



**Tenai v Sidhu & 5 others (Civil Appeal 106 of 2019)  
[2025] KECA 105 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 105 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPEAL 106 OF 2019  
MA WARSAME, JW LESSIT & WK KORIR, JJA  
JANUARY 24, 2025**

**BETWEEN**

**GEOFFREY TENAI ..... APPELLANT**

**AND**

**RAGBHIR SINGH SIDHU ..... 1<sup>ST</sup> RESPONDENT**

**KIPKEMBOI ARAP KOSGEI ..... 2<sup>ND</sup> RESPONDENT**

**COMMISSIONER OF LANDS ..... 3<sup>RD</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 6<sup>TH</sup> RESPONDENT**

*(An appeal from the judgment of the Environment and Land Court at Eldoret  
(A. Ombwayo, J.) delivered on 21st December 2018 in ELC Case No. 200 of 2015)*

**JUDGMENT**

1. The 1<sup>st</sup> respondent, Ragbhir Singh Sidhu, moved the Environment and Land Court (ELC) at Eldoret vide a plaint dated 10<sup>th</sup> July 2015 claiming ownership of land parcel number Eldoret Municipality/Block 13/265 (hereinafter referred to as (“the suit property”), which had been registered in the name of the appellant, Geoffrey Tenai. He claimed that the appellant, alongside Kipkemboi Arap Kosgei, the Commissioner of Lands, the County Land Registrar, the National Land Commission and the Attorney General, the respective 2<sup>nd</sup> to 6<sup>th</sup> respondents colluded and perpetuated fraud leading to the registration of the suit property in the name of the appellant. His claim was vehemently opposed by the appellant as well as the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents.



2. On 21<sup>st</sup> December 2018, Ombwayo, J. entered judgment in favour of the 1<sup>st</sup> respondent as follows:

“I do find that the 1<sup>st</sup> defendant obtained the allotment letter and title to the property on the 25<sup>th</sup> May 2012 and 28<sup>th</sup> February 2013 un-procedurally as there was a pending application for extension of lease. There was no notice issued to the plaintiff [herein the 1<sup>st</sup> respondent] of the intention to allocate the property to another person by the 3<sup>rd</sup> – 6<sup>th</sup> defendants.

In conclusion, this court finds that though the 2<sup>nd</sup> defendant is the registered proprietor of the suit property, his registration as proprietor flows from an irregularity and the plaintiff is entitled to be considered for the application for extension of lease by virtue of the principle of legitimate expectation.

The upshot of the above is an order that the registration in respect of the suit property be rectified and the 2<sup>nd</sup> defendant’s name to be deleted and the name of the plaintiff to be re-entered as the registered proprietor as at the expiry of the lease and the 5<sup>th</sup> defendant to consider the application of the extension of the lease by the plaintiff that is pending determination. Costs to the plaintiff. Orders accordingly.”

3. The appellant is dissatisfied with the judgment of the learned Judge and is before us on the grounds that the learned Judge erred in finding that the 1<sup>st</sup> respondent’s lease expired in 2009 instead of 2008; finding that the failure by the 3<sup>rd</sup> and 4<sup>th</sup> respondents to consider the application for extension of the lease contravened the 1<sup>st</sup> respondent’s right to natural justice and legitimate expectation; applying *the Constitution* of 2010 and the *Land Act*, 2012 retrospectively; finding that there was a pending application for the extension of the lease by the 1<sup>st</sup> respondent; finding that the appellant’s registration as the proprietor was as a result of an illegality; not rendering a decision on the counterclaim; failing to find that the appellant was a purchaser for value; failing to consider the whole evidence on record; and finding that legitimate expectation overrode legal provisions. It is therefore his prayer that the appeal be allowed.
4. The 1<sup>st</sup> respondent’s case was that he purchased the suit property from the original allottees, Rannesh Lall Aggarwal and Sadrudin Shainshudin Nurani and that the lease to the property expired on 1<sup>st</sup> October 2009. Upon the expiry of the lease, he commenced the renewal process and obtained all the requisite approvals whereby the 3<sup>rd</sup> respondent acknowledged having received his application for extension of the lease. He never received any communication that his application had been rejected. While waiting for a response from the 3<sup>rd</sup> respondent, the 2<sup>nd</sup> respondent was issued with a lease over the suit property for 99 years effective from 1<sup>st</sup> June 2012 and on 28<sup>th</sup> February 2013, the 4<sup>th</sup> respondent issued a certificate of lease in respect of the suit property in favour of the 2<sup>nd</sup> respondent. The suit land was then transferred by the 2<sup>nd</sup> respondent to the appellant. It was the 1<sup>st</sup> respondent’s case that the actions of the appellant and the 2<sup>nd</sup> - 5<sup>th</sup> respondents were fraudulent. The 1<sup>st</sup> respondent proceeded to outline various particulars of fraud allegedly perpetuated jointly by the appellant and 2<sup>nd</sup> respondent, as well as those jointly committed by the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents.
5. The particulars of fraud against the appellant and 2<sup>nd</sup> respondent were that of grabbing the suit property; stealing the 1<sup>st</sup> respondent’s land; secretly acquiring documents of title over the 1<sup>st</sup> respondent’s land; colluding with Government officers to illegally acquire the suit land; and un-procedurally acquiring documents of title for the suit land. Against the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents, the particulars of fraud were that of allocation and transfer of the land to the appellant and the 2<sup>nd</sup> respondent in disregard of the 1<sup>st</sup> respondent’s rights; failing to act on the 1<sup>st</sup> respondent’s application



for renewal of the lease; and un- procedurally transferring the suit property to the appellant and the 2<sup>nd</sup> respondent.

6. During the hearing of the case, the 1<sup>st</sup> respondent testified as PW1, stating that the suit property belonged to him having bought it from Ramesh Lall Aggarwal and Sadrudin Shamshudin Nurani in 1982. He produced a lease document dated 6<sup>th</sup> October 1982 and additionally stated that he was issued with the certificate of lease on 1<sup>st</sup> January 1983, which lease was for a period of 99 years commencing on 1<sup>st</sup> October 1909. He further stated that he applied for an extension of the lease on 20<sup>th</sup> September 2010 and in the process acquired all the necessary approvals by the Town Planning Officer and the Physical Planning Officer. He testified that his application was approved by the District Surveyor on 8<sup>th</sup> October 2010 as well as the Municipal Council of Eldoret. His application was then forwarded to the Commissioner of Lands who responded to him confirming receipt of his application for renewal. PW1 attested that he made numerous enquiries on the process of renewal and got no response. He would later learn that the suit property had been allocated to 2<sup>nd</sup> respondent and a new register opened on 28<sup>th</sup> February 2013. On 2<sup>nd</sup> February 2014, the suit property was transferred to the appellant. His case was that the allocation of the land to the 2<sup>nd</sup> respondent and the subsequent transfer to the appellant was fraudulent.
7. The appellant filed a defence and counterclaim through which he denied the allegations put forth by the 1<sup>st</sup> respondent and sought to affirm his ownership over the suit property. At the hearing of the matter, he testified as DW1 stating that he purchased the suit property from the 2<sup>nd</sup> respondent on or about 7<sup>th</sup> August 2013 at the cost of Kshs. 4,000,000. Before he purchased the suit property, he conducted due diligence by applying for a search at the land registry which confirmed that the 2<sup>nd</sup> respondent was the legal and registered owner of the suit property. He attested that he was unaware of any fraud perpetrated by either himself or the 2<sup>nd</sup> respondent and that the documents held by the 2<sup>nd</sup> respondent were genuine and regular. He also stated that at the time, there was no registration of interest by the 1<sup>st</sup> respondent on the suit property which was visible on the face of the documents or the search. He asserted his rights as a bona fide purchaser for value without notice of any defect in the 2<sup>nd</sup> respondent's title. It was also his evidence that upon purchase and transfer of the property, he has had exclusive possession of the same whereof he had proceeded to put up a perimeter wall and gate. He also pointed out that despite the lease by the 1<sup>st</sup> respondent expiring in October 2008, the application for renewal, if any, was made in 2010 which was about 2 years after the lease had expired hence there was nothing to be extended. He also denied any collusion with the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents in acquisition of the land.
8. On their part, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents filed a joint statement of defence denying all the allegations made against them by the 1<sup>st</sup> respondent. During trial, Dorothy Chepkogei Leting (DW2) testified that she was the County Land Registrar hence her familiarity with the case. She affirmed that the suit parcel was a leasehold property with the current lease running for 99 years from 1<sup>st</sup> June 2012. She stated that the previous lease registered in favour of the 1<sup>st</sup> respondent ran from 1<sup>st</sup> October 1909 and that the register was closed on 28<sup>th</sup> February 2013. She produced the register and stated that the closure of the register was due to the expiry of the lease. Upon closure of the register, the land was subsequently re-allocated to the 2<sup>nd</sup> respondent on 28<sup>th</sup> February 2013 and a certificate of lease was issued on the same day. It was her evidence that on 7<sup>th</sup> August 2014, the land was transferred to the appellant. According to the Land Registrar, the plaintiff had not applied for extension of the lease and therefore the allocation to the appellant was regular. She denied any collusion with the appellant or the 2<sup>nd</sup> respondent and insisted that the allocation of the land to the 2<sup>nd</sup> respondent and the subsequent transfer to the appellant was legal.



9. This appeal was before us for hearing on 15<sup>th</sup> July 2024 when learned counsel Mr. Korir appeared for the appellant. Ms. Chesoo represented the 1<sup>st</sup> respondent whereas Mr. Odongo appeared for the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents. There was no representation for the 2<sup>nd</sup> respondent.
10. Learned counsel for the appellant through submissions dated 8<sup>th</sup> July 2024 referred to *Selle & Another vs. Associated Motor Boat Co. Ltd. & Others* [1986] EA 123 as the benchmark for the exercise of the Court's jurisdiction on a first appeal. Turning to the substance of the appeal, counsel submitted that the 1<sup>st</sup> respondent's case did not meet the threshold to warrant the invocation of the doctrine of legitimate expectation. Reference was made to *Communications Commission of Kenya & 5 Others vs. Royal Media Services Ltd. & 5 Others* [2014] eKLR as espousing the principles of legitimate expectation. According to counsel, there was no express and unambiguous guarantee by the 3<sup>rd</sup> respondent to the 1<sup>st</sup> respondent that he would be considered on priority for the renewal of the expired lease.
11. Counsel proceeded to fault the learned Judge for applying *the Constitution* of 2010 and the *Land Act*, 2012 urging that the doctrine of legitimate expectation would not be applied in violation of the express provisions of the law that existed in 2008 when the lease expired. Counsel urged that the applicable law was the Registered *Land Act*, Cap 300. Reliance was placed on the decision in *Municipality of Mombasa vs. Nyali Limited* [1963] EA 371 for the proposition that where legislation affects substantive rights, it will not be construed to operate retrospectively.
12. Counsel further submitted that legitimate expectation did not apply to the lease which was for a fixed period of 99 years. Reliance was placed on *Oshwal Academy (Nairobi) & Another vs. Indu Vishwanath* [2015] eKLR and *EACC vs. Nicholas Mwenda Mtwaruchi & 8 Others* [2018] eKLR for the proposition that the doctrine of legitimate expectation does not apply to fixed term contracts. Counsel additionally submitted, since legitimate expectation was not pleaded, the issue was not available for determination by the learned Judge. In urging this ground, counsel referred to the case of *Kenya Airport Authority vs. Mitu-Bell Welfare Society & 2 Others* [2016] eKLR, where it was held that courts should only determine issues raised by the parties in their pleadings.
13. Faulting the learned Judge for ordering for the rectification of the register, counsel submitted that the order contravened the provisions of section 80 (2) of the *Land Registration Act* which provides that the register shall not be rectified to affect the title of the proprietor in possession who has acquired the land, lease or charge for value and has no knowledge or is complicit in the omission, fraud or mistake in consequence of which the rectification is sought. According to counsel, there was no evidence tendered before the learned Judge to warrant an order of rectification of the register. It was counsel's submission that the appellant was a bona fide purchaser for value without notice. Further, that as was held in *Elizabeth Wambui Githinji & 29 Others vs. Kenya Urban Roads Authority & 4 Others* [2019] eKLR, a bona fide purchaser is assured of protection, notwithstanding that previous dealings might have been mired in fraud so long as he or she did not have actual, constructive or imputed notice of the fraud and did reasonable due diligence before the purchase. According to counsel, as was held in *Katende vs. Haridar & Co. Ltd.* [2008] 2 EA 173 as cited in *George Njenga Kagai vs. Samwel Kabi Njoroge & Another* [2019] eKLR, the title of a purchaser who purchased the property for valuable consideration, from a vendor with an apparently valid title, in good faith without knowledge of, or participation in the fraud, cannot be impeached. Reliance was placed on *Vijay Morjaria vs. Nansing Darbar & Another* [2000] eKLR and *Central Bank of Kenya Ltd vs Trust Bank Ltd & Others* [1996] eKLR, for the submission that fraud must be specifically pleaded and proved. According to counsel, the appellant had proved that he was a bona fide purchaser for value without notice and the 1<sup>st</sup> respondent never



- established fraud on the part of the appellant. In the end, counsel urged that we allow the appeal with costs.
14. Learned counsel Ms. Chesoo relied on her submissions dated 15<sup>th</sup> July 2024 to oppose the appeal on behalf of the 1<sup>st</sup> respondent. Counsel referred to Article 164(3) of *the Constitution* and section 3 of the *Appellate Jurisdiction Act* to outline the jurisdiction of the Court when entertaining a first appeal. On the substance of the appeal, learned counsel adverted to section 13(1) of the *Land Act* to submit that the 1<sup>st</sup> respondent had a pre-emptive right for the renewal of the lease because he was the immediate former holder of the lease and had met the qualifications for renewal. Counsel submitted that the issuance of the lease to the 2<sup>nd</sup> respondent infringed upon the 1<sup>st</sup> respondent's right.
  15. Learned counsel for the 1<sup>st</sup> respondent further submitted that her client's case had satisfied the principles for the application of legitimate expectation. According to counsel, the 3<sup>rd</sup> respondent was required by Article 47 of *the Constitution* to timeously process the application and give reasons to the 1<sup>st</sup> respondent for not renewing the lease. In support of this argument, counsel relied on R (Bibi) vs. Newham London Borough Council [2002] 1 WLR 237. Counsel referred to Republic vs. Commissioner of Lands & Another Ex parte Kithinji Murugu M'Mukindia [2014] eKLR to urge that the Government's past conduct creates legitimate expectation. It was also counsel's submission that the 3<sup>rd</sup> respondent was in breach of section 13 of the *Land Act* and Articles 47 and 232 of *the Constitution*.
  16. Dismissing the appellant's argument that the death of the 2<sup>nd</sup> respondent had disadvantaged him because the trial court was not in a position to determine the regularity and legality of the allocation of the plot to the deceased, counsel submitted that the learned Judge had properly found that the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents did not tender any evidence to support the 2<sup>nd</sup> respondent's application to be allotted the suit property. Further, that the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents had not given any lawful reason for their failure or refusal to renew the lease in favour of the 1<sup>st</sup> respondent. Counsel submitted that by allocating the land to the 2<sup>nd</sup> respondent, the 3<sup>rd</sup> respondent extinguished the 1<sup>st</sup> respondent's right not only to fair administrative action but also the right to be heard. To this end, counsel relied on John vs. Rees [1969] 2 All ER 274 and JMK vs. MWM [2015] eKLR to assert that a person likely to be adversely affected by a decision must be afforded an opportunity to be heard.
  17. According to counsel, the right to property under Article 40 of *the Constitution* did not extend to titles whose origin were questionable. In this regard, counsel referred to the cases of Chemey Investments Ltd. vs. Attorney General & 2 Others [2018] eKLR and Dina Management Ltd. vs. County Government of Mombasa & 5 Others [2023] eKLR, to urge that the plea by the appellant that he was an innocent purchaser for value was not available to him since the original title was fraudulently acquired.
  18. With regard to the laws that were applicable in this case, counsel submitted that since the allotment and transfer of the suit property took place between 2012 and 2014, *the Constitution* of Kenya, 2010 and the *Land Act*, 2012 were correctly applied. Counsel referred to the case of Kenya Airports Authority vs. Mitu-Bell Welfare Society & 2 Others (supra), to urge that *the Constitution* can be applied retrospectively to address historical injustices pertaining to land. In conclusion, counsel urged that we dismiss the appeal with costs.
  19. Through submissions dated 15<sup>th</sup> July 2024, learned counsel Mr. Odongo for the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents submitted that the learned Judge erred in finding that the previous lease lapsed in 2009. According to him, the lease expired on 1<sup>st</sup> August 2008. He submitted that the laws in place when the lease expired were the Government *Land Act* and the Registered *Land Act*, and that *the Constitution*, 2010 and the *Land Act*, 2012 were not in operation then. Even so, counsel contended



- that under section 60 of the Registered *Land Act*, there was a provision for a pre-emptive right for the renewal of the lease of the immediate former leaseholder and urged that right therefore existed prior to the Constitution, 2010 and the *Land Act*, 2012. Counsel relied on the decisions in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd. & 2 Others [2012] eKLR and Commissioner of Income Tax vs. Pan African Paper Mills (E.A) Ltd [2018] eKLR, to point that although the general rule is that Statutes should not operate retrospectively, there are exceptions to the rule. Counsel conceded that the appellant had not shown that the 1<sup>st</sup> respondent did not enjoy the pre-emptive right nor that the right did not exist.
20. Turning to the 1<sup>st</sup> respondent's assertion that he had applied for the renewal of the lease, counsel submitted that the 1<sup>st</sup> respondent fell short of proving that he had made an application for renewal of the lease. Counsel argued that the 3<sup>rd</sup> respondent having been wound up, it was not clear what became of the 1<sup>st</sup> respondent's application, if any. According to counsel, failure to call a witness from the National Land Commission negatively impacted the proceedings.
21. Mr. Odongo conceded that the learned Judge was right in finding that the appellant was not a bona fide purchaser for value without notice. Counsel relied on Henry Muthee Kathurima vs. Commissioner of Lands & Another [2015] eKLR; Funzi Island Development Ltd. & Others vs. County Council of Kwale & 2 Others [2014] eKLR and section 26 of the *Land Registration Act*, for the proposition that a title is as good as the process of acquisition. Finally, counsel highlighted the standard of proof in cases of fraud and proceeded to submit that the learned Judge properly held that fraud was not proved against the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents. Counsel consequently urged that the appeal against the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents be dismissed with costs.
22. This being a first appeal, our duty as enshrined under Rule 31
1.
    - (a) of this Court's Rules, 2022 is as was explained in Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR as follows:
 

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
23. We have reviewed the memorandum of appeal, the record of appeal, the submissions by counsel and the authorities cited in support of those submissions. In our view, the issues in this appeal are: whether *the Constitution*, 2010 and the *Land Act*, 2012 were applicable in this case; whether the doctrine of legitimate expectation was applicable in the circumstances of this case; whether the appellant was a purchaser for value without notice; and who should bear the costs of this appeal.
24. The first issue that arises for our determination is whether *the Constitution*, 2010 and the *Land Act*, 2012 were applicable in this case. In determining this issue, it is imperative to look at the facts and ascertain when the cause of action arose. The Court in D.T. Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina & Another [1980] eKLR adopted the definition of the phrase “cause of



action” as was adopted by Lord Pearson in *Drummond-Jackson V.B.M.A. (1970) 1 W.L.R. 688* at p. 696 thus:

“A cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint.”

25. In simple terms, a cause of action connotes the existence of facts which justify the exercise of the right to sue by the affected party against the offending party so as to be compensated for an infringement of a right. Having stated how a cause of action arises, the next question is to determine when the cause of action arose in this matter. To correctly answer this question, we must ascertain the facts of this case.
26. There is no dispute that the 1<sup>st</sup> respondent held the expired lease as from 22<sup>nd</sup> February 1983. It is also a point of convergence that the lease expired on 1<sup>st</sup> October 2008 as it was for a period of 99 years from 1<sup>st</sup> October 1909. Even though it is not clear when the 1<sup>st</sup> respondent commenced the process of seeking the renewal of the lease, it is deducible from the letter dated 20<sup>th</sup> July 2010 by the 3<sup>rd</sup> respondent that the 1<sup>st</sup> respondent had initiated the lease renewal process by that date. The new lease in the name of the 2<sup>nd</sup> respondent was issued on 28<sup>th</sup> February 2013. The issuance of this lease and its subsequent transfer to the appellant is what was being challenged by the 1<sup>st</sup> respondent before the trial court.
27. Based on the foregoing set of facts and considering that it is the allotment of the suit land to the 2<sup>nd</sup> respondent that is under challenge, the applicable laws were those in force in 2013. The actions of the appellant and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents that yielded the new lease took place in 2013. It is those actions that justified the 1<sup>st</sup> respondent's move to assert his right to the suit property. We therefore find no fault on the part of the learned Judge in determining the dispute based on *the Constitution* of Kenya, 2010 as well as the *Land Act*, 2012. That notwithstanding, and as correctly submitted by counsel for the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents, the repealed Registered *Land Act* at section 60 provided for extension of a lease from time to time between the lessor and the lessee.
28. The next issue is whether the doctrine of legitimate expectation was applicable in the circumstances of this case. On this issue, the appellant's complaint is two-pronged: first, that legitimate expectation was not pleaded; and second, that from the evidence adduced by the 1<sup>st</sup> respondent, the threshold for the application of the doctrine of legitimate expectation was not met. In relation to the first complaint, we have reviewed the pleadings in this case and we find that the 1<sup>st</sup> respondent raised the issue of legitimate expectation in paragraph 9 of the plaint, albeit not directly. Additionally, pleadings are to be considered wholesomely meaning that each paragraph is not to be looked at in isolation. Adopting such a methodology, we do not doubt that the pleadings as drafted, raised before the trial court the question as to whether the 1<sup>st</sup> respondent was entitled to the renewal of the lease being the immediate former lease holder thus bringing the case within the precincts of legitimate expectation or, specifically, section 13 of the *Land Act*.
29. The question therefore is whether the conditions for the application of the doctrine of legitimate expectation were satisfied. The Supreme Court expounded on the doctrine of legitimate expectation in *Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 Others* [2014] eKLR as follows:

“(264) In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.



(265) An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.”

The Court went on to distill the principles of legitimate expectation as follows:

“(269) The emerging principles may be succinctly set out as follows:

- a. There must be an express, clear and unambiguous promise given by a public authority;
- b. The expectation itself must be reasonable;
- c. The representation must be one which it was competent and lawful for the decision-maker to make; and
- d. There cannot be a legitimate expectation against clear provisions of the law or *the Constitution*.”

30. We will assess this case based on the stated principles while being cautious and cognizant that legitimate expectation ought not to override the law or *the Constitution*. The right to legitimate expectation or pre-emptive right as found in section 13(1) of the *Land Act* provided that:

“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.”

31. Therefore, was there an express, clear and unambiguous promise given by a public authority? It was the 1<sup>st</sup> respondent’s case that he initiated the process of renewal of the lease. Indeed, a perusal of the record reveals that there was communication on the 1<sup>st</sup> respondent’s application for the renewal of the lease between him and the 3<sup>rd</sup> respondent as well as between the 3<sup>rd</sup> respondent, the 4<sup>th</sup> respondent, the District Land Officer, and the then Municipal Council of Eldoret. This happened in 2010, the period the 1<sup>st</sup> respondent contends that he was processing the renewal of the lease. It was the evidence of the 1<sup>st</sup> respondent that he received a letter from the 3<sup>rd</sup> respondent dated 12<sup>th</sup> October 2010 and a review of that letter removes any doubt as to whether the 1<sup>st</sup> respondent made an application for renewal. The letter which was addressed to the 1<sup>st</sup> respondent by the 3<sup>rd</sup> respondent informed the 1<sup>st</sup> respondent that the Municipal Council of Eldoret had approved his application.

32. Under section 13 of the *Land Act*, the 1<sup>st</sup> respondent enjoyed the privilege of being considered in priority for the new lease. Additionally, as of 12<sup>th</sup> October 2010, the renewal application was on course without any hitches in the horizon. He had received various approvals and it was therefore his expectation that the lease would be renewed. Based on the letter dated 12<sup>th</sup> October 2010, he would expect that any change in the tides of his application would be promptly communicated to him with the reasons for the change of heart. This was not done.

33. Was the 1<sup>st</sup> respondent’s expectation reasonable? The pre-emptive right herein was that which is anchored in both the *Land Act*, 2012 and the law that it repealed. Furthermore, *the Constitution* having



been in place at the time, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents were under an obligation, as public officials, to tender prompt and efficient updates on the processing of the 1<sup>st</sup> respondent's application. The witness for the 4<sup>th</sup> respondent did not rebut the 1<sup>st</sup> respondent's claim that he made numerous inquiries about the progress of the application. All we heard, learned counsel, Mr. Odongo submit, was that the 3<sup>rd</sup> respondent was defunct and that the application could have fallen through the cracks during the transition. Counsel placed nothing before us to suggest that the 1<sup>st</sup> respondent's expectation that the lease would be renewed was unreasonable.

34. There is also no doubt that under section 13 of the *Land Act*, the 4<sup>th</sup> respondent was competent to make the representation. The question that may arise is that the letter by the 3<sup>rd</sup> respondent to the 1<sup>st</sup> respondent was written prior to the enactment of the *Land Act*. The answer would be that in 2012 when the register was closed, all the functions of the 3<sup>rd</sup> respondent were taken over by the 4<sup>th</sup> respondent including all the pre-existing undertakings. Further, as correctly submitted by Mr. Odongo, under section 60 of the repealed Registered *Land Act*, the 3<sup>rd</sup> respondent was legally mandated to oversee the enjoyment of pre-emptive rights by the 1<sup>st</sup> respondent. Nevertheless, as we have already held, the point at which the cause of action arose was in 2012 when the previous register was closed and a new one opened in favour of the 2<sup>nd</sup> respondent.
35. From the foregoing, we are satisfied that there was in existence a pre-emptive right bestowed upon the 1<sup>st</sup> respondent. It was within his right to develop a legitimate expectation that his lease would be renewed, and if not, he would be given a valid explanation as to why it was not renewed. When called upon to advance their case, the 3<sup>rd</sup> to 6<sup>th</sup> respondents did not tender any evidence before the trial court to explain the process adopted by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents in allotting the new lease to the 2<sup>nd</sup> respondent. No evidence was therefore adduced to support the procedure used in granting the lease to the 2<sup>nd</sup> respondent.
36. We therefore find no fault on the part of the learned Judge in finding that the allotment made in favour of the 2<sup>nd</sup> respondent was made against and in violation of the 1<sup>st</sup> respondent's legitimate expectation that the lease would be renewed in his favour. That expectation rhymed with the pre-emptive right that was provided in the land laws both pre and post the promulgation of the 2010 Constitution.
37. The next issue we will consider is the appellant's defence that his title should be protected as he was a bona fide purchaser for value without notice of any defect in the 2<sup>nd</sup> respondent's title. During cross-examination, the appellant stated that the 2<sup>nd</sup> respondent was his distant relative and that he did all the requisite due diligence before he purchased the land. In determining this issue, the starting point is a reference to the holding in *Munyu Maina vs. Hiram Gathiha Maina* [2013] eKLR 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 need not be noted on the register.”

38. The above dictum must be read in conjunction with section 112 of the *Evidence Act* to the extent that a person with facts within his personal knowledge has the burden of proving or disproving the existence of such facts. In this case, the facts surrounding the acquisition of the suit property were facts within the personal knowledge of the 2<sup>nd</sup> to 5<sup>th</sup> respondents and the appellant in as far as the allotment and the subsequent transfer were concerned.



39. Similarly, in *Samuel Kamere vs. Lands Registrar, Kajiado* [2015] eKLR, the Court dealing with issue of a bona fide purchaser held that:

“Since the appellant’s title is under challenge, in order to be considered a bonafide purchaser for value, he must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.”

40. The Supreme Court addressed the question as to when one can be considered a bona fide purchaser in *Dina Management Limited vs. County Government of Mombasa & 5 Others* [2023] KESC 30 (KLR) as follows:

“93. As held by the Court of Appeal in *Munyu Maina vs. 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.

94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.

....

110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to *Bawazir & Co (1993) Ltd*, who in turn could pass to the appellant.”

41. The cited authorities provide the ground rules for addressing the question as to whether the appellant was a purchaser for value. As can be seen from the cited decisions, where the title is under challenge, the onus is on the owner to prove that the process of acquisition of the title was not tainted. It also emerges that a court seized of such a matter must travel back in history to the first allotment or the origin of the title to ascertain the validity of the acquisition of the document.

42. In this case, the 1<sup>st</sup> respondent challenged the allotment made to the 2<sup>nd</sup> respondent with respect to the suit property which he claimed he had a pre-emptive right over. We have found that indeed such a right existed and that it was not honoured by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents. During the hearing, no evidence was adduced by the 4<sup>th</sup> respondent on the procedure used to issue the new lease to the 2<sup>nd</sup> respondent. The only evidence on record as tendered by DW2 was an allotment letter and the White Card in favour of the lease register opened on 28<sup>th</sup> February 2013. This evidence was not sufficient to dislodge the extensive documentary evidence adduced by the 1<sup>st</sup> respondent that he had commenced the process of renewal of the lease. It remained a grey area whether the 2<sup>nd</sup> respondent followed due process in securing the allotment of the suit property. It was also worth noting that despite averring that he conducted due diligence before acquiring the suit property from the 2<sup>nd</sup> respondent, the appellant failed to adduce any evidence as to the nature of the due diligence that he carried out. Not even did he



exhibit the document acquired as a result of an alleged search. Instead, the appellant concentrated on proving that the lease previously registered in favour of the 1<sup>st</sup> respondent had expired.

43. From the record, we are unable to find that the original lease issued in favour of the 2<sup>nd</sup> respondent was obtained procedurally and legally. It follows that the defence of a bona fide purchaser for value could not shield the appellant's title.
44. The other complaint by the appellant was that his counterclaim was not considered. Based on the conclusion that we have reached, we find that the counterclaim lacked merit and no error can be attributed to the trial court in that regard.
45. In the end, we find this appeal is without merit and is for dismissal. As for the costs, we find no reason to depart from the general rule that costs should follow the event. However, considering the complicit posture of the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents at the trial and despite their U-turn in this appeal, we find that they are not deserving of costs from the appellant. In essence, the appellant shall only bear the 1<sup>st</sup> respondent's costs of this appeal.

**DATED AND DELIVERED AT ELDORET THIS 24<sup>TH</sup> DAY OF JANUARY, 2025.**

**M. WARSAME**

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**JUDGE OF APPEAL**

**J. LESIIT**

.....

**JUDGE OF APPEAL**

**W. KORIR**

.....

**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

