



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE NO. 71 OF 2013

(Formerly HCC NO. 130 of 2008 (Consolidated with 129, 131, 132

& 133 OF 2008

KENYA INDUSTRIAL ESTATES LIMITED.....PLAINTIFF

VERSUS

ANNE CHEPSIROR.....1ST DEFENDANT

SAMACK GENERAL SUPPLIES LIMITED.....2ND DEFENDANT

ULTRA EUREKA FARM LIMITED.....3RD DEFENDANT

CUSTOM CREDIT MANAGEMENT LIMITED.....4TH DEFENDANT

TAJOKOS ENTERPRISES LIMITED.....5TH DEFENDANT

ATTORNEY GENERAL.....6TH DEFENDANT

JUDGEMENT

(Suit by Kenya Industrial Estates (KIE) a wholly owned Government corporation for recovery of land; land having been held by KIE on lease that expired; lease not renewed to KIE but to private individuals; argument by defendants that Commissioner of Lands had unfettered power to renew lease to any person; renewal of leases; whether Commissioner of Lands had obligation to renew lease to previous lease holder; whether the land held by KIE was held for public use; Land set aside for public use; whether Commissioner of Lands could allocate the same to private individuals; held that Commissioner of Lands wrongly utilized his powers; order that land do revert to KIE)

A. INTRODUCTION AND PLEADINGS

1. On 9 October 2008, Kenya Industrial Estates (KIE), instituted five suits by way of plaint. These suits were filed in the High Court at Eldoret as civil suits numbers 129, 130, 131, 132 and 133 of 2008. They were later transferred to the Environment and Land Court at Eldoret for disposal after the establishment of the Environment and Land Court pursuant to the provisions of Article 162 (2) (b) of the Constitution of Kenya, 2010. Respectively, the suits were against Samack General Supplies Limited, Ann Chepsiror, Ultra Eureka Farm Limited, Custom Credit Management Limited, and Tajakos Enterprises. On 19 May 2010, by consent of the parties, the suits were consolidated into the suit No. 130 which was ordered to be

the lead file. Through an application dated 10 December 2008, the plaintiff applied to amend the plaint to enjoin the Commissioner of Lands and the Attorney General as defendants. This application was allowed and the Amended Plaint was filed on 2 July 2012. The Amended Plaint as filed consolidates the claim of the plaintiff in the original five suits. The 1st - 5th defendants are the defendants in the original suit, whereas the Attorney General was introduced as the 6th defendant.

2. In the Amended Plaint, it is pleaded that KIE is a fully owned State Corporation whose shareholders include the Treasury, and, the Ministry of Trade and Industry. It is pleaded that KIE entered into an agreement to purchase land then known as L.R No. 779/370 from the Municipal Council of Eldoret, which land was later renamed Eldoret Municipality/ Block 8/53. The land was under a lease of 34 years commencing on 1 August 1965 and in total measured 5.06 acres. The lease was therefore to expire on 1 August 1999. It is pleaded that on these land parcels, stand houses, that were developed by KIE for residential purposes, and as at May 2008, the properties were valued in excess of Kshs. 35 Million.

3. It is pleaded that sometimes in the years 1998 and 1999, KIE sub-divided the land parcel Eldoret Municipality/ Block 8/53 into the land parcels Eldoret Municipality/ Block 8/591, 592, 593, 594, 595, 596, 597, and 598. It is pleaded that in the year 2002, KIE applied for renewal of the lease, having inadvertently failed to do so upon expiry, but that the Commissioner of Lands failed and/or neglected to renew the expired leases. Instead, the Commissioner of Lands issued title to the said parcels to the 1st - 5th defendants on 4 July 2008. This is said to have been done fraudulently and the following particulars of fraud are pleaded :-

(i) The plaintiff had applied for and was in the process of acquiring a renewal of its expired lease when purported transfers and issuance of title were effected.

(ii) The defendants acquired the said titles against restrictions which were in place.

(iii) The Registrar of Lands in Eldoret/Uasin Gishu failed to place restrictions in some of the suit parcels in spite of requests to do so by the plaintiff.

(iv) The transfers and titles were carried out or issued without recall of the head file by the Registrar which file would have revealed that the parcels being developed property could not lawfully be transferred without reference to the current or previous proprietor.

(v) The defendants failed to carry out due diligence or search which would have revealed the foregoing and they did choose to ignore the same and cannot claim to be innocent purchasers for value without notice.

(vi) Failure to follow the procedure laid down under Sections 3, 9, 13, and 14 of the Government Lands Act which provides namely that only the President can alienate Government Land, Government Land must be advertised prior to being alienated and parties who would be affected given room for raising any objections, compensation or persons who would be affected, renders the titles so issued illegal, irregular and therefore null and void.

KIE as the plaintiff, has thus sought the following orders :-

(a) A mandatory injunction compelling the defendants to vacate the premises or suit property and/or to deliver possession to the plaintiff and/or its tenants.

(b) A Permanent injunction restraining the 1st to 5th defendants from alienating, selling, transferring and/or dealing with the properties Eldoret Municipality/Block 8/ 592-597.

(c) An order of cancellation or rectification of the titles to the land parcels Eldoret Municipality/ Block 8/592-597 and in the alternative, a declaration that the plaintiff is entitled to compensation, damages, and/or indemnity pursuant to the mistake and or fraud on the part of the Registrar of Lands.

(d) A declaration that the plaintiff's rights over the suit properties were in the process of being acquired and protected as interests overriding the so called 1st titles acquired by the defendants.

(e) A declaration that the failure to allow laid down procedure under the Government Lands Act for alienation of Public Land renders the defendants' titles to all the suit parcels irregular and null and void.

4. Together with the original plaint, was filed an application for injunction, which was compromised by consent dated 19 May 2010, where it was agreed that the defendants do remain in possession of the suit properties pending hearing and determination of the suit.

5. On 22 February 2013, the plaintiff filed an application to review the consent, on the complaint that the defendants were making additional constructions on the suit properties. The application was slated for *inter partes* hearing on 10 April 2013 when counsel for the 1st -5th defendants, applied for adjournment, on the ground that he was unwell. Rather than have the application adjourned, I was of the view that it is best that the matter do proceed for hearing once and for all, and fixed the matter for hearing of the main suit on 22 April 2013. On the same day, Mr. Nyarotso advocate, then of the law firm of M/s Gumbo & Associates, applied to file Defence out of time, on behalf of the 1st- 5th defendants. I allowed the defendants some time to file defence and on 11 April 2013, a joint defence was filed on behalf of the 1st - 5th defendants.

6. In the defence, it is *inter alia* pleaded that the plaintiff was under obligation to apply for extension of the lease before the same expired, if it was at all interested in its extension. It is averred that it was a show of extreme indolence on the part of the plaintiff to wait for three years upon expiry before applying for renewal of the same. It is also pleaded that equity aids the vigilant and not the indolent. It is further averred that it was the exclusive legal mandate of the Commissioner of Lands to either extend the lease in favour of the plaintiff immediately upon expiry of the same and upon application by the plaintiff or grant the said lease to another party, and that the Commissioner of Lands could not just wait indefinitely for the plaintiff to apply for the extension and/or renewal of the lease. It is further pleaded that the power of the Commissioner of Lands to renew and/or extend an expired lease is purely discretionary, and in doing so, the Commissioner of Lands is legally obligated to consider and/or be guided by various factors and/or principles. It is averred that it is not mandatory for a lease to be extended and/or renewed by the Commissioner of Lands whether previously held by a State Corporation or otherwise. It is pleaded that the Commissioner of Lands has power to change the regime under which a title is issued and in changing the legal regime, the Commissioner was not under obligation to seek consent of the plaintiff as the lease had expired, and even if the lease had not expired, there was no obligation to consult the plaintiff. It is also pleaded that the office of the Commissioner of Lands is independent of that of the Chief Land Registrar, and that the Commissioner of Lands is not subject to the directives of the Chief Land Registrar. It is further pleaded that :-

(i) The suit parcel of land is not trust land as alleged or at all.

(ii) The plaintiff had no interest or right over the suit land as at the time the lease in respect thereof was granted to the 1st -5th defendants by the Government of Kenya.

(iii) The 1st -5th defendants followed all the known legal procedures and/or satisfied all the known legal requirements in having the lease granted to them by the Government of Kenya in respect of the suit property.

(iv) As such, the defendants are innocent lessors for value without notice.

(v) Both the 1st-5th defendants and the plaintiff had an equal right to apply for grant of the lease over the suit land and it was purely the discretion of the Commissioner of Lands to decide whom to grant the said lease.

(vi) Whereas the plaintiff waited for over three years upon the expiry of the lease and applied for

its renewal in the year 2002, the 1st -5th defendants applied for the grant of the said lease and had it legally granted to them in the year 2001. It is therefore unjust and inequitable for an indolent party to rush to a court of equity for assistance.

7. The Attorney General as the 6th defendant did not file defence, although to be fair to the 6th defendant, counsel on the 9 May 2013, when the first of the plaintiff's witnesses had testified in chief, applied to file Defence out of time, which application I rejected. I considered that the Attorney General had been served with the Amended Plaintiff in July 2012, and had entered appearance on 16 August 2012. I further considered that the matter was already partly heard, and was of the opinion that the application was coming rather late in the day. The matter therefore proceeded without the 6th defendant filing any defence.

B. EVIDENCE OF THE PARTIES.

(i) Evidence of the plaintiff

8. PW-1 was Reginald Kimanathi. He is the Industrial Estates Development and Incubation Services Manager with KIE. He testified that KIE is charged with the responsibility of developing small and medium scale industries through financing and incubation (provision of work space) across the country. He testified that KIE is owned by the Government and that its shareholding comprises of the Treasury and the Ministry of Industrialization, with Treasury owning 99% of the company and the Ministry of Industrialization, 1%. He testified that the property held by KIE is held in trust for the two shareholders. He testified that in the year 1965, KIE purchased the suit property, measuring 5.06 acres, from the Municipal Council of Eldoret at a consideration of Kshs. 50,000/=. The property at that time was not developed and was registered as L.R No. 779/370 (I.R No. 21358). The property was transferred to KIE on 20 August 1975. KIE took over the land and developed five superior staff quarters intended for use by the employees of KIE. The properties were developed in phases between the years 1975 and 1996. He testified that the lease over the property was to expire in 1999.

9. He testified that in the year 1998, KIE applied to sub-divide the land into 8 plots. KIE anticipated that when the lease expired, it would be issued with 8 new title deeds to the 8 plots for a lease of 99 years. He produced a letter dated 18 November 1998 written by KIE to the Director of Surveys. The 8 new titles were not delivered to KIE and KIE still holds the original Certificate of Title, which is LR No. 779/370. 8 new numbers for the 8 sub-divisions were however issued, the same being Eldoret Municipality/ Block 8/591-598, but KIE was not issued with title to these. He testified that KIE exchanged several correspondences with the Department of Lands with the aim of ensuring that KIE got titles to the sub-divided parcels but the Commissioner of Lands never responded. He produced a letter dated 20 March 2002 from the Managing Director, KIE, addressed to the Chief Land Registrar but which letter he said was not responded to. While awaiting the issuance of titles in the year 2002, KIE paid land rates, fees for an extension of user, and fees for the Area Development Fund, in total Kshs. 139,208.40/= of which he produced the cheque and receipt dated 20 March 2002. He testified that through a letter dated 21 March 2002, the Chief Land Registrar wrote to the District Land Officer, Uasin Gishu, asking the District Land Registrar, to place a Government Restriction over the plots. On 25 March 2002, the Chief Land Registrar, again wrote to the District Land Registrar, Uasin Gishu, making reference to his letter of 21 March 2002, and asked the District Land Registrar, to confirm in writing, that he had complied with the contents of the letter of 21 March 2002. He testified that they were notified through a letter dated 5 March 2002, that the titles to the 8 plots would be issued to KIE. He also produced a letter dated 15 February 2002, written by KIE to the Commissioner of Lands, which stated that the lease had lapsed and requested for an extension. He testified that on 22 September 2005, KIE wrote to the Commissioner of Lands reminding the Commissioner about the extension of the lease and the Government restriction over the suit properties.

10. In 2008, while KIE was in occupation, their staff were forced out of the premises and KIE wrote a letter dated 30 September 2008, to the Kenya Anti-Corruption Commission, asking the Commission to investigate. He testified that KIE was never informed of any intention to issue the 8 titles to third parties and that the original title was never recalled. He testified that the titles were issued to the defendants when there was a Government restriction and that KIE anticipated that the new titles would be issued to itself.

11. In cross-examination, PW-1 inter alia stated that the Certificate of Title that KIE held was the title L.R No. 779/370 (Grant I.R No. 21358) and not the title Eldoret Municipality/Block 8/53 which is the title from which the suit properties were carved out of. He affirmed that the title was one from the Government and that the Commissioner of Lands was empowered to issue a lease over the same. He stated that before the lease expired in the year 1999, KIE had applied for renewal of the same in the year 1998, although no letter of the year 1998 was produced. It was his view that another person could not apply for renewal of the lease so long as the land was developed and that the Government had obligation to renew the lease to the previous holder. He agreed that although they had complained to the Kenya Anti-Corruption Commission, no person had been charged for a criminal offence over the leases to the defendants. He agreed that the letter dated 20 March 2002 (plaintiff's exhibit No. 8) sought an extension of the lease after the same had expired. He stated that KIE asked for a restriction to be placed on the properties when they realized interference by third parties. He conceded that the letter asking for a restriction was written after the lease had expired. He insisted that the Commissioner of Lands had an obligation to seek consent from KIE before issuing a lease to other parties. He also stated that before issuing new titles, the Commissioner of Lands had to recall the head title which was not done.

12. Cross-examined by counsel for the 6th defendant, PW-1 stated that he was not aware of the conversion of the original title LR No. 779/370 to the regime of the Registered Land Act, and he had no evidence that KIE held title to the land parcel Eldoret Municipality/Block 8/53.

13. PW-2 was Edwin Wafula, a Senior Lands Registrar, based in Nairobi. He testified that he works under the Chief Land Registrar. He testified that the Chief Land Registrar, on 21 March 2002, wrote to the District Land Registrar Uasin Gishu, which letter was copied to KIE, asking the District Land Registrar, Uasin Gishu, to place a Government restriction on the title Eldoret Municipality/Block 8/53. He produced the letter as an exhibit. This was followed by another letter dated 25 March 2002 asking for restrictions to be placed in the sub-divisions of the parcel No.53 which sub-divisions are the current parcel Nos. 591 - 598. He testified that where a restriction is placed, no dealings are to be entered on the property. He was not however certain whether the District Land Registrar, Uasin Gishu, placed any restrictions as advised. He also testified that once a lease expires, one was supposed to apply for extension.

14. PW-3 was Edna Adala. She is the Legal Manager and Company Secretary of KIE. She is also an advocate of the High Court of Kenya, having been admitted to the bar in the year 2008. She joined the corporation in the year 2011 when this matter was already in court. She testified that KIE had an initial 34 year old lease over the property LR No.779/370. Before the lease expired, KIE sub-divided the land into 8 portions which later brought forth the suit properties. She testified that the parcel No. 592 is in the name of Custom Credit Ltd who became registered as owners on 7 January 2003. She testified that there is a restriction on the title which restriction refers to the Chief Land Registrar's letter of 25 March 2002. She testified that the title of parcel No. 596 was issued to Samack General Suppliers on 7 January 2003 and that the title has a similar restriction to that placed in the parcel No. 592. She stated that the position was similar to the parcel No. 597 issued to Ultra Eureka Farm Ltd and the parcel No. 598 issued to Simon Kiptui Kipchilat. She testified that the title to parcel No. 594 was issued on 4 July 2008 to Anna Chepsiror. She testified that it is the position of KIE that titles were irregularly issued to the defendants and that the Land Registrar, failed to place restrictions on some of the titles. She produced official searches to the titles.

15. Cross-examined by Mr. Nyarotso for the 1st-5th defendants, PW-3 testified that the application for sub-division was made in the year 1996 by KIE before the expiry of the lease. She stated that by the year 1998, the process had been completed, and KIE was expecting titles to the 8 plots to be issued to KIE. She was of the view that under the circumstances, the Commissioner of Lands had to renew the lease in favour of KIE and issue new titles to KIE for the 8 sub-divisions. She stated that KIE applied for renewal in the year 2002 as the new titles to the 8 plots were not forthcoming. She testified that the letters by the Chief Land Registrar, were issued under the direction of the Commissioner of Lands since KIE had directed their correspondences to the Commissioner of Lands. She conceded that the official searches produced did not show when the restrictions were entered. She however testified that the issuer of the titles must have been aware of the Chief Land Registrar's letter of 25 March 2002. She blamed the Commissioner of Lands for issuing titles to the 1st -5th defendants and also blamed the said defendants

for pursuing titles when there were restrictions in place.

16. Cross-examined by Mr. Ngumbi for the 6th defendant, PW-3 stated that it was KIE which converted the title LR No. 779/302 to Eldoret Municipality/ Block 8/53. KIE did not however get title to the latter registration. She stated that it was KIE which conducted the sub-divisions although she did not have the mutation forms. She stated that the purpose for sub-division was for staff housing.

17. With the above evidence, the plaintiff closed its case.

(ii) Evidence of the Defendants

18. Before I go to the evidence tendered by the defendants, it is noteworthy that I had ordered closed the case of the defendants on 5 February 2014, when they failed to attend court and give evidence. At that time, all the defendants were represented by the law firm of M/s Gumbo & Associates Advocates. Later, the defendants appointed new firms of advocates to represent them, with the firm of M/s Njuguna Kathili & Company Advocates coming on record for the 1st, 4th and 5th defendants, and the law firm of M/s Nyaundi Tuiyott & Company Advocates coming on record for the 2nd and 3rd defendants. The defendants, through their newly appointed advocates, applied to have their cases be re-opened, so that they can tender their evidence. This application was allowed by consent and the defendants tabled their evidence as follows.

19. DW-1 was Anne Chepsiror. She testified that she is a driver employed by the Ministry of Roads. She testified that she is the owner of the land parcel No. 594. She stated that she asked for this land from the Government and her application was allowed. She was then issued with an allotment letter dated 20 September 2001, which she produced as an exhibit. The allotment letter required her to make certain payments, which she did make, on 8 June 2007. She paid the sum of Kshs. 45,452/= through Banker's Cheque. She testified that she has been paying land rent and produced payments and clearance certificate for the year 2008. She testified that on the land allocated to her, she found an old house which she renovated and now resides in it. She stated that when she was allocated the plot, she was not aware of any claims by KIE over the plot. She testified that she was issued with the Certificate of Lease on 1 October 2001 (although it was actually 4 July 2007) and has been on the land since then.

20. Cross-examined by Mr. Ngumbi, DW-1 stated that she first entered the plot in the year 2008. The house that she found was a three-bedroomed house. She did not inquire who had developed the house and did not investigate the history of the land. Challenged to produce the application for the plot, DW-1 stated that she had given it to her advocate.

21. In cross-examination by Mr. Lagat for the plaintiff, the letter of allotment and the banker's cheque were put to DW-1. DW-1 conceded that she made payment for the plot 8 years after the allotment letter. She stated that she was not aware that there was a case in court in the year 2008 over the same plot. She testified that she was not aware of any notice by the Chief Land Registrar that the plot should not be interfered with. She stated that she could not be at fault for being given land by the Commissioner of Lands. She testified that when she took over the property, the same was vacant, and she was not aware of any occupation of the properties by KIE staff. She did not know what was happening in the property between the years 2001-2008 (the period between the allocation of the plot and issuance of title to the same).

22. DW-2 was Andrew Kibiego Biwott. He testified that he is a director of Custom Credit Management Limited. He testified that Custom Credit Management Ltd owns the land parcel No. 592 which was allocated to the company on 1 October 2001. He produced the letter of allotment in evidence. After the allotment, the company paid Kshs. 69,740/= on 8 March 2002. On 3 January 2003, the company was issued with a forwarding letter to the District Land Registrar, Eldoret, advising him to grant the company a lease. The Certificate of Lease was issued on 7 January 2003. He produced the title and a search dated 3 October 2008. He testified that he found a three bedroomed house, which was vacant, and he moved into it in the year 2006-2007. He did not apply for a search of the property and neither did he inquire who previously owned the house. He said that he was not aware of the letters by the Chief Land Registrar

asking that a restriction be placed on the title. As far as he was concerned, the title of the company is a clean title.

23. DW-3 was Jackson Chebet. He testified that he is a businessman. He testified that he is a director and shareholder of Samak General Supplies Ltd and Ultra Eureka Ltd. He testified that the land parcel No. 596 is owned by Samak General Supplies Ltd whereas the land parcel No. 597 is owned by Ultra Eureka Ltd. He produced the Certificates of Title. He testified that they applied for the land and the same was granted to them. The application was not specific to these properties but for any residential land. Letters of allotment dated 20 September 2001 were issued to the two companies. He testified that they accepted the offer and paid the stand premium on 15 March 2002. They paid stamp duty on 31 December 2002 and continued to pay land rent and rates. He testified that they carried out a search of the properties in the year 2005 and the same did not show a restriction or any encumbrance. He testified that the two plots are vacant without any developments and he was not aware of any claim by the plaintiff over the said properties. He himself did not peruse the file of the land parcel in the Lands Registry.

24. DW-4 was John Kipchumba. He testified that he owns Tajakos Enterprises. He stated that the land parcel No. 595 was allotted to Tajakos Enterprises in the year 2001. Later in time, he had a separate dispute with one Hosea Ruto, in a suit registered as Eldoret High Court Civil Suit No. 160 of 2008, and to settle that matter, Tajakos Enterprises surrendered its interest in the land to the said Hosea Ruto. He gave Hosea Ruto the allotment letter. He was not aware that Tajakos Enterprises was registered as proprietor of the land parcel No. 595. He stated that he has never seen nor visited the land parcel No. 595. Cross-examined by Mr. Lagat for the plaintiffs, he testified that when they transferred their interest in the land parcel No. 595 to Hosea Ruto in the year 2008, he was not aware of any order of injunction against the property. He testified that he was not aware of any suit and had not been served with summons. He was of the view that Tajakos Enterprises needs to be removed from this case as they have no interest in the land.

25. DW-5 was Hosea Kibet Ruto. He testified that he is a businessman and farmer. He testified that in the year 2001, John Kipchumba Tarus (Kipchumba) (DW-4), approached him with a letter of allotment and offered to sell the land to him. He handed over to Hosea Ruto the letter of allotment. By that time, the premiums noted in the allotment letter had been paid specifically on 15 March 2002. About the year 2006, Mr. Kipchumba called him (Mr. Ruto) and informed him that the title has been registered and that he had a Certificate of Lease issued on 21 March 2006. However, Kipchumba did not give him the Certificate of Lease, but asked for more money to facilitate payment for another piece of land which they could co-own on a 50:50 basis. This land was Eldoret Municipality Block 8/590 (which does not appear to be a land parcel in dispute in this case). A dispute later ensued on the ownership of the parcel No. 590, which led to the filing of the case Eldoret HCCC No. 160 of 2008. To settle the matter, a consent was entered into on 9 January 2009. The effect of the consent was that Mr. Ruto relinquished his interest in the land parcel No. 590 and this gave Mr. Kipchumba the comfort to release to Mr. Ruto the title to the parcel No. 595. He did a search of the property, conducted on 2 October 2008, before release of the title to him, which he produced as an exhibit. The same showed that Tajakos Enterprises, on 21 March 2006, became registered as proprietors of the said parcel No. 595. He stated that he was not aware of this case until very late. He was informed of the case by Mr. Kipchumba, who also mentioned to him that his advocate was Mr. Gumbo and later Mr. Njuguna. In the year 2009, he paid for land rent and land rates and on 13 October 2011, a transfer in his favour was registered. The advocate who handled the transaction was Mr. Gumbo (who it will be noted initially appeared for the defendants in this case). He stated that he did a search on 13 October 2011, which he produced as an exhibit, which did not show any restrictions. On the land he found a three bedroomed house which he renovated and occupied.

26. Cross-examined by Mr. Ngumbi, he stated that he did not peruse the file of the property in the Lands Office. He stated that in the transaction, it was Mr. Gumbo advocate, who acted for both himself and Mr. Kipchumba. Cross-examined by Mr. Lagat for the plaintiff, he stated that Mr. Gumbo advocate did not show him any order which prevented any dealings on the land before and that he was an innocent purchaser.

27. With the above evidence, the defendants closed their case.

C. SUBMISSIONS OF COUNSEL

28. Mr. H.K. Lagat for the plaintiff, in his submissions, inter alia submitted that Article 40 of the Constitution of 2010, guarantees the protection of proprietary rights and submitted that the state deprived the plaintiff of its property. He also relied on Sections 28 and 30 of the Registered Land Act (CAP 300) (RLA) (now repealed by the Land Registration Act, Act No. 3 of 2012) which essentially provided that the registration of a person as proprietor, gave such person the absolute ownership of the subject title. He submitted that the plaintiff, having acquired title through valuable consideration, was protected by Sections 28 and 30 of the RLA. He was also of the view, that KIE had an overriding interest as declared by Section 30 (g) of the RLA. He submitted that the defendants failed to undertake due diligence which would have revealed that KIE were the proper owners of the land and that there were restrictions placed on the titles. He submitted that the titles of the defendants were fraudulently acquired as they did not show how they came to know that the lease had expired nor how they applied for the properties. He submitted that a title acquired through fraud was liable to be cancelled and relied on Section 24 of the Registration of Titles Act (CAP 281) (RTA) (now repealed) . He also relied on Section 13 of the Land Act, Act No. 6 of 2012, which provides that when a lease expires, the previous holder of the lease has pre-emptive rights over its renewal. He submitted that the Commissioner of Lands was under obligation to offer KIE, as the previous holder of the lease, first priority when it came to renewal. He further submitted that KIE had a right to information, and to be informed of the reasons of failure to extend the lease in their favour. He relied on Article 35 (1) of the Constitution of Kenya of 2010 and on various authorities which interpret Article 35 of the Constitution. He also submitted that with the right of natural justice also arises legitimate expectation and proportionality in fair administrative action and that the Commissioner of Lands thus contravened Article 47 of the Constitution, which gives a right to fair administrative action. He submitted that the Commissioner of Lands and the District Land Registrar, never gave any reason for refusing to renew the lease to the plaintiff. He was of the view that the plaintiff fully deserves the prayers sought. In his submissions he relied on various authorities.

29. Mr. Njuguna for the 1st, 4th and 5th defendants, submitted inter alia, that the application by the plaintiff to renew the lease was made in the year 2002, after the lease had expired. He also wondered why the plaintiff had not in its pleadings, enjoined the owners of the land parcel No. 591, 593, and 598. He submitted that there was no evidence of an application to renew the lease made in the year 1998. He submitted that the payment of Kshs. 139,208/= for extension of use was made to the Municipal Council of Eldoret and not the Commissioner of Lands. He further submitted that there was no impropriety in the defendants getting title as the Ethics and Anti-Corruption Commission has not preferred any charges against the defendants. He submitted that the Commissioner of Lands was under no legal obligation to notify the plaintiff of the grant of the leases to the defendants. He further submitted that once the defendants were granted the leases, there was nothing to offer the plaintiff. He submitted that the restrictions on the titles were placed after the defendants had already got title. He also submitted that there was no evidence that the District Land Registrar had received the letters from the Chief Land Registrar asking for restrictions to be placed against the titles. He faulted the plaintiff for not calling the District Land Registrar to confirm the issue of restrictions. He submitted that the plaintiff was clearly indolent and that equity aids the vigilant and not the indolent. He submitted that the Commissioner of Lands had discretion on whom to grant a lease and that he cannot be faulted for granting a lease to the defendants. He submitted that the defendants properly applied for the properties which were allotted to them and they paid the requisite premiums. He submitted that they are innocent proprietors for valuable consideration without notice of the plaintiff's alleged claims. He submitted that Section 27 (b) of the RLA protects the title of the defendants. He also relied on various authorities to support his position.

30. M/s Nyaundi Tuiyott & Company, Counsels for the 2nd and 3rd defendants echoed the submissions of Mr. Njuguna. They added that there was no allegation of fraud and or malpractice proved against the defendants. They submitted that the titles of the defendants are protected by Section 26 of the Land Registration Act, Act No. 3 of 2012.

31. Mr. Ngumbi for the 6th defendant urged that the plaintiff's suit be allowed. He submitted that the 1st -5th defendants had a duty to investigate their titles, especially because there were houses on the land, and they ought to have inquired who had constructed the said houses. He asked that the titles of the 1st -5th

defendants be cancelled.

D. DECISION

32. It is with the above pleadings, evidence and submissions, that I need to determine this matter.

33. The evidence shows that KIE is a wholly owned State Corporation. It purchased the land parcel LR No. 779/370, a title issued under the Registration of Titles Act, (RTA) CAP 281 (repealed), from the Municipal Council of Eldoret, who held, from the Government of Kenya, a lease of 34 years from 1 August 1965. The transfer to KIE was registered on 19 December 1975 and KIE became proprietors of the leasehold title. The lease was to expire on 1 August 1999. Prior, to the year 1999, about the year 1998, or so, it appears as if the title was converted from the RTA regime to the regime of the Registered Land Act, (RLA) and a new registration number, being Eldoret Municipality/ Block 8/53 was given. It is not clear how this conversion took place, and the plaintiff has raised suspicion on the process, as they still hold the original Certificate of Title issued under the RTA, and they were never asked to surrender the same for cancellation when conversion was done. Be as it may, I do not have any doubt in my mind that the RTA title LR No. 779/370, is the same land comprised in the title Eldoret Municipality/ Block 8/53. This title No. 53 was sub-divided into 8 parcels. It is not very clear to me when this sub-division was done, suffice to state that upon sub-division, new titles were issued to the 1st -5th defendants for the parcels numbers 592, 594, 595, 596 and 597. I do not know who was issued with title to the parcels No. 591, 593 and 598, which are not the subject of this suit. I also have no idea why KIE did not deem it fit to claim these parcels of land and I will say no more about them.

34. It needs to be appreciated that all the transactions herein took place before the enactment of the current Constitution in 2010, and before the new land law regime which is now comprised in the Land Registration Act, Act No. 3 of 2012, and the Land Act, Act No. 6 of 2012. Before the enactment of these statutes, the land regime was governed by various statutes, core of which were the Land Titles Act (CAP 282) the Government Land Act (CAP 280) the Registration of Titles Act (CAP 281), the Indian Transfer of Property Act, and the Registered Land Act (CAP 300). All these were repealed by the Land Registration Act, 2012, which statute came into force on 27 May 2012.

35. Mr. Lagat for the plaintiff made various references to the current Constitution of 2010, and to the provisions of the new legal regime on renewal of leases as provided in the Land Act, Act No. 6 of 2012, which came into force on 27 May 2012. The Land Act, gives the incumbent leaseholder a pre-emptive right of renewal. It provides as follows :-

S. 13. (1) Where any land reverts back to the national or county government after expiry of the leasehold tenure the Commission shall offer to the immediate past holder of the leasehold interest pre-emptive rights to allocation of the land provided that such lessee is a Kenya citizen and that the land is not required by the national or the county government for public purposes.

(2) The Commission may make rules for the better carrying out the provisions of this section, and without prejudice to the generality of the foregoing, the rules may provide for the following.

(a) prescribing the procedures for applying for extension of leases before their expiry.

(b) prescribing the factors to be considered by the Commission in determining whether to extend the tenure of the lease or re-allocate the land to the lessee.

(c) the stand premium and or the annual rent to be paid by the lessee in consideration of extension of the lease or re-allocation of the land.

(d) other covenants and conditions to be observed by the lessee.

36. But the above provision came into being after the events herein had already occurred, and the said provision cannot aid the plaintiff. So too the other laws that came after. The events herein need to be

construed in light of the law that was prevailing at the time that the lease was renewed.

37. The key question in this case, is whether or not the Commissioner of Lands, in light of the then prevailing legal regime, had a duty to renew the lease in favour of the plaintiff, or whether he had a discretion to issue a lease to any other party and completely disregard the plaintiff. The position of the plaintiff is that the Commissioner of Lands was under a duty to renew the lease in favour of the plaintiff whereas the defendants differ. In answering the key question, we must take into consideration the surrounding circumstances of this case, which were tendered in evidence, and also the prevailing law at the time that the leases were issued to the 1st - 5th defendants. In order to arrive at an answer to the key question, the following issues, in my view, need to be determined.

(i) What was the procedure for distribution of Government land and Government leases for town plots in the previous legal regime ?

(ii) When a lease for a town plot expired under the former regime, what was the procedure for renewal and was there an obligation to renew the same to the previous leasehold owner ?

(iii) Could the Commissioner of Lands give to private individuals, land that was held by the Government or public body ?

(iv) Was the issuance of title to the 1st -5th defendants by the Commissioner of Lands in line with the law ?

(v) Are the 1st - 5th defendants innocent purchasers/proprietors for value.

(vi) Should the titles of the 1st -5th defendants be protected or are they liable to be cancelled.

(vii) What is the position of the title sold to Hosea Ruto ?

(viii) Should KIE be registered as proprietors of the suit properties ?

I will deal with the above issues in the following discourse.

Issue (i) : What was the procedure for distribution of Government land and Government leases for town plots in the previous legal regime ?

38. The procedure for issuance of Government land and Government leases was governed by the provisions of the Government Land Act (GLA) (CAP 280) Laws of Kenya. This was pursuant to the provisions of Section 4 of the GLA, which provided as follows :-

GLA S.4 : All conveyances, leases and licences of or for the occupation of Government lands, and all proceedings, notices and documents under this Act, made, taken, issued or drawn shall, save as therein otherwise provided, be deemed to be made, taken, issued or drawn under and subject to the provisions of this Act.

39. The matters herein, were undertaken during the previous land regime and it is therefore the GLA which is operative in the circumstances of this case. My reading of the GLA, has revealed that two entities had power to issue Government land and Government leases. These are the President and the Commissioner of Lands. The powers of the President were set out in Section 3 which was drawn as follows :-

GLA S.3 : The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—

(a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;*

(b)* with the consent of the purchaser, lessee or licensee, vary or remit, either wholly or partially, all or any of the covenants, agreements or conditions contained in any agreement, lease or licence, as he may think fit, or, with the like consent, vary any rent reserved thereby;

(c) †extend, except as otherwise provided, the time to the purchaser, lessee or licensee for performing the conditions contained in any agreement, lease or licence liable to revocation for such period, and upon such terms and conditions, as he may think fit, and the period so extended, and the terms and conditions so imposed, shall be deemed to be inserted in the agreement, lease or licence and shall be binding on the purchaser, lessee or licensee, and on all transferees, mortgagees, assignees and other persons claiming through him;

(d)* accept the surrender of any lease or licence under this Act;

(e)† accept the surrender of any certificate granted under the East Africa Land Regulations, 1897, or of any lease granted under the Crown Lands Ordinance, 1902, and grant to the lessee a lease under this Act of the area the subject of the surrendered certificate or lease, provided such surrender is made within such period as the President may by notice in the Gazette direct, such period to be not less than twelve months from the commencement of this Act;

Provided that this paragraph shall not apply to land granted under the East Africa Land Regulations, 1897, or leased under the Crown Lands Ordinance, 1902, upon terms which differ from the ordinary terms in force at the time at which such land was granted or leased; and

(f) accept the surrender of any freehold conveyance under the Crown Lands Ordinance, 1902, or freehold grant under this Act.

(* The powers of the President under these paragraphs were delegated to the Commissioner of Lands (Cap. 155 (1948), Sub. Leg.) and for † The powers of the President under the said paragraphs to accept the surrender of a lease granted under the Crown Lands Ordinance, 1902, and to grant the lessee a lease of the same land under this Act were delegated to the Commissioner (Cap. 155 (1948), Sub. Leg)

40. Section 5 of the GLA established the office of the Commissioner of Lands. The powers of the Commissioner of Lands were set out in Section 7 which was drawn as follows :-

GLA S. 7 : The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute for and on behalf of the President any conveyance, lease or licence of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the President under this Act:

Provided that nothing in this section shall be deemed to authorize the Commissioner or such officer to exercise any of the powers conferred upon the President by sections 3, 12, 20 and 128.

41. The exercise of the powers of the Commissioner of Lands in so far as disposal of town plots was concerned, was set out in Part III of the GLA. There is an elaborate procedure which was set out therein and I think it is best that I lay out some of the said provisions in full. Sections 9, 12 and 13 stated as follows :-

9. The Commissioner may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner.

12. Leases of town plots shall, unless the President otherwise orders in any particular case or cases, be sold by auction.

13. The place and time of sale shall be notified in the Gazette not less than four weeks nor more than

three months before the day of sale, and the notice shall state—

(a) the number of plots and the situation and area of each plot sold;

(c) the amount of survey fees and the cost of the deeds for each plot;

(d) the term of the lease and the rent payable in respect of each plot; and

(e) the building conditions and the special covenants, if any, to be inserted in the lease to be granted in respect of any plot:

Provided that the lease of any plot may be withdrawn from sale by the Commissioner at any time before it is offered for sale.

42. The properties herein were not granted to the 1st -5th defendants directly by the President. It is the Commissioner of Lands who issued the leases. It will be seen from the provisions that I have set out above, that the Commissioner of Lands was not supposed to simply dish out land to people. First, under Section 9, he could only issue leases where the land was not required for a public purpose. After determining this, he was required to follow a process whereby the land was put up at an auction and the highest bidder was to be the purchaser. That is what the statute required of him. The practice adopted by the Commissioner of Lands of simply issuing allotment letters and titles to people, without following the procedure set out in the above provisions, was in my view, erroneous and not backed by law.

43. I will come back to this aspect later when looking at how the title of the 1st - 5th defendants was acquired as I now want to dispose of issue No. 2.

(ii) *When a lease for a town plot expired, under the former regime, what was the procedure for renewal and was there an obligation to renew the same to the previous leasehold owner ?*

44. I have looked at the GLA and I have not seen a provision which covers the renewal of leases of town plots. This is unlike leases over agricultural land. Section 27 (1) (c) of the GLA provided that where leases over agricultural land expired, and the leaseholder had performed his obligations under the lease, then the leaseholder was entitled to be granted a freehold title over such land.

45. Court decisions on whether a leaseholder had a right of renewal are also not unanimous. In the case of ***Goan Institute Nakuru v Said Abdalla Azubedi (2007) eKLR***, the plaintiff held a lease which had expired. The Government then issued a new lease which led to the registration of the defendant as proprietor. The plaintiff's suit for a declaration that it is owner of part of the lease was dismissed. In the case of ***Nairobi City Council v Chhagal Lala Divani W/o Chhagan Lala & 2 Others (2013) eKLR***, the plaintiffs sought an order to compel the Commissioner of Lands to renew and extend their lease. It was held that there was no specific provision conferring upon the plaintiff the right to an extension of the leasehold title. There is also the fairly recent ruling made in an interlocutory application in the case of ***Suleiman Murunga v Nilestar Holdings Ltd & Another , Nairobi ELC No. 1549 of 2013, (2014) eKLR***. The applicant in that case previously held a leasehold title which expired. Upon expiry, the lease was renewed to the tenant in the premises comprised in the leasehold title. The previous leasehold owner sued for rent. In determining the interlocutory application, Mutungi J, was of the view that that once the leasehold title expired, the Government henceforth became entitled to allocate the property to any other person. The learned judge dismissed the interlocutory application for injunction as in his view, the plaintiff had not established a *prima facie* case. In the case of ***Republic v Commissioner of Lands & 3 Others ex parte Shelfco Ltd, Milimani Judicial Review Misc. Application No. 173 of 2012*** the matter therein touched on renewal of a lease that had expired. Odunga J was of the view that the matters therein were not proper for determination by way of Judicial Review and dismissed the application. However a separate holding was made in the case of ***Abdul Waheed Sheikh and Abdul Hameed Sheikh as Charitable Trustees of the Sheikh Fazal Ilachi Noordin Trust v Commissioner of Lands & 3 Others, Nairobi High Court, Misc. Civil Case No. 1531 of 2005 (O.S) (2012) eKLR***. In the matter, the applicants held a leasehold title that expired and they applied for renewal. The Commissioner of Lands however

intended to renew the same to another person. The court held that the applicants were entitled to hold a legitimate expectation that the lease would be renewed to them. A similar holding was made in the case of ***Serah Mweru Muhu v Commissioner of Lands & 2 Others High Court at Milimani, Petition No. 413 of 2012 (2014) eKLR***. In the matter, the petitioner held a lease that was due to expire. Before its expiry, she entered into negotiations with the state to purchase the same. While negotiations were ongoing, the leasehold title expired. The State declined to renew the lease and acquired it for itself. Majanja J, held that the petitioner held a legitimate expectation that the lease would be renewed to her.

46. I am not averse to the general hypothesis, that when a lease for a town plot expired, the land reverted back to the Government as the owner of the radical title. It is arguable therefore that such plots needed to be disposed of, following the procedure outlined in Section 12, 13 and 14 which I have already explained above. But my reading of Section 9, gives me the impression that Section 9 of the GLA implies that the disposition thereof is in relation to the lease of plots in the first instance, which are generally undeveloped plots, and not to subsequent renewals of expired leases. Section 9 states that the Commissioner may carve out plots, *suitable for erection of buildings for business or residential purposes* and such plots ought to be disposed of vide the procedure outlined in Sections 12, 13, and 14. That is why I feel strongly, that Section 9 covered only leases of first instance for undeveloped plots.

47. For such plots, when their lease expired, and the person to whom the plot was allocated had not developed it, such plot would again fall under the caption of a plot "*suitable for erection of buildings for business or residential purposes*" and the Commissioner of Lands could allocate it afresh. In my view, the procedure outlined in Part III, needed to be followed again. Thus, the Commissioner of Lands would once again need to offer the plot at an auction and sell it to the highest bidder. In such a case, that is renewal of a lease for an undeveloped plot, or where the allottee had not complied with the terms of the lease, I am of the opinion that there was no duty upon the Commissioner to automatically renew the lease to the former leaseholder. In fact, there could not be any compulsion to renew the lease to such person, because the leaseholder would not have developed the property as required by the lease; rather, the leaseholder would probably only be holding the land for speculative purposes. Such vacant plot would have had again to be put through the auction process for the highest bidder to purchase.

48. But what if the land was developed as required by the terms of the original disposal and the lease expired ? As noted earlier, there was no specific provision under the GLA that addressed the renewal of town plots which have been developed in accordance with the terms for which the lease was issued. In my view, Section 9 does not apply, for as I have set out above, I am of the opinion that Section 9 and the procedure in Part III was in relation to undeveloped town plots, or plots whose proprietors have not conformed with the terms of the lease. If the lessee of such property has utilized the land in accordance with the terms of the lease, why would the Commissioner of Lands refuse to renew to him such lease ? There would be no reason at all. In fact, it would be unjust not to renew the lease to such person because such person would have spent resources in developing the property. Imagine a lessee who has under a leasehold title developed, say, a 30 storey commercial building, or a 5 star hotel, in accordance with the terms of the lease. Any other person taking over such property, as a subsequent lessee, would be unjustly enriched by the industry of the first lessee. In the same vein, the first lessee would be deprived of his investment for no reason at all. It follows, that the first lessee, is entitled to hold a legitimate expectation, that the Commissioner of Lands would renew the lease to him for a further term. I am fully in agreement with the decision of Lenaola J, in ***Abdul Waheed Sheikh & Another v Commissioner of Lands*** and Majanja J, in ***Serah Mweru Muhu v Commissioner of Lands*** which held that the previous lessee has a legitimate expectation that the expired lease would be renewed to him, so long as he has complied with the terms of the grant. I have looked again and again at the decision in ***Nairobi City Council v Chhagal Lala & 2 Others*** and with the utmost of respect, I find great difficulty in following it. I have seen that in arriving at the finding, reliance was made upon the decision of Osiemo J, in the case of ***Charles Mwangi Kagonia v Dharj D. Popat & Another, Nairobi High Court, Civil Suit No. 96 of 2005, (2006) eKLR***. But the latter case involved a dispute of an expired lease between two private individuals and I think the facts therein can be distinguished where the property in issue is a leasehold title from the Government. The case of ***Goan Institute Nakuru v Said Abdalla Azubedi (2007) eKLR***, did not succeed partly because the Commissioner of Lands was not a party to the case.

49. I have every conviction to hold, and I do hold, that a former holder of a Government leasehold title, who had complied with the terms of the lease, held a legitimate expectation that such lease would be renewed to him by the Commissioner of Lands. It is my considered view, that despite there not being any explicit provision in the GLA, concerning renewal of leases of developed town plots, such plots needed to be renewed to the previous leaseholder, unless the leaseholder had breached a fundamental term of the lease, or is no longer interested in its renewal.

50. In exercising his duty to renew such lease, the Commissioner of Lands would be exercising an administrative function. Any person acting in the exercise of administrative power has an obligation to act fairly and justly. That is what everyone expects of such person. Administrative power is not to be exercised capriciously, without regard to what is fair, just and proportionate. The Commissioner of Lands could not in the fair exercise of his administrative power, renew the lease to another person, for as I have laid out before, such action would break the legitimate expectation of the incumbent leaseholder. What would be fair, just and equitable in such circumstance would be to renew the lease in favour of the incumbent holder of the lease.

51. In the circumstances of our case, the lease was issued to KIE to develop residential houses. KIE did develop 5 executive staff houses on the property. They expended money to develop the properties. KIE was paying land rent and land rates. It has not been insinuated that they were in breach of any terms of the lease. In fact, they did abide by the terms thereof. There was absolutely no reason why the Commissioner of Lands ought not to have renewed the lease in favour of KIE. I hold that the Commissioner of Lands had an obligation to renew the lease to KIE as there was no reason at all to deprive them a further lease term. Bypassing KIE, who had developed the property, using its own resources, nay, public resources, was an unfair and a disproportionate exercise of administrative power on the part of the Commissioner of Lands. It meant that all the investment that KIE had put into the property was going to fall into the hands of persons who had not put in a single coin in the developments therein. In essence, the 1st - 5th defendants were going to reap where they did not sow and KIE were going to lose all resources that they had put in developing the property. KIE were perfectly entitled to hold a legitimate expectation that the lease would be renewed to them.

Issue (iii) : Could the Commissioner of Lands give to private individuals, land that was held by the Government or public body ?

52. There is a reason why the Government holds certain land and does not give it away to private individuals. There is also a reason why the Government assigns certain land to its own institutions. These institutions could be State Corporations, Schools and other educational institutions, or hospitals. Such land is meant for use by the public. It could be land for recreational purposes, or land reserved for a school or hospital, or a road, or for research purposes, or to maintain a forest. In so far as town plots are concerned, it is my view that unless such land ceased to serve a public function, then such land, could not be issued to private individuals. That to me, is the import of the provisions of Section 9 of the GLA which was drawn as follows :-

*GLA S. 9. The Commissioner may cause any portion of a township which is **not required for public purposes** to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner (emphasis mine).*

53. There would be no legitimate reason, to hand over to private hands, land which is still required for a public purpose or which is held and occupied by a public institution for a public purpose. If public land had to revert to private hands, then the procedure of offering the said land by way of public auction had to be followed. But even then, the Commissioner of Lands ought not to have offered such land to private individuals if the public purpose for which the land was reserved still existed. That position has been affirmed by various decisions. In the recent case of **Republic v Commissioner of Lands & 4 others ex parte Associated Steel Limited, High Court at Nairobi, Misc. Civil Suit No. 273 of 2007, (2014) eKLR**, there was a dispute on whether certain land that had been allocated to a private individual was a public road. The court held that the land was a public road and was therefore not available for allocation or alienation. The court held that in order to convert the public utility to private hands, the Commissioner of

Lands needed to follow the provisions of Sections 12 and 13 of the GLA and further hold consultations from all stakeholders. It held that the Commissioner of Lands held the land as trustee on behalf of the public and affirmed as follows :-

"It is thus our holding that the disputed plot having already been set aside as a public utility plot the same was held in trust by the 1st respondent (Commissioner of Lands) for the public and public purposes and was not available for further alienation and could not at any rate be allocated to a private developer as a commercial plot".

54. I am in full agreement with the above dictum.

55. In our case, the properties in issue were owned by KIE. KIE is a public body fully owned by the Government. It ensues that land held by KIE was land held for a public purpose. The purposes for which KIE were formed were well enumerated by PW-1. KIE is meant to offer opportunities for development of industry to individuals. These, no doubt, are public functions. The holding of the suit properties by KIE was therefore in pursuance of their public functions. It has not been demonstrated to me that the public purpose for which the land was held by KIE had ceased, so as to allow the Commissioner of Lands, offer these parcels of land to private individuals. Since these parcels of land were held by a public body for a public purpose, the Commissioner of Lands had a duty, to first inquire from the public body, and all other stakeholders, whether the public body still required the said properties. It was only upon being satisfied that the parcels of land were no longer required for any public purpose, that the Commissioner of Lands could now offer them to private individuals. The Commissioner of Lands could not in my view properly issue land to the 1st - 5th defendants without first giving KIE a hearing. In the case of ***Commissioner of Lands v Kunste Hotel Limited , Nakuru Court of Appeal , Civil Appeal No. 234 of 2005, (1997) eKLR***, the Court of Appeal held that it was necessary for the Commissioner of Lands to involve all parties before conferring land to a private individual. On the facts of the case, the Court of Appeal was of the view that the respondent, having been promised to be issued with the suit land, needed to be consulted before the land could be granted to another person.

56. In the circumstances of this case, it was therefore wrong for the Commissioner of Lands not to consult KIE and other stakeholders before issuing the suit properties to the 1st - 5th defendants.

57. In my view, any party aggrieved by the failure of the Commissioner of Lands to dispose of public land through the proper procedure had an avenue to approach the courts for redress. That is exactly what KIE has done in this instance. Public land is land meant to be utilized by the public. It is not land that is open for distribution to private individuals without first there being a determination that the land is no longer required for any public purpose. Public land must be protected by all, no less the person of the Commissioner of Lands, or its successors upon whom the administration of public land was or has been entrusted to. I am deeply disappointed that the Commissioner of Lands failed in his public duties, to hold in trust, land that was set aside for a public purpose and proceeded to distribute it to private individuals, without first ascertaining that the land was still required for public purposes.

58. In my opinion, the Commissioner of Lands breached the provisions of Sections 9, 12 and 13, in secretly allotting the land to the 1st - 5th defendants, who are private individuals, without regard to whether or not, the public purpose for which the land was leased out to the plaintiff had been spent.

Issue (iv) : Was the issuance of title to the 1st -5th defendants by the Commissioner of Lands in line with the law ?

59. I have already stated above, that first, KIE had a legitimate expectation that the lease would be renewed to itself. I have also held that it was wrong for the Commissioner of Lands to deprive a public institution of land before ascertaining that such land was still required by the public institution. What I want to address under this head, is whether the Commissioner of Lands followed due process in the issuance of titles to the 1st - 5th defendants, assuming that the said properties could properly have been available for allocation.

60. The 1st -5th defendants stated that they made applications to be allotted plots for purposes of developing residential houses. None of the defence witnesses had any proof of such applications, and I can only assume that there were no such applications. It follows that the Commissioner of Lands, for some reason, which reason is open for speculation, singled out the 1st- 5th defendants and secretly allocated to them the suit properties. I say secretly, because the Commissioner of Lands did not follow the procedure of offering the land for public auction and neither did the Commissioner of Lands offer it to the general public in any other way. In fact, it will be seen that two plots, parcels numbers 596 and 597, were offered to the same individuals under the guise of different companies. It is not clear what made them so deserving of the plots, that they had to receive two of them.

61. All the allotment letters, were issued on 20 September 2001. All the allotment letters required parties to pay the premiums noted therein within a period of 30 days. None of the allottees paid the premiums within the required period. Anne Chepsiror paid her premiums on 8 June 2007, about 6 years after the allotment. She was issued with title on 4 July 2007. It is interesting that the Commissioner of Lands kept this title for her for so long without her paying the required premiums. Custom Credit Ltd on its part paid its premiums on 8 March 2002, again outside the 30 days period. It was nonetheless issued with title on 7 January 2003. So too the other allottees. Tajakos Enterprises paid its premiums on 15 March 2002 and was issued with title on 21 March 2006. Samak Ltd and Ultra Eureka Ltd paid their premiums on 15 March 2002, again outside the 30 day period, and were issued with title on 7 January 2003.

62. It will further be noted that the persons paid the premiums when KIE had already written to the Commissioner of Lands, their letter of 15 February 2002, asking the Commissioner of Lands for renewal. The Commissioner of Lands was therefore alive to the fact that KIE had an interest in renewing the lease. Even if he could properly offer the lands to other individuals, why didn't the Commissioner of Lands offer to KIE the renewal of the lease, when the 1st - 5th defendants had not abided by the terms of the allotment letters ? Even if the Commissioner of Lands could extend the time for the payment of the premiums, in light of the interest shown by KIE, in my view, the Commissioner exercised his discretion wrongly, in waiving the required period within which the stand premiums had to be paid.

63. Moreover, vide the letter of 20 March 2002, before any titles had been issued to the 1st - 5th defendants, KIE had already asked for restrictions to be registered in the title. I have seen some restrictions placed in some of the titles but it is not clear when the restrictions were placed, and it is not clear if they were placed before or after the issuance of titles. What however is not in doubt, is that the Commissioner was alive to the request to place restrictions on the title but without giving any hearing to KIE, he proceeded to issue titles to the 1st - 5th defendants. He must have been aware that KIE was still interested in renewing its lease but he completely ignored them.

64. I have pointed out various irregularities in the manner in which the 1st - 5th defendants obtained title. I therefore find that the issuance of titles to the 1st - 5th defendants was not in accordance with the law and that proper procedure was not followed in the issuance of their titles. In the face of the interest of KIE over the said properties, the Commissioner of Lands in the fair exercise of his administrative power, ought not to have waived the irregularities, but rather, offer the suit properties to KIE for issuance of a new lease.

Issue (v) : Are the 1st - 5th defendants innocent purchasers/proprietors for value.

65. The 1st - 5th defendants stated in their evidence, that they are innocent purchasers and proprietors for value. It was argued that they were simply offered plots and that they cannot be vilified for paying for plots that have been offered to them. In their evidence, they all stated that they did not know who the previous owners were.

66. On my part, I am not convinced. On the land were nicely built houses. Any reasonable person ought to have been put into inquiry as to who has developed these houses. It is highly improbable for one to receive a gift without inquiring where the gift has come from. In the same vein, it is highly improbable that the 1st - 5th defendants did not know that the houses they were taking over, were houses developed by KIE. The plaintiff's witnesses stated that the 1st - 5th defendants took over the houses in the year 2008.

When the 1st - 5th defendants took over these houses, KIE staff were resident therein. I find it difficult to believe that the 1st - 5th defendants never came to know that the plots and houses that they had been allocated, were never at one time owned by KIE.

67. I am buttressed in holding this opinion given the reason that the 1st - 5th defendants were rather hesitant in taking over the properties. Although they were allocated the properties in the year 2001, they never moved to take possession until the year 2008. No good reason was given as to why they waited this long before moving to take possession. The only probable reason is that they knew that the properties were owned and occupied by KIE and that is why they were afraid of taking immediate possession. They were aware that KIE was being defrauded of their investment, and with the lure of free riches, they were only too happy to play along, and they gladly participated in the deprivation of the property of KIE.

68. On this point, I hold that the 1st - 5th defendants were not innocent purchasers for value.

Issue (vi) : Should the titles of the 1st -5th defendants be protected or are they liable to be cancelled ?

69. The titles issued to the 1st - 5th defendants were titles issued under the RLA. The RLA did allow for cancellation and rectification of title. This was covered by the provisions of Section 143 which was drawn as follows :-

143. (1) *Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.*

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

70. It will be noted from the foregoing that so long as the title was not a first registration, it could be cancelled if such title was obtained by fraud or mistake. Where the proprietor was in possession, his title could not be cancelled if the proprietor had acquired the land or lease for valuable consideration, unless such proprietor had knowledge of the fraud or mistake or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

71. The titles of the 1st - 5th defendants cannot be said to be a first registration. That land had previously been registered under the RTA and later under the RLA. Their titles are subsequent registrations to these. It follows that the titles are subject to cancellation and/or rectification. I have already held that the 1st - 5th defendants were not innocent purchasers for value. They knew, or must have been expected to know, that what they were acquiring was land developed by KIE and that KIE was being defrauded of its property. If they did not know, then it was out of their own neglect, which is not excusable as noted by Section 143 (2). Moreover, they found the plaintiff in possession when they moved to take over the said properties. Their titles are therefore subject to cancellation under Section 143 of the RLA.

72. The same result will ensue if I am to apply the current law. The present Constitution does not protect property that was unlawfully acquired. This is explicitly set out in Article 40 (6) of the Constitution of Kenya, 2010. In addition, Section 26 of the Land Registration Act, provides that title may be challenged (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

73. I have already set out why I think the title of the 1st - 5th defendants was unlawfully and unprocedurally acquired. Such title cannot be protected and is liable to be cancelled and I am inclined to cancel the same.

Issue (vii) : What is the position of the title sold to Hosea Ruto ?

74. It emerged in the course of evidence that Tajakos Enterprises, is now no longer the proprietor of the property Eldoret Municipality/Block 8/ 595. When this case was instituted, on 9 October 2008, Tajakos Enterprises were the registered proprietors of that property, having become registered on 21 March 2006. That property was transferred to Hosea Ruto on 13 October 2011, which is the date that Hosea Ruto became registered as proprietor.

75. Hosea Ruto gave a history of how that property came to be in his name. He had a dispute with Mr. Kipchumba of Tajakos Enterprises, and to settle the dispute, Mr. Kipchumba assigned the parcel No. 595 to Mr. Ruto. That assignment was contained in a consent drawn on 9 January 2009, entered into in the suit between the two and another person. Interestingly, the consent was drawn by Mr. Gumbo advocate, who was all along on record for Tajakos Enterprises in this suit.

76. When this suit was filed, the plaintiff sought interim orders of injunction to preserve the property in all the five suits. The matter first appeared before Mwilu J, as she then was, on 13 October 2008. She gave interim orders in terms of prayer 2 of the application for injunction which was drawn as follows ;

A temporary injunction do issue forthwith, restraining the defendant/respondent whether by itself, employees, agents, assignees, successors, servants, or otherwise howsoever from trespassing into, occupying, alienating, selling, transferring, and or dealing in any manner whatsoever with all that parcel of land or property known as (the properties described depending on the suit) pending inter partes hearing and determination of this application.

77. These interim orders were extended on various dates and the interlocutory application was disposed of vide a consent entered on 19 May 2010 which was drawn in the following terms :-

"By consent of the parties herein,

1. The plaintiff (sic) applications in all the matters dated 8th October 2008 seeking orders of injunction against the defendants/respondents be compromised as hereunder :

(a) That the defendants and or their assigns or agents to remain in occupation of the suit premises pending the hearing and determination of the suit.

(b) That the defendants shall not during the pendency of the suits filed herewith transfer, sell or delineate the suit premises to any other third parties.

2. The defendants' application dated 14/10/08 seeking to discharge the interim orders and to dismiss the plaintiff (sic) suits be and is hereby withdrawn.

3. The defendants (sic) preliminary objection dated 13/10/08 be heard and disposed of prior to the hearing of the plaintiff's application dated 10/12/08 seeking to amend the plaint and to enjoin the Attorney General.

4. Costs of each suit be in the cause."

Signed by D. Wambola of Lumumba & Lumumba Advocates for the plaintiff.

Signed by E. Gumbo Advocate for Gumbo & Associates .

The Consent was endorsed by Ang'awa J.

78. It will be seen from the above consent, that it was agreed inter alia, *"that the defendants shall not during the pendency of the suits filed herewith transfer, sell, or delineate the suit premises to any other third parties"*. Mr. Kipchumba of Tajakos Enterprises, and indeed Mr. Gumbo, who was on record for him, must have known of the order of injunction issued herein. Hosea Ruto, stated that it was Mr. Gumbo who acted on his behalf in the transaction, and had the property registered in his name. Mr. Gumbo was

not a witness in this case, and I have not heard his side of the story, so I will not comment any further on his involvement. Suffice it to state that the transfer of the property to Mr. Ruto, while there was an order stopping such transactions, cannot be lawful. Mr. Ruto's title is therefore liable to be cancelled by dint of Section 143 of the RLA, Article 40 (6) of the Constitution of 2010, and Section 26 of the Land Registration Act. In as much as Mr. Ruto is not a party to this case, I gave him a hearing, and I have come to the conclusion that his title must be cancelled, for it was unlawfully acquired. He may have been an innocent purchaser for value, but Section 26 (b) of the Land Registration Act, does not discriminate. So long as a title is acquired illegally, unprocedurally, or through a corrupt scheme, it matters not that the title holder is an innocent purchaser for value. This has been held in various authorities including the decision of Mutungi J, in the case of *Esther Ndegi Njiru & Another v Leonard Gatei, Nairobi ELC No.128 of 2011, (2014) eKLR*. The title of Hosea Ruto is therefore liable to be cancelled.

Issue (viii) : Should KIE be registered as proprietors of the suit properties ?

79. The main prayer sought by KIE is for cancellation of the titles of the 1st - 5th defendants and for KIE to be registered as proprietors. Following the discourse above, I am of the view that KIE are perfectly entitled to these orders.

80. The last issue is costs. Costs ordinarily follow the event. The costs hereof shall be to the plaintiff jointly and/or severally against the defendants.

81. I have finalized all issues in this case and I now make the following final orders :-

(a). I declare that the Commissioner of Lands erred in law in not renewing the leasehold titles comprised in the parcels Eldoret Municipality/ Block 8/ 592, 594, 595, 596 and 597 to the Kenya Industrial Estates and erred in law in issuing titles to the 1st - 5th defendants.

(b). I hereby issue an order cancelling the titles of the 1st - 5th defendants to the properties Eldoret Municipality/ Block 8 / 592, 594, 595, 596, and 597.

(c). I order the successor of the Commissioner of Lands to issue KIE with the requisite leasehold title thereto and they be registered as proprietors of the leasehold titles.

(d) I hereby order the 1st - 5th defendants, and /or Hosea Ruto and/or their servants, agents and/or assigns, to forthwith vacate the premises comprised in the land parcels Eldoret Municipality/ Block 8/ 592, 594, 595, 596, and 597, and if they do not so vacate within 15 days of the date hereof, the plaintiff be at liberty to apply for an order of eviction which shall be done at the cost of the party to be evicted.

(e). I issue an order of permanent injunction, barring the 1st - 5th defendants by themselves, their servants/agents and/or assigns from entering, being upon, or utilizing the land parcels Eldoret Municipality/Block 8/592, 594, 595, 596 and 597.

(d). I award costs to the plaintiff jointly and/or severally against the defendants.

82. It is so ordered.

DATED and DELIVERED at ELDORET this 30th day of JANUARY 2015.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT ELDORET

DELIVERED IN THE PRESENCE OF:-

Mr. Aseso h/b for Mr. Lagat of M/s Lumumba & Lumumba Advocates for the Plaintiff.

Mr. Miyienda h/b for Mr. J.N. Njuguna of M/s Njuguna Kathili & Company Advocates for the 1st, 4th and 5th Defendants.

Mr. J.M. Ngumbi of the State Law Office present for 6th Defendant.

No appearance for M/s. Nyaundi Tuiyott & Company Advocates for 2nd & 3rd Defendants.