, 2005. What is puzzling is that this payment was not made to the 2<sup>nd</sup> defendant but to a third party ANIMAL SAFARIS LIMITED. Looking at the transaction as a whole, a reasonable person should have realized that there was something amiss. Warnings were all there for the 3<sup>rd</sup> defendant to see but he chose to ignore them. Even if it is assumed that the 3<sup>rd</sup> defendant acquired the suit property in good faith without notice of any defect in the 2<sup>nd</sup> defendant's title, I am of the view that his title to the suit property cannot be upheld.

As I have stated earlier in this judgment, the plaintiff led uncontroverted evidence that the suit property was allocated to Njoka on 7<sup>th</sup> February, 1992. Njoka accepted the allotment and made payment of the charges that were required by the 4<sup>th</sup> defendant. With the consent of the 4<sup>th</sup> defendant, Njoka sold and transferred his interest in the suit property to the plaintiff in 1997. The plaintiff was issued with a new letter of allotment on 25<sup>th</sup> June, 1997. According to the list of allottees of land at Jamuhuri Phase II Scheme that was attached to the internal memo dated 10<sup>th</sup> February, 1998 from the Director of City Planning & Architecture to the Chief Counsel of the 4<sup>th</sup> defendant (P. Exhibit 13(a)), the suit property is indicated as having been allotted to the plaintiff by the 4<sup>th</sup> defendant. The 3<sup>rd</sup> defendant did not place any evidence before the court showing that the 4<sup>th</sup> defendant had allocated the suit property to the 1<sup>st</sup> defendant and that the 1<sup>st</sup> defendant had accepted the terms of the allotment and made the necessary payment. There is also no evidence on how the suit property moved from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant. What the 3<sup>rd</sup> defendant placed before the court were his certificate of title and the lease that is alleged to have been issued by the 4<sup>th</sup> defendant to the 1<sup>st</sup> defendant. There is completely no material to back the issuance of this lease that has been disputed by the 4<sup>th</sup> defendant. The purported lease was issued in the year 2001 several years after the suit property had been allocated to the plaintiff by the 4<sup>th</sup> defendant. The 4<sup>th</sup> defendant had no right in law to allocate the suit property to any other person while the allotment to the plaintiff was subsisting.

In the case of Nancy Wanjiru Kunyihya vs. Samuel Njoroge Kamau Nakuru ELC No. 295 of 2014 (2018) eKLR the court was faced with a similar situation. The court stated as follows:

*“If the Municipal Council of Nakuru (now the County Government of Nakuru), the holder of the head lease, states that it has never issued a lease in respect of this land, and there is no record of any lease having been so issued, how can this court hold that there was actually a lease granted to Samwel Kamau Mwangi? The only reason that I would have not to doubt this evidence is if I was given the actual lease of Samwel Kamau Mwangi, or a letter of allotment to him over this plot. I have absolutely nothing. The holder of the head lease has stated that it issued an allotment letter to Mr. Kunyihya, and never issued any lease to one Samwel Kamau Mwangi. I cannot wish away this strong evidence which is not controverted. I am therefore persuaded on a balance of probabilities, that the plot herein was allotted to Mr. Kunyihya, and no lease was ever drawn in favour of Samwel Kamau Mwangi. The registration of Samwel Kamau Mwangi as proprietor of the leasehold title, on 23 September 1991, was either erroneous or outrightly fraudulent... The defendant is claiming a leasehold title pursuant to a register which is not backed up by any lease. The register is thus clearly fraudulent and/or fictitious. The Certificate of Lease held by the defendant is merely a paper document, not acknowledged by the head lessor and the necessary documentation, and cannot stand. It follows that Godfrey Wadahi never had any title to transfer to the defendant.”*

The 3<sup>rd</sup> defendant's title is under challenge. The 3<sup>rd</sup> defendant did not place before the court sufficient evidence that would have enabled the court to trace the root of his title. The Court of Appeal in the case of Munyu Maina vs. Hiram Gathiha Maina (supra) stated that, where a title is under challenge, dangling the instrument of title as proof of ownership cannot suffice. The registered proprietor must go the extra mile of proving the legality of how he acquired the title. This was not the case here.

In the absence of documents backing the 1<sup>st</sup> defendant's title such as an allotment letter or valid lease from the 4<sup>th</sup> defendant, the only inference which can be drawn is that the 1<sup>st</sup> defendant's title was issued unprocedurally. Such a title is liable to impeachment under section 26(1) (b) of the Land Registration Act, 2012. The 3<sup>rd</sup> defendant need not have been a party to the vitiating factors set out under section 26(1) (b) aforesaid before its title can be impeached.

From the evidence on record, the 1<sup>st</sup> defendant did not have a valid title that he could pass to the 2<sup>nd</sup> defendant. Similarly, the 2<sup>nd</sup> defendant having acquired an invalid title from the 1<sup>st</sup> defendant, had nothing to pass to the 3<sup>rd</sup> defendant. In the case of Arthi Highway Developers

Ltd vs. West End Butchery & 6 others(supra), the court held that a party cannot pass a better title than he has. The court stated as follows:

*“It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.”*

Since the 3<sup>rd</sup> defendant did not acquire a valid title, his title cannot be protected by the law. The Court of Appeal in the case of Henry Muthee Kathurima vs. Commissioner of Lands & Another (2015) eKLR expressed itself on this issue as follows:

*“We have considered the provisions of Section 26 of the Land Registration Act in light of the provisions of Article 40(6) of the Constitution and it is our considered view that the concept of indefeasibility of title is subject to Article 40(6) of the Constitution. Guided by Article 40 (6) of the Constitution, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that the title to the property was unlawfully acquired.”*

Similar findings were made by the Court of Appeal in Suleiman Rahemtulla Omar & another vs. Musa Hersi Fahiye & 5 others (2014) eKLR where the court stated as follows:

*“...we find that the cited provisions only protect a bona fide purchaser for value without notice and who is not privy to the fraud. In any event, having found that the sale itself was fraudulent and that the seller had no title to pass to the vendors, then all subsequent transactions including the registration of the indenture and the transfer of the property from the Government Lands Act (GLA) to the Registration of Titles Act (RTA) were all null and void. The issue of indefeasibility of Title does not therefore arise.”*

#### The second issue:

From what I have stated above, I am satisfied that the plaintiff has proved her case on a balance of probabilities as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants and as such she is entitled to the orders sought though not as prayed for. Section 80 (1) of the Land Registration Act, 2012 gives the court power to order rectification of the register by directing that any registration be cancelled or amended where the court is satisfied that the registration was obtained, made or omitted by fraud or mistake. This in my view is a proper case for the court to invoke its powers under section 80(1) of the Land Registration Act. The rectification will be limited however only to the cancellation of the invalid title held by the 3<sup>rd</sup> defendant. This court cannot order that the plaintiff be registered as the owner of the suit property. The plaintiff will have to obtain a lease from the 4<sup>th</sup> defendant on the strength of her letter of allotment. It is upon registration of that lease that she would acquire leasehold interest in the suit property. This is an interest that the court cannot confer upon her without a duly registered lease in her favour.

#### The third issue:

Costs follow the event. No reason has been put forward to make me depart from this established rule. The plaintiff has succeeded and is entitled to costs as against the losing parties.

#### Conclusion:

In conclusion, I hereby enter judgment for the plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants jointly and severally on the following terms:

1. I hereby declare that the plaintiff is the lawful owner of all that parcel of land known as L.R No. Nairobi/Block 63/457.
2. The title held by the 3<sup>rd</sup> defendant in respect of L.R No. Nairobi/Block 63/457 is hereby cancelled.
3. A permanent injunction is issued restraining the 3<sup>rd</sup> defendant by himself, his servants, agents and/or employees from trespassing on, constructing on or in any other way whatsoever interfering with the plaintiff's possession and/or ownership of L.R No. Nairobi/Block 63/457.
4. The plaintiff shall have the costs of the suit as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
5. The plaintiff's claim against the 4<sup>th</sup> and 5<sup>th</sup> defendants is dismissed with no order as to costs.

**Delivered and Signed at Nairobi this 26<sup>th</sup> day of April 2018.**

**S.OKONG'O**

**JUDGE**

Judgment read in open court in the presence of:

Ms. Akong'a h/b for Mr. Onsembe	for the Plaintiff
No appearance	for the 1 <sup>st</sup> Defendant
No appearance	for the 2 <sup>nd</sup> Defendant
Mr. Okello h/b for Ms. Wambua	for the 3 <sup>rd</sup> Defendant
Mr. Getuma h/b for Mr. Morara	for the 4 <sup>th</sup> Defendant
No appearance	for the 5 <sup>th</sup> Defendant
Catherine	Court Assistant