



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
LAND CASE NO. 87 OF 2013
(FORMERLY KITALE HCC NO. 18 OF 2008)

ELDORET EXPRESS CO. LIMITED.....PLAINTIFF

VERSUS

TAWAI LIMITED..... DEFENDANT

NATIONAL LAND COMMISSION.....INTERESTED PARTY

JUDGMENT

PLAINTIFFS CASE

1. The Eldoret Express Ltd, (Herein after referred to as the Plaintiff) is a Limited Liability Company duly registered in Kenya under the companies Act Cap 486 – Laws of Kenya whilst Tawai Ltd (hereinafter referred to as defendant) also is a limited liability company duly incorporated in Kenya.
2. The Plaintiff claims to be the registered proprietor of land comprised in title land reference number 5707(6) IR NO. 43019 measuring 289.1 situate in Trans Nzoia District in the republic of Kenya. The Plaintiff claims to be in lawful occupation and has been cultivating, ploughing and developing the said property since 2001 when it bought it lawfully from Kaitet Tea Estate (1977) Ltd sometimes in December 2007, the defendants, its agents, servants, members and shareholders without a reasonable cause or any colour of right have moved and or trespassed into part of the plaintiffs said suit land and have unlawfully put up and/or constructed illegal houses, structures thereon, thus denying the plaintiff quiet and peaceful enjoyment of the property which they own and are in possession thus causing the plaintiff loss and damage.
3. According to the plaintiff, the defendant has no proprietary interest on the suit land and has never been in possession occupation and/or part thereof since 1984 or at any one time at all hence the reasons for the defendant filing Kitale High Court Civil Case No. 2002 Of 2006 seeking an eviction order against the Plaintiff from the suit land. He claims that land reference numbers 5707 and 5707/R are non-existent and that land reference NO. 5707/6 does not belong to the defendant. He denies any fraud associated to him and contends that he is the lawfully registered owner of land reference No. 5707/6 since 12.2.2001 and being a bonafide purchaser for value. According to the plaintiff, Land reference No. 5707/6 was initially registered in the names of Kaitet Tea Estate (1977) Ltd on 17.7.1987 being free and discharged from any liabilities and or encumbrances and the same was endorsed by the registrar of titles without any objections, protests from the defendant.
4. The land was duly registered and transferred after lawful survey and a deed plan duly prepared and approved for that purpose. The plaintiff claim that there is no privity of contract between the plaintiff and

the defendant and that he did not purchase the suit land from the defendant. He claims to have been in lawful occupation of the suit land and has been working on it since February, 2001 to date and therefore any claim of Mesne Profits does not arise. He further states that claims against Kaitet Tea Estate are time barred pursuant to section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya as the transfer in favour of Kaitet Tea Estate (1977) Ltd was registered on 17.7.1987.

5. The Plaintiff further contends that following the subdivision and survey of original title land reference No. 5707 in 1987 or thereabouts, the same gave rise to 5707/1, 5707/2, 5707/3, 5707/4, 5707/5 and 5707/6. The defendant has been issued with and taken certificate of titles for land reference Numbers 5707/1, 5707/2, 5707/3, 5707/5 hence acknowledging the validity and legality of such survey and the defendant should be estopped in law to allege otherwise. The plaintiff avers that the provisional title for land reference number 5707 was issued in a vacuum as there was no such land in existence at the time of issuance of the same. The Plaintiff further avers that the Defendant was incorporated sometime in 2004 or thereabout and not in 1974 as alleged and therefore has no complaint against what happened in 1980.

6. The Plaintiff prays for a declaration that he is the lawful owner of title LR NO. 5707/6 (1R 43019) and therefore an order of eviction should issue against the defendant, its agents, servants, employees, members, shareholders and/or any other person whatsoever acting or claiming through or on its behalf from the suit land and demolition of all illegal structures and houses erected thereon.

7. The Plaintiff prays for a permanent order of injunction restraining the defendant by itself, its agents, servants, members, shareholders and/or other person whatsoever acting for or through or on its behalf from trespassing upon the suit land. The plaintiff prays for costs of the suit.

DEFENDANT'S CASE

8. The defendant denies the plaintiff's claim and states that the whole of LR NO. 5707 was registered in the names of the defendant and had been charged and the same had not been discharged by Brooke Bond Kenya Ltd. The defendant avers that the Plaintiff never bought the suit land lawfully and that the members of the defendant have been occupying the suit land lawfully since the year 1984 to date. That the defendant rightfully occupied parcel No. 5707 which included 5707/1 to 5707/5 and 5707/R which is purported to be 5707/6 whose registration in the name of the plaintiff was obtained by fraud.

9. The particulars of fraud are that the transfer documents are fatally defective as they were not executed as illegally required. The entire land was discharged by an order of the court and no mention of a portion having been transferred to the plaintiff. That the loss of title was duly advertised in Kenya Gazette and that the plaintiff did not raise a finger that he had any interest in the said title. That there could have been no transfer of title without a discharge. The defendant states that it's members have been in occupation of the suit land since 1984 when they lawfully purchased the same and that they are the registered owners of the same.

10. The defendant in their counter claim state that the continued occupation of the suit land by the plaintiff has no legal basis and therefore the plaintiff should be evicted from the suit land. That the defendant is the registered owner of the suit land having obtained the discharge of the entire land through a court order the purported purchase does not arise as there was no proper execution of the documents confirming title to the land. There was no discharge of charge to the suit land and that the statutory powers of sale were not exercisable by the purported seller to the plaintiff and therefore the entire land was discharged to the defendant. The defendant claims that the purported transfer of the suit land to a company known as Kaitet Tea Estate 1977 Ltd from which the plaintiff bought the land was obtained by fraud as due process was not followed.

11. The defendant prays for the dismissal of the plaintiff's suit with costs to the defendant and a declaration that the registration of LR No. 5707/6 in the name of Kaitet Tea Estate (1977) Ltd and thereafter to the Plaintiff is illegal and unlawful and the same should be cancelled. Ultimately the defendant prays for an order of eviction of the plaintiff herein by itself, its heirs, servants, agents, employees or any other person acting on its behalf howsoever. The defendant also prays for Mesne

Profits.

STATEMENT BY THE NATIONAL LAND COMMISSION

12. National Land Commission is the interested party and pleads that parcel of land No. LR 5707 does not exist in their records. According to the interested party, the defendant was registered as the proprietor of land known as LR 5707 on the 16.10.1981 and the property was charged to the Kenya National Capital Ltd for Kshs 900,000/=. On the 31.1.1986 the property was charged to Brooke Bond Kenya Ltd for Kenya Shillings 1,900,000.

13. On the 17.6.1987 a transfer of 259.1 hectares across comprising of LR NO. 5707/6 which was registered as entry No. 20 was done to Kaitet Tea Estate for a sum of Kenya Shillings 7,100,000. This was done despite the fact that the property was charged and not discharged. A discharge of charge to Kenya National Capital Ltd was done on 10.7.2008 and the same registered as entry No. 23 on the grant.

14. The scheme plan in relation to LR 5707 was approved on 21.11.1983 in which the defendant subdivided LR 5707 into five portions and resultant sub plots were LR NO. 5707/1- 5707/5 with a remainder 5707/R and therefor 5707/6 does not exist as per the plan. The purported transfer to Kaitet Tea Estate was based on misrepresentation that LR 5707/6 was in existence. Kaitet Tea Estate could not purport to pass any good title to anyone as the title it had acquired was based on misrepresentation and fraud hence irregular.

PLAINTIFFS EVIDENCE

15. The plaintiff called **Simon Mbugwa Thungu,(PW1)** a farmer carrying on transport business and residing at section 6 Kitale Municipality. He is one of the directors of Eldoret Express Company Limited. He states that they sat down as directors and resolved to have one director to file a case in court. He produced the minutes containing the resolution. The company owns land and vehicles for transport.

16. The company brought this suit regarding parcel No. LR 5707/6 measuring 640 acres and registered in the name of the company. It is located West of Kitale town near a place called Kiungani. He produced a copy of the certificate of title as exhibit 2. The company started buying the land in 2000 and the transaction was completed in 2001. The company bought the land from Kaitet Tea Estate (1977) Limited. At the completion of the purchase the land, which had been fenced, was transferred into company's name. At that time, the directors did not know Tawai Limited as they only knew the owner Kaitet Tea Estate (1977) Ltd. Kaitet Tea Estate (1977) Ltd obtained the land in 1987.

17. The plaintiff paid Kshs.40 million for the land. The property was free from any encumbrances when the company bought it. In December, 2007, the members of the defendant invaded the company's land and the company was unable to remove them because the police were overwhelmed following the post-election violence. The defendant's members have occupied about 200 acres of the suit land. The plaintiff filed a suit against Tawai Ltd in 2008 who filed a defence and counter-claim. The company filed a reply to the defence and filed a defence to the counter-claim with a list of documents, a witness statement which is in the court records.

18. PW1 recalls on 30/7/2008 the advocates for the parties herein agreed to send a surveyor to the disputed land. The defendant did not object to the surveyor going to the land. The surveyor went to the land and prepared a report which was filed in court. The surveyor's report is clear that people had encroached on to the plaintiff's land. Tawai Limited have filed a case against the plaintiff in Kitale being Kitale High Court Civil Case No. 15 of 2006. The plaintiff was Tawai Ltd and the defendant was Eldoret Express Ltd. Tawai Ltd withdrew the case before the same could be concluded. There were however rulings which were made. The case was being heard by Justice Wanjiru Karanja, he knows that Tawai Limited tried to bring Kaitet Tea Estates (1977) Ltd as a party to that suit. The Judge declined to allow the application by Tawai Ltd. He produced the ruling of 29/11/2006 as exhibit 4. Tawai Ltd withdraw the case against the plaintiff one month after the ruling of the court. He is aware that Tawai Limited filed a case in Bungoma being Miscellaneous Application Non-58 of 2009. Tawai had sued the Attorney

General, Land Registrar and others. A ruling was delivered.

19. According to PW1 they have not encroached on LR No. 5707/R as alleged. The plaintiff took possession of the land in 2001. Prior to 2007 the defendant's members invaded the land. They were removed. They again invaded the land in 2007. The defendant has tried to bring in Kaitet Ltd but they have not succeeded.

20. On cross examination by **Mr Ingosi**, he states that the plaintiff bought the land from Kaitet Tea Estates (1977) Ltd. The title the plaintiff has is as a result of subdivision of LR, No. 5707. LR No. 5707 was in the name Tawai Ltd. The subdivision was done in 1987. The land was sub divided into 6 blocks. There are LR 5707/1, 5707/2, 5707/3, 5707/4, 5707/5 and 5707/6. He was shown the deed plan. The deed plan shows five blocks. The deed plan does not contain LR 5707/6. Deed plan marked DMFI 1.

21. The witness states further that the plaintiff did not bother to ask Kaitet how they acquired the land. He cannot recall if he did a search before they bought the land. The witness shown copy of Title in respect of Plot LR 5707. Kaitet Tea Estate (1977) Ltd appears at entry No. 20. It is Kenya National Capital Corporation who were transferring the title to Kaitet. Witness referred to entry number 15. The entry shows that the land belonged to Tawai Ltd. Entry No. 16 shows that the land was transferred to Kaitet Tea Estates (1977) Ltd.

22. The witness was shown the provisional certificate and stated that he was not involved in any fraud and was not aware that LR 5707/6 was initially LR 5707/R. He does not know how LR 5707/R became LR 5707/6. He agreed that "R" means remainder and was aware that Tawai Limited unsuccessfully tried to bring in Kaitet Tea Estate (1977) Ltd as a party to HCCC 15 of 2006. He was aware that Tawai Ltd filed another case at Kitale High Court. The witness was shown a discharge of charge discharging Tawai Ltd. Witness shown a discharge of charge but did not know whether the discharge is authentic.

23. **Peter Jones Wanyama** was PW2, the Regional Surveyor, Nyanza. He holds a Bachelor of science degree in survey and photogenetic. He is employed by the Ministry of Lands and Housing and Water Development. In 2007 to 2009, he was the District Surveyor, Trans Nzoia. In 2008, they were ordered to visit L.R. No. 5707/6 Nairobi. This was following a court order. The registered proprietor was Eldoret Express Company Ltd. They were asked to establish the beacons and to fix the beacons in accordance with the acreage. They were to establish when the structures on the suit land fell within the boundaries of suit land. They visited the suit land and found that there were some existing beacons. He returned the ones missing.

24. On 14.5.2009, the Registrar of Titles sent a Registrar from Nairobi known as Charles Ngetich as per the Court Order. He availed copies of title and deed plan. The entire land is 259.1 hectares equivalent to 640 acres. They found the structures to be falling within L. R. No. 5707/6, registered in the name of Eldoret Express Company Ltd. The structures occupy 57.34 hectares which translates in 141.7 acres. **When Shown Survey Plan** he identified it as a survey plan F(R) No. 166/71 for Trans Nzoia. He states that Parcel No. 5707 was subdivided in L.R. No. 5707(1), 5707(2), 5707(3), 5707(4), 5707(5), 5707(R) and concludes that parcel LR NO 5707(6) is not on the survey plan.

25. He did not have a copy of the original deed plan. He explains that a deed plan is an extract of the plot. It is prepared by the Director of Survey for registration purposes. A parcel of land can only exist with the registration of the deed plan.

26. **On Cross examination by Mr odongo the state counsel**, he states that he was shown the title document and confirmed that the registration was under R.T.A. The register is in Nairobi under inland registry. Registration is not at District level. Land under Registration of Titles Act Cap 281 Laws of Kenya(repealed) is surveyed using survey plans. The plans originate from the Director of Surveys. When the land is not in the survey plan, you find out from the Director of Survey why it is not appearing. The other documents are deed plans. The deed plan originates from survey plan.

27. **On Cross examination by Karani**, he states that when he carried a survey, the plaintiff's director

was present. He states further that he did not acquaint himself to the history of the plot but did locate L.R. 5707(6). He had deed plan No. 128887 supplied by Registrar of Titles. The survey plan and deed plan cannot be the same. That was the close of the plaintiff's case.

DEFENDANTS' EVIDENCE

28. Prescilla Njeri Wangoi was DW1, a Land Surveyor working with the Director of Survey, stationed at Ardhi House, Nairobi. Summons to attend court were issued to Director of Survey who sent her pursuant to the summons. She received summons to attend court on 29.11.2016 and to produce survey plans for parcel No. 5707. According to DW1, the parcel of land was surveyed on 24.10.1983. It was subdivided into five parcels thus, 5707/1, 5707/2, L.R. 5707/3, 5707/4, 5707/5 and 5707/R. This is a remainder of the whole 5707. *5707/1 measures 9.503 Ha, 5707/2 measures 10.12 Ha, 5707/3 measures 10.12 Ha, 5707/4 measures 10.12 Ha, 5707/5 measures 10.12 Ha, 5707/R is not given acreage.* The whole 5707 was 764 acres. This means 309.17 Ha. The acreage of the remainder is the difference between 309.17 Ha and the acreage for 5707/1-5. They do not have any number that is 5707/6. 5707/R has been subdivided into many parcels. 5707/6 is a road reserve. They received a title document for 5707/6 with a deed plan that had abutments and not from the director of surveys office. They do not have such a document. The document came with Eldoret Express document. Parcel of land 5707/6 does not exist as it has no deed plan. He had a plan for 5707 before subdivision and produced it as DEx6(a) and 6(b).

29. On Cross examination by Mr Onyancha, she states that she is a Land Surveyor 1 who graduated from the Jomo Kenyatta University. She did survey engineering and Geographical Information System. She is not aware that documents disappear from Ardhi House and people sneaking crafty documents in the files. Subdivision of 5707 was done in October, 1983. When subdivision is done, the parcel title is surrendered. I am not aware that original title should be surrendered. The documents served were served with summons. She knows Mr. Wanyama (PW2). As her senior but she does not know about experience. All surveyors use survey plans. **Shown PEx6** she states that It shows 5707/R was given 5707/6. However, he has not referenced the report to a date. No survey plans for Block 6. What is attached is a scheme plan. The deed plan attached to the report is not right because it has abutments. There is a title attached that does not come from the Director of Survey.

30. According to the title, a transfer was done when there was a charge. The register say that the transfer was free from encumbrances. There is no complaint from Brooke Bond.

31. Charles Wafula Masinde was DW2, a resident of Kiminini in Trans Nzoia County a farmer by profession and a member of Tawai Ltd. He is one of the Directors. He produced a letter from the Registrar of Companies showing that he is one of the Directors number 2 on the list. He narrates that Tawai Ltd was established in 1974 as per the certificate of incorporation. The company was for land buying. They collected money and bought land No. L.R. 5707 in 1974 from a white settler called George Alexander Singler and entered in October 1974. They have a grant. The entry was No. 15 being a transfer to Tawai Ltd in undivided shares. He produced the grant as DEx.2. They have used the land as security to get a loan from Kenya National Capital Corporation Ltd in 1981. This is Entry No. 16. They paid the loan. They went to the bank and were given original title. They were given discharge of charge on 15.9.2008.

32. They took a loan of Kshs. 1,900,000 from Brooke Bond who later changed their name to Unilever Kenya Tea Ltd. The defendant paid the debt and their title deed was discharged on 21.2.2008. He produced the discharge of charge as DEx.5. They obtained the certificate of title of the land. He produced the provisional certificate. He states further that the suit land LR No. 5707 has been divided. Initially, it was in 1983 to create 5707(1) – 5707(5) that was the order of subdivision.

33. The remainder of the subdivision was made L. R. 5707/R. 5707/R was never transferred to Kaitet Tea Estate by the defendant. Entry No. 20 has an inception 1395 over 9104 and R/R. This entry was made on 17.7.1987. At that time, they had not cleared their debts in Brooke Bond. The land was still charged. According to this witness, transfer was not possible as the property was charged. It was not possible to subdivide without the bank's knowledge.

34. On Cross examination by Onyancha, he states that their pleadings are in the amended defence and counterclaim amended on 12.5.2011. They pray that Eldoret Express to be evicted from 5707/6. They are also claiming mesne profits and that the title issued to Keitet Tea Estate in 1987 be cancelled. Kaitet Tea Estate is not a party. Entry No. 20 shows that Kaitet Tea Estate were availed the land. They have never sued Kaitet. Kaitet Tea Estate did not sell the property to Eldoret Express Ltd.

35. Entry No. 20 shows that Entry No. 16 and 19 were discharged. Kaitet did not buy the land because of the failure by Tawai to pay a loan. Kenya National Capital Corporation Ltd cannot complain because they were still holding their documents. When they paid the loan, the bank discharged the whole piece of land.

36. They have not made a resolution to subdivide 5707/R. They have no consent to subdivide and have not hired a surveyor to subdivide 5707/R. Eldoret Express is occupying 639 minus 240 = 399. they have no agreement with Eldoret Express, so they cannot give out of their land. He was not in court when the Director gave evidence. They did not surrender the charged title to the Commissioner of Lands.

37. The Attorney General for the interested party called one witness **Julius Chacha Maroa(DW3)** who states that he is a Registrar, Ministry of Lands and Physical Planning. His duties entail registration of land and that he is aware of Parcel No. L.R. 5707. The Lands Registrar was ordered to file a report in court. The report dated 16.1.2017 was prepared by himself filed on 3.2.2017. L.R. 5707 was given title No. IR No. is 18551. The property was first registered in the name of George Alexander Sinclair. The title was registered under Registration of Titles Act Cap 281 Laws of Kenya(repealed). The basis for registered a title is a deed plan and not Rates clearance and rent clearance and approval of subdivision.

38. This case was a subdivision and transfer by chargee. The charge was Kenya National Capital Corporation Ltd. The chargor was Tawai Ltd. The transferee was Kaitet Tea Estate 1977 Ltd. The chargee can transfer property under a charge in two considerations:

- Under statutory power of sale.
- Under private treaty where the chargor has defaulted.
- In this case, the transfer was under private treaty.

39. On Cross examination by Mr. Onyancha he states that the documents presented showed 5707/6. In the register, it was entry No. 20. The deed plan was No. 128587. No title can be issued without a deed plan. When subdivision is done, the Mother title dies. If the proprietor loses a title, he has a right for a provisional title. A bank on transfer by chargee transfers all encumbrances on one of the parties. Various titles were issued for L.R. 5707/1 up to LR 5707/5.

40. As per their records, Kaitet Tea Estates 1997 Ltd was issued with a title No. IR 43019, LR 5707/6 based on deed plan No. 128587 that was annexed to transfer by charge. If a title is issued by a deed plan, that is not registered with survey then the title is fake. It is upto the survey department to confirm the deed plan. In land transactions, anything is possible.

41. On **Cross examination by Okemwa** he states that in a normal transfer, you have to attach complete documents. In this case, the property was a leasehold. There was need to attach rent clearance certificate, rates clearance certificate. Since it was a transfer by private treaty, they were to attach the private treaty agreement. The transfer was booked on 17.7.1987. Entry No. 20 in I.R. 18551. The rent clearance certificate was issued on 21.7.1987. The documents were issued after the transfer. This was unprocedural. The statement of rates and other charges was issued in the name of Tawai Ltd. The rent clearance certificate is issued in the names of Tawai Ltd. Entry No. 20 has No. RR comments. The RR comment refers to another document. Transfer by chargee is only under statutory power of sale and transfer by private treaty. I do not have a private treaty agreement nor a statutory power of sale. Transfer indicates private treaty.

PLAINTIFFS SUBMISSIONS

42. **Mr Onyancha, learned counsel for the plaintiff** submits that the plaintiff was a bonafide purchaser for value of the whole suit land LR NO. 5707/6 from Kaitet Tea Estate (1977) Ltd who were registered proprietors of the suit land on 17.7.1987 and therefore there is no privity of contract between the plaintiff and the defendant as they were not the registered owners of LR NO. 5707/6 at the time of sale.

43. On the issue of fraud, the plaintiff submits that no fraud or misrepresentation was proved. The plaintiff submits that the title issued to Kaitet Tea Estate was good and therefore the plaintiff's title is also good. He submits that the available evidence is that the remainder of LR NO. 5707/R was later in 1987 registered as LR NO. 5707/6 as per the Chief Land Registrars report.

44. The plaintiff further submits that he is protected by the registration of Titles Act Cap 281 Laws of Kenya (Repealed). The Act is applicable though repealed by the Land Registration Act. Section 107 (1) of the Act which is the saving and transitional provision protects the rights and actions under the repealed law. According to the plaintiff, he was not party to the fraud and misrepresentation and therefore his title cannot be challenged.

45. In conclusion, the plaintiff submits that he has proved his case on a balance of probabilities whilst the defendants counter claim has not been proved and should be dismissed with costs.

DEFENDANT'S SUBMISSIONS

46. **Mr Okemwa learned counsel for the defendant** submits that the defendant and interested party have proved fraud and misrepresentation thus the transfer documents were fatally defective, fraudulent, irregular and incurable. The plaintiff overlooked the above anomalies and went ahead to transact on the land. He argues that the transaction between the plaintiff and Kaitet Tea Estate was illegal for the absence of the consent of the Land Control Board. Failure to obtain consent of the Land Control Board makes the transaction between the Plaintiff and Kaitet Tea Estate a nullity. Counsel argues further that the Plaintiff was not an innocent purchaser due to lack of due diligence and consent of Land Control Board, Lack of due consideration. Moreover, with the failure by the Plaintiff to show that he paid Kshs 40,000,000 as the purchase price either through cash or cheque or R.T.G.S, he can't be said to be a purchaser at all leave alone an innocent purchaser. There is no evidence of payment of consideration.

47. According to counsel, there is no evidence of due diligence by the Plaintiff as this was a large transaction involving a large parcel of land and huge sums of money.

48. The defendant submits that even if the plaintiff was an innocent purchaser which is denied, he cannot disparately hang on registration of fraudulent documents registered by Kaitet as registration by Kaitet was fraudulent and any transaction following therefrom was null and void.

49. As to the intention of Section 23 of the R.T.A, the defendant argues that the Section did not intent to dispossess an innocent proprietor of land by a fraud star. The defendant refers to Article 40 (6) which provides that the registration under Article 40 (6) do not extend to property that has been proved to be unlawfully acquired.

50. On the issue of non-joinder of Kaitet, to defendant submits that it was the duty and burden and responsibility of the plaintiff to present Kaitet to court as its witness not the defendant. Counsel prays for judgment against the plaintiff on the counter claim, mesne profits and costs of the suit.

SUBMISSIONS BY INTERESTED PARTY.

51. The gravamen of the submissions by **Mr Odongo learned state counsel for the interested party** is that there are only two issues for determination and the first being whether LR NO. 5707/6 exists and whether it was lawfully created. According to the interested party, it is survey plans F/R/66/71 and F/R 95/52 which created LR NO. 5707 and 5707/R respectively. LR NO. 5707/6 was not created by those survey plans and therefore no deed plan for LR 5707/6 can genuinely exist. The interested party submits that LR No. 5707/6 was created in a suspicious manner as no deed plan that created it exists at all. The

interested party argues that Article 40 (6) of constitution limits claim of indefensibility of title under Section 23 of the R.T.A unless the proprietor proves or explains the manner in which the title was acquired or created. In other words, any title found to have been acquired illegally must be cancelled. According to the interested party LR 5707/6 was illegally created and the title illegally issued.

52. On whether the plaintiff holds a valid title and whether he is entitled to the orders, the interested party argues that the plaintiff failed to carry out due diligence before entering into the transaction to buy the land. He never inspected the property or do a historical search of the records of the property.

53. The interested party further argues that since Kaitet Tea Estates (1977) Ltd did not have a good title to pass to the plaintiff hence the plaintiff's title cannot therefore be said to be a good title. He therefore cannot enjoy the order sought in the plaint.

54. Moreover, that the transaction leading to the transfer of the property is a controlled transaction pursuant to Section 6 of the Land Control Act Cap 302 which prohibits dealing in controlled transaction without the necessary consent of the Land Control Board. The property being agricultural land, it was necessary for Kaitet Tea Estates (1977) Ltd to, within 6 months from the date of the agreement, apply and obtain a consent from the local Land Control Board to sanction the transfer to the Plaintiff. Failure to obtain a consent made the whole transaction a nullity ab initio.

55. The learned state counsel submits that the plaintiff has failed to prove his case on a balance of probabilities. Whilst the defendant proved his case on balance of probabilities. Counsel prays that their suit be dismissed with costs and counter claim be allowed as prayed.

ANALYSIS OF EVIDENCE ON RECORD.

56. A search on the grant in respect of the suit property shows that the property was registered in the name of George Alexander Sinclair of Kitale P.O Box No. 568 on the 24.11.1961. In 1964, George Alexander Sinclair transferred it to Lands Ltd, who in turn transferred it to Agricultural Settlement Trust in 1967.

57. The parcel of land was transferred back to Lands Ltd in 1972. In 1976, Lands Limited transferred the property to Gulhem Husein Walji Mulji and Abdul Ragut Walji and Tawai Ltd as tenants in common in equal shares.

58. On 16th October 1981, Gulham Husein Walji Mulji and Abdul Ragul Walji transferred their undivided share in that parcel to Tawai Ltd. As a result, to the transfer of shares Tawai Ltd became the sole owner of the parcel. On the same date, Tawai Ltd charged the parcel to Kenya National Corporation Ltd for Kshs 900,000/=. This was captured in entry No. 16 of the grant.

59. In 1984, a caveat was registered by Brooke Bond Kenya Ltd claiming a chargees interest. However, in 1986 the caveat was withdrawn and a charge for Kshs 1,900,000 registered as entry No. 19 in favour of Brooke Bond Kenya Ltd subject to the charge to Kenya National Corporation Ltd registered as entry No. 16.

60. In 1987, a subdivision of LR No. 5707 was registered as entry number 20. The subdivision of LR No. 5707/6 measuring 259.1 hectares was transferred to Kenya National Corporation Ltd to Kaitet Tea Estate (1977) Ltd for Kshs 7,100,000/= freed and discharged from the two charges registered as entry number 16 and 19. Title Number LR 43019/LR NO. 5707/6 was created and issued to Kaitet Tea Estate (1977) Ltd vide deed plan No. 128587.

61. In February 2001, Kaitet Tea Estate (1977) Ltd transferred LR NO. 5707/6 LR 43019 to Eldoret Express Co. Ltd. In February 2008 a discharge of charge of the charge to Unilever Tea Kenya Ltd, formerly known as Brooke Bond Kenya Ltd was registered as entry No. 21. In May 2008, a provisional certificate of title for LR No. 5707 was issued to Tawai Limited and registered as entry No. 22 and in June 2008, a discharge of charge of the charge to Kenya National Corporation Ltd was registered as entry

No. 23 and subdivision of LR NO. 5707 creating LR NO. 5707/1-5 were registered as entries numbers 24-18 giving rise to title numbers LR 112800 – 112804 all issued to Tawai Limited. The above are the facts as per the grant and its entries.

62. I have considered the above facts, evidence on record and the submissions by parties and do find the following issues ripe for determination: -

- **Whether LR 5707/6 exist and whether it was lawfully created.**
- **Whether the plaintiff is a bonafide purchaser for value.**
- **Whether the defendant is the legal owner of the suit land.**
- **Which orders should the court grant.**

63. On the first issue, as whether LR no. 5707/6 exist & whether it was legally created, it is clear from the grant that Title Number 5707/6 was created from 5707 which measured 259.1 Ha and the same transferred to Kaitet Tea Estate for Kshs 7,100,000 on the 17.7.1987. Kaitet Tea Estate (1977) Ltd was registered as proprietors as leasees for a term of nine hundred and Ninety-Nine (999) years from the 1.10.1960. The property was charged to Agricultural Finance Corporation on the 12.11.1987. The charge was discharged on 2.11.2000 and ultimately the property was transferred to Eldoret Express Company Ltd on 12.2.2001.

64. From the above it is clear that the suit property 5707/6 exists. On the issue, as to whether the same was properly created, I do find that at the date of transfer, the property was encumbered in favour of Kenya National Capital Corporation till the discharge of charge was effected and registered on 29.9.2008. It is questionable how Kaitet Tea Estate obtained title to property when it was charged. There was no evidence that Kenya National Capital Corporation sold the property in exercise of its statutory power of sale and it is evident that the property was discharged on 29.9.2008. I do further find that LR 5707/6 was not created by a deed plan as DW1 stated that the deed plan attached was not strictly a deed plan and that it did not exist in the records of the Director of Surveys in Kenya. The deed plan produced was not authenticated by the Director of Surveys and was disowned by the said Director.

65. I do agree with the defendant that LR 5707/6 was created illegally, fraudulently and through misrepresentation.

66. Moreover, this court finds that the property in dispute was agricultural land and therefore the plaintiff was called upon to demonstrate that he followed the procedure in accordance to the **Land Control Act Cap 303 Laws of Kenya. Section 6 of the Land Control Act** provides for transactions affecting agricultural land that require the consent of the Land Control Board thus: -

(a) the sale, transfer lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

(c)

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

(2) For the avoidance of doubt, it is cleared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).

(3) –

(7) If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.

(8) (1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto provided that the High Court may, notwithstanding the period of six months may have expired, extend that period where it considers that there is sufficient reason to do so, if any, as it may deem fit.”

67. There is a long line of authorities on the effect of lack of consent of the Land Control Board. Initially, one had to obtain the consent within three months but this period was later enlarged to six months. In **Hirani Ngaithe Githire v Wanjiku Munge [1979] KLR 50, Chesoni, J** (as he then was) stated at page 52:

“Section 6 of the Land Control Act is an express provision of a statute. It is a mandatory provision, and no principle of equity can soften or change it. The court cannot do that; for it is not for us to legislate but to interpret what parliament has registered. So, in this case that agreement between the parties having being entered in June 1969 became void for all purposes (including the purpose of specific performance) at the expiration of three months from the date of making it; and since no consent had been obtained within that time, nothing can revise or resurrect such an agreement. Failure to obtain the necessary Land Control Board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural land in a land control area unless the consent of the Land Control Board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes.”

68. Similar sentiments were expressed in **Onyango & Another v Luwayi [1986] KLR 513** at page 516 Nyarangi, J stated:

“The appellants admitted that no consent for the proposed transaction concerning agricultural land had been given by the Divisional Land Control Board. The transaction was therefore void for all purposes under Section 6(1) of the Land Control Act, Cap 302 because the transaction was not excluded by Section 6(3). An application for consent in respect of the proposed sale of the material parcel of land had to be made to the appropriate Land Control Board within six months of the making of the agreement ... No such application was made. That agreement therefore is of no effect and no question of specific performance can lawfully arise.”

69. There is no evidence that Kaitet Tea Estate obtained consent of the Land Control Board as required by the law even if the transaction was a sale by the chargee under private treaty. There is no evidence that the plaintiff obtained consent of the Land Control Board for the property to be transferred from Kaitet Tea Estate to the plaintiff. It is common ground that the suit property was agricultural land and the transactions were transfers to Kaitet and the plaintiff respectively which required the consent of the Land Control Board. Ultimately it is proper to conclude that the transaction was not sanctioned by the Land Control Board of the area as required by law.

70. On the issue, as to Whether the plaintiff is a bonafide purchaser for value.

Section 23 of the Registration of Titles Act repealed provides as follows: -

(1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge.

except on the ground of fraud or misrepresentation to which he is proved to be a party.

(2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.

71. It is my view that Section 23 of the Registration of Titles Act Cap 281 Laws of Kenya did not intend to ratify a fraudulent transaction. The proprietary rights of an individual were guaranteed under the 1963 Constitution of Kenya and a property owner could not be disposed unlawfully. The Kaitet Tea Estate did not obtain title in a lawful manner and therefore did not have good title capable of being protected by the law and therefore the transfer of the said unlawfully procured title could not make it a good and legal title as it was nullity. The said rights are also guaranteed under Article 40 of the Constitution of Kenya 2010 however with a rider that the rights under Article 40 of the Constitution of Kenya 2010 do not extend to property that has been found to be unlawfully acquired. The doctrine of innocent purchaser for value without Notice only applies where the alleged bonafide purchaser holds the title, proves that he purchased the property in good faith, for valuable consideration and that the vendor had an apparent good title, he did not notice fraud and that he was not party to the fraud.

72. In this matter, the doctrine of innocent purchaser does not apply as the plaintiff has not produced any tangible evidence that consideration was paid. Moreover, Kaitet Tea Estate obtained the title fraudulently, illegally and unlawfully as there is no evidence of transfer by private treaty and consent of the land control board and therefore could not transfer the fraudulently obtained title to the plaintiff. It follows that they had no good title to transfer and the title held by Kaitet Tea Estate was a nullity and that nullities are always nullities.

73. On the issue of non-joinder of Kaitet Tea Estate, this court finds that it was the duty of both parties to apply for the joinder of Kaitet Tea Estates Co. Ltd as a party. However, it was a greater duty upon the plaintiff to apply for the enjoiner of the said company as a defendant due to the fact that it was Kaitet Tea Company that allegedly received consideration and transferred the property to the plaintiff. It was enough for the defendant to prove that the transfer of the property to the Kaitet Tea Estate was a nullity as the property was still charged and that there was no deed plan supporting subdivision of 5707 and creation of 5707/6 and transfer of the same to Kaitet Tea Estate Co. Ltd.

74. On the issue of Mesne profit, I do find that the defendant has not demonstrated how he has reached the figure of Kshs 10,000 per acre per one year and therefore there is no basis for awarding the figure claimed of Kshs 108,800,000. However, it is evident that the plaintiff is a trespasser and therefore ought to pay damages which I assess at Ksh 2,000 per acre, for 399 acres occupied by the plaintiff, per year for 15 years which adds to Ksh 11,970, 000.

75. Ultimately the plaintiffs suit is dismissed with costs to the defendant and interested party. The defendants counter claim is allowed and therefore, I do hereby declare the registration of LR No. 5707/6 in the name of Kaitet Tea Estate (1977) Ltd and thereafter to the Plaintiff is illegal and unlawful and the same should be and is hereby cancelled. I do further issue an order of eviction of the plaintiff herein by itself, its heirs, servants, agents, employees or any other person acting on its behalf howsoever from the suit parcel of land of LR No. 5707/6 and mesne profits of 11,970,000. Orders accordingly.

76. Last but not least, I'm greatly indebted to all counsel in this matter for their conduct and research and commitment to the speedy conclusion of this matter that is now almost 10 years old. Special thanks to **Mr. Onyancha** advocate for the plaintiff, **Mr. Okemwa** and **Mr. Ingosi**, advocates for the defendant and **Mr. Odongo**, advocate for the interested party. Not to be forgotten for their able representation for the members of Tawai is **Mr. Omboto** and **Mr. Matete**. **THANK YOU ALL.**

DATED AT ELDORET TIS 16TH DAY OF AUGUST 2017.

ANTONY OMBWAYO

JUDGE