



**Abdullahi & another v Mohamed & 2 others; Nairobi City County
 (Interested Party) (Environment & Land Case 725 of 2016 & 325 of 2019
 (Consolidated)) [2024] KEELC 1619 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1619 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
 ENVIRONMENT & LAND CASE 725 OF 2016 & 325 OF 2019 (CONSOLIDATED)
 EK WABWOTO, J
 MARCH 20, 2024**

BETWEEN

HABIBA NYAMBURA ABDULLAHI PLAINTIFF

AND

SHEIKH ABDULLAHI MOHAMED 1ST DEFENDANT

MELIHUN HASSEN WORSEME 2ND DEFENDANT

AND

NAIROBI CITY COUNTY INTERESTED PARTY

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 325 OF 2019

BETWEEN

MELIHUN HASSEN WORSEME PLAINTIFF

AND

HABIBA NYAMBURA ABDULLAHI DEFENDANT

AND

NAIROBI CITY COUNTY INTERESTED PARTY



JUDGMENT

1. This judgment is in respect to two consolidated suits which relate to the same suit property known as LR No. 209/7260/38, I.R. No. 135663 situated as Section 3, Eastleigh, Nairobi. In ELC Suit No. 725 of 2016, the Plaintiff vide the Plaint dated 29th June 2016 sought the following reliefs against the defendants; -
 - a. A declaration L.R. No. 209/7260/38 belongs to the Plaintiff.
 - b. That this Honourable Court orders the 1st Defendant to vacate the suit property and to demolish the structures he has erected thereon at his own costs.
 - c. That the Plaintiff pays aggravated damages to the Plaintiff for the unlawful trespass, occupation and mense profit.
 - d. The cost of the suit and interest at court rates.
2. Before the commencement of the hearing the 2nd defendant Melihun Hassen Worseme and the Interested party were joined to the said suit as the 2nd Defendant and Interested Party respectively. The 2nd Defendant despite being joined to the said suit as a party never filed any defence therein. The Interested Party filed an affidavit sworn on 14th December, 2021 by Eric Abwao Advocate its County Solicitor. The contents of the said affidavit shall be examined later in this judgement.
3. In respect to ELC No. 325 of 2019, the Plaintiff sought the following reliefs against the defendant vide the Plaint dated 3rd October 2019;
 - a. A permanent injunction restraining the Defendant whether by herself, her agents, or any other person claiming interest through her from trespassing causing any form of nuisance, evicting or interfering with the Plaintiff's tenants in occupation, harassing, intimidating and/or interfering with the Plaintiff's suit property L.R. No. 209/7260/38, I.R. No. 135663 Section 3 Eastleigh.
 - b. A declaration that the Plaintiff herein was and is the lawful and registered owner of L.R. No. 209/760/36, I.R. No. 135663 situated at Section 3, Eastleigh, Nairobi (herein "suit property") and the Defendant has no right whatsoever over the suit property.
 - c. General damages for trespass together with interest thereon.
 - d. Costs of the suit plus interest.
 - e. Such further relief as this court may deem fit to grant.
4. In response to the said suit, the Defendant filed a statement of defence and counterclaim dated 27th February, 2020. In the said counterclaim the Defendant sought the following reliefs against the Plaintiff:-
 - a. A declaration that the Counter-Claimant is the original and legal allottee of parcel of land known as LR. No. 209/7260/38 situated in Eastleigh within Nairobi County.
 - b. A declaration that the transfer of the suit property from one Sheikh Abdullahi Mohammed to the Plaintiff is null and void.



- c. A declaration that the counterclaimant is entitled to exclusive and unimpeded right of possession and occupation of the land known as LR. No. 209/7260/38 situated in Eastleigh within Nairobi County.
 - d. A declaration that the Respondent whether by herself or her servants or agents or otherwise howsoever are wrongfully in occupation of the suit property and are accordingly trespassers on the suit property.
 - e. Vacant possession of the suit property known as LR. No. 209/7260/38 situated in Eastleigh within Nairobi County.
 - f. A permanent injunction restraining the Plaintiff, whether by herself, her servants or agents or howsoever from entering, remaining on or continuing to be in occupation of the suit property LR. No. 209/7260/38; IR No. 135663 situated in Eastleigh within Nairobi County.
 - g. A mandatory Injunction do issue to the Commissioner of Lands to be compelled to forthwith cancel registration of the Plaintiff's title number to parcel of land known as LR. No. 209/7260/38; IR No. 135663 situated in Eastleigh within Nairobi County.
 - h. Costs of this suit.
 - i. Any other relief as this Honourable Court may deem fit to grant.
5. The Interested Party in the said suit Nairobi City County filed an Affidavit sworn on 14th December, 2021 by its County Solicitor Eric Abwao Advocate.
 6. As earlier mentioned, the suits were consolidated and heard together.
The case of Habiba Nyambura Abdullahi (The Plaintiff in ELC Case No. 725 of 2016 and Defendant in ELC 325 of 2019)
 7. The case of Habiba Nyambura Abdullahi is contained in her Plaint dated 29th June, 2016, witness statements sworn on 29th June 2016, 27th February, 2020, list and bundle of documents dated 29th June 2016, 27th February, 2020, and her oral testimony tendered in court on 17th October, 2023.
 8. It was her case that she is the registered allotted and beneficial owner of the suit property having been allocated by the then Nairobi City Council in 1996. She averred that she has never transferred the suit property to the Defendants nor any other person and that she still holds original documents in relation to the same.
 9. It was averred that after being allocated the said property she erected a perimeter wall in 1997 and thereafter began constructing a building on the suit premises. It was pleaded that the she was in peaceful occupation until around February, 2010 when one Abdi Hassan trespassed onto the suit property, demolished the perimeter wall and the building that she had begun constructing, claiming to be the owner of the suit property and later on or about June 2016, one Sheikh Abdullahi Mohamed equally trespassed into the suit property and demolished a building that she had constructed which had reached up to the 1st floor claiming to be the owner of the suit property.
 10. During trial, Habiba testified in support of her case in both the consolidated matters and she adopted and relied on her witness statement and bundle of documents that were on record as her evidence in Chief.
 11. When cross-examined, she stated she bought the land from Dr. Oyato who was working at City Hall even though she did not have a sale agreement. She also stated that she paid Kshs. 900,000 and was



issued with an allotment letter. She also stated that she had developed on the suit property before the structures were demolished.

12. She also stated that the court had ruled in ELC Case No. 63 of 2010 that she was the owner of the suit property and no appeal has ever been filed in respect to the said decision.
13. When asked about her name, she stated that the name “Abdullahi” belonged to her deceased husband and that she holds a dual nationality.
14. When asked whether she was aware if the property belonged to another person, she stated that she had seen another allocation issued to one Brian Muriuki in 2002. She also stated that she was not aware if Sheikh Abdullahi Mohamed had sold her property as she did not know when the same was done.
15. When re-examined, she stated that Dr. Oyato had a letter of allotment and had sold to her directly. She also stated that she had been paying rates and had never received any letter demanding any rates arrears. She further stated that Brian Muriuki was a minor and that she never saw any documents for transfer of the suit property from him. It was also stated that at the time of the transfer of the suit property to the 2nd Defendant, there was a case that was still pending before court.
16. She also stated in re-examination that the land had never been repossessed by the City Council and that she had been in the property from 1996 and that by the year 2002 she had been in the property for about six years.

The Case of Sheikh Abdullahi Mohamed the 1st Defendant in ELC 725 of 2016

17. The 1st Defendant save for filing an affidavit dated 25th February 2019 never filed any pleadings nor defended the suit. Equally no submissions were filed on his behalf despite knowledge of these proceedings.

The case of Melihun Hassen Worsame the 2nd Defendant in ELC Case No 725 of 2016 and Plaintiff in ELC Case No. 325 of 2019.

18. The case of Melihun Hassan Worsame is contained in her plaint dated 3rd October 2019, list and bundle of documents dated 3rd October 2019 and her oral testimony tendered in court on 17th October, 2023.
19. It was averred that she purchased the suit property in February 2016 from Sheikh Abdullahi Mohamed and at that time the property was not developed. She stated that after the property was transferred to her she obtained relevant approvals from National Environment Management Authority and Nairobi City County and proceeded to develop the suit property by putting up residential flats which were constructed in late 2016.
20. She pleaded the following particulars of illegality against Habiba;
 - a. Acting illegally and trespassing on the Plaintiff's on the Plaintiff's suit property.
 - b. The Defendant interference has made the Plaintiff not to enjoy quite possession and use of the suit property.
 - c. Claiming that she has interest over the suit property despite the fact that the Plaintiff is the lawful and registered owner of the suit property.
21. During the hearing of the suit she relied on her witness statement and documents on record as her evidence in chief. She also added that she did a search before buying the property from Sheikh Abdullahi Mohamed and it was transferred to her in 2016.



22. When cross-examined, she stated that she bought the land in December, 2015 for a sum of Kshs. 6,000,000. She also stated that she was not aware of any case neither was she informed of any that was pending when purchasing the property.
23. When asked about her profession. She stated that she is a business lady who earns her living from selling clothes.
The Case of Nairobi City Country, the Interested Party in the consolidated suits.
24. Save for filing an affidavit sworn on 14th December, 2021, by Eric Abwao Advocate and a County Solicitor of the Interested Party, no evidence was tendered on their behalf during trial and neither did they participate in the proceedings despite knowledge of the same.

The written submissions of Habiba Nyambura Abdullahi.

25. Habiba filed written submissions dated 16th November, 2023. She submitted that the then Nairobi City Council allocated the suit land to her vide a letter dated the 18th day of December 1996 at a consideration of Kshs. 41,000 which she fully paid vide a receipt dated 17th April, 2001 for Kshs. 40,166 filed and numbered 16 in her bundle of documents. Thereafter she proceeded to pursue the certificate of lease for the suit land and which was subsequently issued on the 5th June, 2001. She started constructing on her property and was confronted by an impostor claiming the same land which situation led her to file ELC Number 63 of 2010 and a ruling was delivered in her favour against the impostor, Abdi Hassan.
26. It was submitted that again later when she then started building on the suit property as the beneficial owner Sheikh Abdullahi Mohamed invaded her property and demolished her building which was at first floor in 2016.
27. She submitted that Sheikh Abdullahi allegedly laid claim to the suit property vide an allotment issued to an infant by the name Brian Muriuki and she questioned how Nairobi City Council enter into a contract with an infant with all the legal steps to be undertaken before forming a contract.
28. It was submitted that Sheikh Abdullahi Mohamed's documents laying claim to the suit property were a letter of allotment of the suit property addressed to the minor Brian Muriuki dated 6th day of November 2002 while her letter of allotment is dated the 18th December, 1996 and there has never been any cancellation or repossession and neither has any full Council meeting ever discussed termination of her Lease or pass resolution of repossession in respect of the said property to date.
29. It was submitted that she was not aware of the transfer of the suit land to Melihun from Sheikh Abdullahi Mohamed in 2016. She also submitted that no transfer or sale agreement was produced in Court by Melihun to confirm that indeed the property was bought for Kshs. 6 million which was very low for property in that area in 2016.
30. It was submitted that the title document exhibited by Melihun was obtained long after she had been allotted the suit land and the same had never been repossessed and as such it was never available for allocation to the alleged Brian Muriuki who in any case had no capacity to enter into contract with the Nairobi City Council. It was submitted that the dispossession of the property from her was irregular, illegal, corrupted and criminal in nature.
31. In respect to the role played by the Interested Party herein, it was submitted that its representative Eric Abwao failed to focus on the validity of the process of allocation of the property already duly allocated



after full payments of the fees and issuance of a lease and possession by lessee who has no known case of breach of any of the terms of allocation or whose allocation has not been revoked.

32. It was contended that the suit property was transferred to Melihun during the pendency of ELC No. 63 of 2010 and therefore contrary to the doctrine of “lis pendence” and hence claim to the same ought to be dismissed.
33. She also submitted on the equitable doctrine of first in time and argued that from the records her allotment letter for the suit property is dated the 18th December, 1996. Sheikh Abdullahi Mohamed documents shows that he was trying to acquire the suit property from persons not before court on 2nd April 2011 and Melihun acquired the property on 2nd March, 2016 and as such the doctrine of first in time is in her favour.
34. In respect to the reliefs sought, it was submitted that Sheikh Abdullahi Mohamed demolished Habiba’s building which had reached first floor using questionable documents and as such it is only fair that he pays damages. She prayed for damages and loss of anticipated income of Kshs. 20,000,000. She also prayed for dismissal of the claim sought by Melihun and costs of the suits together with an order of a permanent injunction.

The written submissions by Melihun Hassen Worsame

35. Melihun filed written submissions dated 15th December, 2023. She reiterated the evidence of the parties as tendered in court and pleading that were filed.
36. In respect to ELC No. 725 of 2016, she submitted that no prayers had been sought against her by Habiba and as such the same ought to be dismissed. She cited the case of Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd (High Court at Migori Civil Appeal No. 52 of 2017).
37. It was submitted that Habiba and Sheikh Abdullahi Mohamed were in cahoots and/or in collusion to defraud her the property. It was argued that during cross-examination Habiba could not distinguish whether she was allocated the suit property by Nairobi City Council vide the purported allotment letter dated 1st December 1996 and paid a total sum of Kshs. 40,166 to Nairobi City Council or she bought the suit property (transferred) from Dr. Oyato upon payment of Kshs. 900,000.
38. It was also submitted that Habiba had failed to discharge her burden of proof on the balance of probabilities to demonstrate ownership of the suit property. The case of Stanely Maina Kagwonyo vs Isaac Kibiru Kahuthia [2022]eKLR was cited in support.
39. In respect to ELC 325 of 2019, it was submitted that the identity of Habiba remains unknown since in the court pleadings she goes by the name “Habiba Nyambura Abdullahi” yet her passport shows her names as “Kowalski Habiba Nyambura.”
40. It was argued that Melihun did due diligence before purchasing the suit property and that she duly confirmed that the suit property belonged to Sheikh Abdullahi Mohamed. The due diligence was done through Njihia Muoka Rashid Co. Ltd and a sum of Kshs. 6, 000,000 was paid as a purchase price and transfer effected.
41. In respect to the claim by Habiba, it was submitted that there were disparities in her names as they appeared in various documents, the ruling in ELC Case Number 63 of 2010 was a ruling obtained in default for failure of the defendant therein to enter appearance. Habiba had no proof of land rents and rates payments made in respect to the suit property and that no lease certificate had been issued to her.



42. In respect to the role of the interested party, it was submitted that Nairobi City County through its County Solicitor one Eric Abwao Advocate had filed an affidavit demonstrating that from their records the suit property was registered in the name of the her name and had earlier on been registered in the names of Sheikh Abdullahi Mohamed.
43. Citing the case of Moses Parantais Peris Wanjiku Mukuru suing as the Legal Representatives of the Estate of Sospeter Mukuru Mbere (Deceased) vs Stephen Njoroge Macharia [2020]eKLR, it was submitted that she is an innocent purchaser for value without notice having done due diligence before purchase.
44. Relying on the provisions of Section 24(G) and Section 26 of the *Land Registration Act* No. 3 of 2012, it was argued that her interest in respect to the property ought to be protected because she is the registered owner of the same. The Court was urged to grant her the reliefs sought on the basis that the suit had been proven to the required standard. The court was also urged to award costs.

Analysis and determination

45. The Court has carefully read and considered the pleading by the parties, the evidence adduced and the relevant provisions of law and finds that the issues for determination are as follows: -
 - i. Who is the bona fide owner of the suit property?
 - ii. What are the appropriate reliefs to issue herein.

The Court shall now proceed to address the said issues sequentially.

Issue No. 1 Who is the bona fide owner of the suit property?

46. Article 40 of *the Constitution* of Kenya, 2010, elaborates on the right to own property in Kenya. It provides as follows; -
 - “(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - (a) of any description; and
 - (b) in any part of Kenya.
 - (2) Parliament shall not enact a law that permits the State or any person--
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
 - (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--
 - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or



- (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a Court of law.

47. Indefeasibility of the title is provided for in Section 26 (1) (b) of the [Land Registration Act](#) which states;

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –

- (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.”

48. In *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR the Court of Appeal stated that:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

49. In *Daudi Kiptugen v Commissioner of Lands & 4 Others* [2015] eKLR the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

50. In *Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another*, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.



51. Habiba and Melihun have both laid claim to the suit property. Melihun has claimed being the sole registered owner of the same on the basis of Section 24(a) and 26(1) of the [Land Registration Act No. 3 of 2012](#). Habiba has stated that she acquired the property when the then Nairobi City Council allocated the suit land vide a letter dated the 18th day of December 1996 at a consideration of Ksh 41,000 which she paid vide a receipt dated 17th April 2001 which was produced in evidence at page 16 of her bundle of documents. She also produced in evidence a certificate of lease dated 5th June 2001 issued by Nairobi City Council showing that she is the proprietor of the suit property.
52. Melihun on the other hand gave the following narrative as to how she acquired the suit property; she stated that she acquired the suit property upon purchase from Sheikh Abdullahi Mohamed in 2016 after undertaking due diligence and carrying out various searches of the suit property on diverse dates of 3rd December 2015, 6th January 2016 and 4th February, 2016. A sum of Kshs. 6,000,000 was paid as purchase price and transfer executed. Approvals from the relevant government agencies including NEMA and Nairobi City County were obtained and residential flats were completed in late 2016 upon a six-storey building with thirty (30) units was constructed. On 17th September, 2019 a search was conducted and confirmed that the property belongs to her as the duly registered owner.
53. She also averred that she was an innocent purchaser for value in respect to the suit property.
54. As earlier stated both parties are laying claim to the suit property. Both parties also claim to have a title to the same. From the evidence that was tendered, it was not disputed that Melihun is currently in possession of the suit property. Both parties having laid claim to the property are deserving proprietary protection and to adequately donate this protection this Court must look into the root to its ownership. This approach was well appreciated in the case of *Hubert L. Martin & 2 Others vs Margaret J. Kamar & 5 Others* [2016] eKLR. Equally in the case of *Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another*, the court stated as follows:
- “We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.
55. Habiba submitted that Sheikh Abdullahi did not acquire the suit property lawfully since the allotment letter issued therein upon which he acquired the suit property was issued to a minor Brian Muriuki who did not have any capacity to contract.
56. Melihun on the other hand submitted that Habiba had not proved her case to the required standard since she had acquired the property lawfully upon purchase from Sheikh Abdullahi. It was submitted that Habiba was unable to demonstrate and distinguish whether she was allocated the suit property by Nairobi City County vide allotment letter dated 1st December, 1996 and paid a total sum of Kshs, 40,166 to Nairobi City Council or to having bought the same from Dr. Oyato for a sum of Ksh 900,000/-
57. From the evidence that was adduced herein during trial, it was evident that the root of the suit property can be traced from originally being held by Nairobi City Council before its subsequent allocation. The evidence before this court shows that Habiba’s allotment letter is dated 18th December, 1996. Sheikh Abdullahi who was a party to this suit declined to give or tender any evidence as to how he acquired



the suit property. While Melihun alleges due to have done diligence, she ought to have also done a historical interrogation and investigation in respect to the said property. If she would have bothered to delve into the history of the title, she would have discovered that the property belonged to someone else and was not available for sale.

58. The Supreme Court in *Dina Management Limited vs County Government of Mombasa and 5 Others* [2023]eKLR stated;

“As held by the court of Appeal in *Munyu Maina versus Hiram Gathiha Maina Civil Appeal No. 239 of 2009* [2013]eKLR, where the registered proprietor’s root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore, the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”

59. Habiba was allotted and or acquired the property on 18th December, 1996. There was no evidence adduced to the effect that the same had been cancelled nor revoked. Hence therefore the said property was not available for reallocation to another entity unless through Habiba’s consent.

60. Melihun alleged to have acquired the same in 2016 through purchase from Sheikh Abdullahi. This makes it clear that Habiba acquired the suit property earlier before it was transferred to Sheikh Abdullahi. This brings into consideration the doctrine of first in time. In this regard it is imperative to make reference to the holding of the Court of Appeal cases of *Elizabeth Wambui Kiragu vs Ndirangu Macharia* [2018]eKLR and *Kamau James Njedu vs Serah Wanjiru & Another* [2018]eKLR. Where the Court held thus:-

“Further, there are two competing titles herein over Ruiru Kiu Bloc 2/2820, which parcel of land lie on Index Map Sheet No. 4. The Plaintiff obtained her title deed over sheet No. 4 on 7th September 2010 and the Defendant obtained his in the year 2011. Therefore, this Court finds that the Plaintiff title is the first in time and should therefore, prevail. The Court will rely on the Maxim of Equity which states that when two equities are equal, the first in time prevails.”

61. Equally, in the case of *Gitano Investment Ltd & 3 Others vs Commissioner of Land HCCC No. 1114 of 2002*, where the Court held that:-

“...having found that the Plaintiff’s title deed is the first in time and that it should prevail, then the court further finds as a holder of certificate of registration, she’s deemed to be the absolute and indefeasible owner.”

62. On whether Melihun was a bonafide purchaser far value without notice. A bona fide purchaser may successfully rely on the bona fide doctrine if she proves that:

- i. She holds a certificate of Title.
- ii. She purchased the Property in good faith;
- iii. She had no knowledge of the fraud;
- iv. The vendors had apparent valid title;
- v. She purchased without notice of any fraud;



- vi. She was not party to any fraud.
63. In the instant case, Melihun pegged her acquisition of the suit property through purchase from Sheikh Abdullahi. From the evidence adduced herein, it was evident that Sheikh Abdullahi's documents were tainted with fraud. He never appeared before this court nor testified to controvert the adverse evidence tendered against him. The alleged Brian Muriuki who allegedly had the property before it was transferred to Sheikh Abdullahi equally never attended court to testify either by himself or through his mother. Equally Edwin Abwao who deponed an affidavit on behalf of the Nairobi City County alleging that the property belonged to Melihun did not attend court to prove the said allegations. Melihun equally did not adduce any evidence nor submitted on how the property was acquired by Sheikh Abdullahi prior to her purchase. Considering the above, Melihun doesn't fit within the parameters of a bonafide purchaser for value without notice of any defect in the title.
64. The Court having analysed the evidence adduced herein, is satisfied that Habiba has been able to satisfactorily show and prove that she is the bonafide owner of the suit property herein.

Issue No. 2 What are the appropriate reliefs to grant herein

65. Habiba sought for several orders in her plaint dated 29th June, 2016 and other relief in her counterclaim dated 27th February, 2020 as enumerated earlier in this judgement. Melihun equally sought for several reliefs as enumerated in her plaint in respect to ELC 325 of 2019 dated 3rd October, 2019. The Court has already held that Habiba was able to prove that she is the bonafide owner of the suit property and in view of the foregoing she is entitled to the reliefs sought.
66. I wish to refer to the case of Elijah Makeri Nyangwara –Vs- Stephen Mungai Njuguna & Another [2013] the Court held that;
- “The evidence in this case puts no one in doubt that the title to the 1st Defendant was obtained illegally, unprocedurally or through a corrupt scheme. The documents that conveyed title to him were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of Section 26 (1) (b) have been met and that the title of the 1st Defendant is liable to be cancelled. I therefore proceed to cancel the title of the 1st Defendant and his registration as proprietor of the suit land. The Plaintiff should be registered as owner of the suit land. It is regretful that the 1st Defendant was snared by the scheme perpetuated by the 2nd Defendant. I sympathise with him but I must ensure that the real title holder is protected and that he is registered as the proper owner of the suit land.”
67. Further in the case of Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR the Court held that
- “It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna



& Another, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- "...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. "I stand by the above words and I am unable to put it better than I did in the said dictum."

68. The Court is satisfied that the certificate of title held by Melihun was procured un-procedurally and therefore, null and void. In view of the foregoing, this court must then determine whether it is in a position to cancel it. Section 80(1) of the Land Registration Act comes into play. It stipulates:-

"Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake."

69. This court having found that Habiba is the legal owner of the suit property, it is only fair that the register be rectified to cure the illegality perpetrated herein and return the suit property to its rightful owner.

70. Habiba also sought for damages for trespass and demolition of her structures which were on the suit property. The evidence that was adduced herein, shows that the Habiba had constructed a perimeter wall and put up a structure in the suit property which was demolished when it was at the first floor. It was submitted that she had suffered damages since the building was demolished by Sheikh Abdullahi Mohammed and She urged the court to consider damages for loss of her building and anticipated income since 2016 of Kshs. 20 million for loss of anticipated income from her demolished building for a period of over 7 years from 2016 to date.

71. The claim for general damages for trespass touches on the interference with the legal and bonafide proprietor's right to occupation, possession and use of the property. The said claim cannot arise in the absence of interference with occupation and possession of the designated property.

72. In assessing and awarding the quantum of general damages, this Court has taken into account and adopted the principles espoused in the case of Kenya Power & Lighting Company Ltd v Ringera & 2 others (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment), where the Court of Appeal stated and held thus;

"The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distill and replicate as hereunder:

- i. Harlshurys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner's land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried



out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.

- ii. Duncan Nderitu Ndegwa vs. Kenya Pipeline Company limited & Another [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.
- iii. Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less."

73. Considering the elaborate principles which have been encountered and highlighted above, coupled with the locality of the suit property as well as the duration of trespass complained of and considering the right of ownership to land as espoused vide Article 40(3) of *the Constitution* of Kenya 2010, it is the finding of this court that an award of Kshs. 5,000,000 for general damages would be sufficient.
74. In respect to costs the court is granted discretion under Section 27 of the *Civil Procedure Act* to award costs. Costs usually follow the even unless special circumstances present themselves. In this case Habiba is the successful party and she has succeeded in making her case and getting orders as outlined above. Thus, she is entitled to the costs of the consolidated suits and the counterclaim.

Final Orders

75. In conclusion, this court having renewed and analysed the issues and evidence adduced herein, it is satisfied that Habiba Nyambura Abdullahi has proved her case on a balance of probabilities and proceeds to grant the following orders: -
- a. A declaration be and is hereby issued that the suit property L.R. No. 209/7260/38, I.R. No. 135663 belongs to Habiba Nyambura Abdullahi.
 - b. An Order be and is hereby issued directing Melihun Hassen Worseme to vacate the suit property and demolish the structures erected thereon within 90 days from today.
 - c. Sheikh Abdullahi Mohamed is hereby ordered to pay a sum of Kshs. 5,000,000/- as general damages for trespass to Habiba Nyambura Abdullahi.
 - d. An Order of permanent injunction be and is hereby issued against Melihun Hassen Worseme whether by herself or any other person acting on her behalf from entering, remaining on or continuing to be in occupation of the suit property L.R. No. 209/7260/38, I.R. No. 135663.
 - e. An Order be and is hereby issued directing the Chief Land Register to cancel registration of Melihun Hassen Worseme's title in respect to L.R. No. 209/7260/38, L.R. No. 135663.
 - f. Costs of the consolidated suits and counterclaim are awarded to Habiba Nyambura Abdullahi.
 - g. Any other relief not expressly granted is declined.

Judgment accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF MARCH, 2024.

E.K. WABWOTO

JUDGE

In the presence of:-

Ms. Njeri Kiagayu for Plaintiff in ELC No. 725 of 2016 and Defendant in ELC No. 325 of 2019.

Ms. Khisa h/b for Mr. Musdaf for 2nd Defendant in ELC No. 725 of 2016 and Plaintiff in ELC No. 325 of 2019.

N/A for other parties.

Court Assistant: Caroline Nafuna.

