



**Teleposta Pension Scheme Registered Trustees v Intercountries Exporters Limited & 5 others (Civil Appeal 293 of 2016) [2024] KECA 870 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KECA 870 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 293 OF 2016  
HM OKWENGU, JM MATIVO & GWN MACHARIA, JJA  
JULY 12, 2024**

**BETWEEN**

**TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES ..... APPELLANT**

**AND**

**INTERCOUNTRIES EXPORTERS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUBILEE INSURANCE COMPANY LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**PARK AVENUE INVESTMENTS LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**TRUST BANK LIMITED (IN LIQUIDATION) ..... 6<sup>TH</sup> RESPONDENT**

*(Being an appeal against the Judgment and order of the High Court of Kenya  
(R.E. Ougo, J) delivered on the 27th July, 2016 in HCCC No. 1400 of 2004)*

**JUDGMENT**

1. Allocations of land in this country have resulted in serious disputes. This is an appeal arising from one such dispute, in which the High Court (Ougo, J.) in a judgment delivered on July 27, 2016 found in favor of Intercountries Importers and Exporters Limited, who is now the 1<sup>st</sup> respondent in this appeal. The High Court declared the 1<sup>st</sup> respondent the lawful owner of the disputed property, land reference No. 209/13238 (originally LR 209/2397), located at Muchai road off Ngong road, Nairobi (hereinafter referred to as the suit property). The High Court also ordered Telposta Pension Scheme Registered Trustees (Telposta), who is the appellant herein to vacate the suit premises within sixty (60) days from the date of that judgment.



2. The suit in the High Court had been filed by Telposta who claimed that the suit property was originally under the occupation and ownership of the East African Community Common Services, and was later vested in the Kenya Post and Telecommunication Corporation (KPTC) which is the predecessor of Telposta. Up to the date of filing suit, Telposta, and before it, KPTC its predecessor, had been in occupation of the suit property.
3. Things took a different turn, when by a letter of allotment dated April 30, 1996, the Commissioner of Lands allocated the suit property (then Land Reference No. 209/2397) to Park Avenue Investments Limited (herein Park investments). A Grant (I.R. 69308) dated 1<sup>st</sup> May 1996 was issued for a term of 99 years and registered in favor of Park Investments. Upon carrying out a survey, the suit property was given 209/13238 as a new Land Reference Number.
4. Park Investments charged the suit property to Trust Bank Limited in liquidation (“the Bank”) as security for a loan facility of Kshs 40 Million. Park Investments defaulted in the repayment of the loan and the Bank in exercise of its statutory power of sale, advertised the suit property for sale by public auction, and sold the suit property to Intercountries Importers and Exporters Limited (herein Intercountries Limited), for a consideration of Kshs. 28,000,000/=. Subsequently, Intercountries Limited wrote to Telposta as the registered owner of the suit property, demanding vacant possession of the suit property by 31<sup>st</sup> December 2004. This is what impelled Telposta to file the suit in the High Court against Intercountries limited, Commissioner of Lands, The Attorney General, Jubilee Insurance Company Limited (Jubilee), Park Investments and the Bank.
5. Telposta sought inter alia a declaration that the purported alienation of the suit property to Park Investments, and the subsequent charge to the Bank, were all fraudulent, illegal, null and void. It claimed that it was the lawful owner of the suit property following vesting orders made by the government of Kenya in 1988 and 2001, vesting all movable and immovable property belonging to its predecessor (KPTC) on it (i.e. Telposta), to enable it discharge its public duty of paying the pensioners of its predecessor. Consequently, the suit property was not un-alienated government land that could be alienated to Park Investments, and from whom Intercountries Limited could lawfully derive title. Telposta faulted the Commissioner of Lands for acting ultra-virus and in violation of procedural requirements, in alienating the suit property to Park Investments, while being fully aware that the property belonged to Telposta and or its predecessor. Telposta stated that the market value of the suit property was Ksh.240,000,000/-.
6. Telposta pleaded fraud on the part of the Commissioner of Lands, contending that it acted in collusion with Park Investments, in issuing the title in the latter’s name, and attempting to dispose of the suit property to third parties in order to defeat Telposta’s claim. It sought, inter alia, an order for cancellation of the grant issued in favour of Park Investments, and the issuance of a new grant in its favour, or in the alternative, an order that the Commissioner of Lands compensates it, by paying to it a sum equivalent to the market value of the suit property as at the time of the High Court judgment.
7. In its defence, Intercountries Limited stated that it was the legal owner of the suit property, having legally purchased the suit property from the Bank, as a bonafide purchaser for value without notice, and therefore it had an indefeasible title.
8. Intercountries Limited filed a counterclaim in which it maintained, that Telposta had no cause of action against it; that the right cause of action was an action in damages which ought to have been brought by KPTC against the Commissioner of Lands; that KPTC, its servants and agents have been in occupation of the suit property since 2006; that consequently, Intercountries Limited has not been able to finalize its plans for conversion of the suit property to several high-rise apartments, causing



Intercountries Limited to lose revenue since 2004; Intercountries counterclaimed the loss of revenue from Telposta.

9. The Commissioner of Lands and the Attorney General (AG) filed a joint defence in which they contended that the registration of Park Investments, as the lawful owner of the suit property, by the Commissioner of Lands, was legal and lawful; that Telposta's purported ownership of the suit property was not known to the Commissioner of Lands or reflected in the register; and that any order for nullification of the title could only be made by a court of law. The Commissioner of Lands denied having acted wrongfully, illegally or fraudulently, as alleged by Telposta, but maintained that Telposta and its predecessors are the authors of their own misfortune having failed to present for registration the instruments vesting ownership of the suit property in its name.
10. Jubilee also filed a defence to Telposta's claim in which it claimed that it was a bonafide lender who advanced substantial sums to Intercountries Limited on the security of a charge over the suit property; that Intercountries Limited was the registered and unencumbered owner of the suit property; and that the registration of the charge was legal pursuant to Sections 23 and 32 of the Registration of Titles Act. Jubilee accused Telposta of being guilty of laches having failed to pursue any legal remedies for its claim. It urged that the suit against it, was frivolous, vexatious and an abuse of the court process.
11. Similarly, Park Investments also filed a defence and counterclaim, in which it denied Telposta's claim and pleaded that the vesting order and legal Notice No. 131 of 2001, on the basis of which Telposta claims ownership of the suit property, are incapable of granting ownership and or title to the suit property to Telposta. Park Investments claimed that it was at the material time the lawfully registered owner of the suit property. It denied being involved in any fraud as alleged by Telposta. In regard to the counterclaim, Park Investments maintained that its title to the suit property was absolute and indefeasible under the registration of Titles Act, *the Constitution* of Kenya and all other enabling provisions of the law. It conceded having charged the suit property to the Bank and explained that the Bank which was in liquidation, had secretly, fraudulently and without its knowledge purported to sell and transfer the suit property to Intercountries Limited. Park Investments pleaded that the purported sale of the suit property to Intercountries Limited was irregular, fraudulent, null and void, and that the sale violated its right of redemption as no auction or advertisement was ever done before the sale.
12. Park Investments added that the Bank illegally and fraudulently colluded with Intercountries Limited to sale the suit property at an under value, secretly, without notice or consent of Park Investments. It prayed for a declaration that the sale and purported transfer of the suit property to Intercountries Limited by the Bank is illegal, null and void, and an order directing the Commissioner of Lands and or the Registrar of Lands to cancel any purported registration of Telposta and Intercountries Limited as owners of the suit property, reinstate Park Investments' title to the suit property and award it damages for fraud and trespass.
13. The Bank also filed a defence in which it maintained that it had a lawful charge in regard to the suit property having advanced a substantial amount to Park Investment on the security of the suit property; that it had issued appropriate demand notices for payments; that no payments having been made, it sold the suit property through a private treaty to Intercountries Limited at a price of Ksh.28,000,000/-, that it exercised all due diligence in the sale and endeavored to find the best possible price in order to recover the outstanding amount of Ksh. 155,309,993.35/-. It denied being involved in any fraud or colluding with any person in the realization of the security.
14. During the hearing of the suit in the High Court, Telposta relied on the evidence of two witnesses. Peter K. Rotich an Administrator and Trust Secretary in the company, and one Daniel Cheruiyot, a valuer with Regent Valuers Int. Ltd. According to Mr. Rotich, Telposta is a pension scheme responsible



- for pension benefits due to pensioners who were employees of KPTC. The scheme generates income from properties vested upon it by the government. The suit property is one of such property, and the gazette notice vesting the suit property on KPTC has not been revoked, hence it was not available for alienation to Park Investments. To the contrary it is the title issued to Intercountries Limited which was revoked by the National Land Commission through Gazette Notice No. 15323 of 6<sup>th</sup> December, 2023. According to Mr. Cheruiyot, Regent Valuers Int. Ltd. valued the suit property at an open market value of Kshs. 240,000,000/ as at February, 2010. This is what informed the assertion by Telposta that the suit property which was sold to Intercountries Limited for Kshs 28 million, was sold at a gross undervalue.
15. Intercountries Limited relied on the evidence of 3 witnesses: these were Arif Madhani, the Managing Director of the Company, Reuben Kabbau, an Architect with Dream Architects Ltd and Charles Migwi a valuer with Lyold Masika Ltd. In a nutshell, Arif Madhani's evidence was that the suit property was sold to Intercountries Limited by the Bank by way of private treaty, at a consideration of Kshs.28 million. In addition to the consideration, the company paid outstanding stamp duty fees and rates of Kshs. 1,120,000 that was due and outstanding from Park Investments who was the former registered owner of the suit property. Consent to transfer the suit property was issued by the Commissioner of Lands, and the transfer was registered.
  16. Arif Madhani also testified that Intercountries Limited had plans of converting the suit property into several high-rise apartments and had therefore lost revenue as it was not able to put the plan into action due to Telposta's suit.
  17. Reuben Kabbau testified that Dream Architects prepared plans for conversion of the suit property into high end 3 bedroom apartments, and presented the plans to the then Nairobi City Council for approval, but the approval was not processed due to the ownership dispute involving the suit property. Charles Migwi testified that he did a valuation of the suit property, and carried out a rental assessment. On the basis of Migwi's evidence, Intercountries Limited claimed to have suffered lost income anticipated from the proposed apartments of Kshs.172,000,000/ which amount it counterclaimed from Telposta.
  18. The Commissioner of Lands relied on the evidence of Gordon Ochieng (Ochieng), who was at the material time the Chief Lands Administration Officer at the Department of Lands. The witness testified that the suit property was allocated to Park Investments through a letter of allotment dated 30<sup>th</sup> April, 1996. Following payment and the fulfillment of necessary procedures, the suit property was resurveyed and registered in the name of Park Investments as LR No. 209/13238 on 26<sup>th</sup> May, 1996. The witness explained that prior to the allotment to Park Investments, the suit property was owned by the East African Community Common Services, but upon winding up of that body, the land reverted back to the government in 1977 as unalienated government land. Gordon Ochieng stated that L.N. No. 131 of 2001 that purported to vest the suit property on KPTC was of no legal effect as the suit property had already been registered in the name of Park Investments.
  19. Ms. Margaret Maimba, an accountant with Jubilee, testified on behalf of the company. She stated that Jubilee granted Intercountries Limited a financial facility of Ksh.25 million which was secured by a charge on LR No. 209/13238 (i.e. the suit property). Intercountries Limited provided Jubilee with the original grant for the suit property, which grant was in the name of Park Investments. It also availed a transfer dated 6<sup>th</sup> February, 2004, made between the Bank and Intercountries Limited for transfer of the suit property to Intercountries Limited, which transfer was made pursuant to the Bank's statutory powers of sale. Jubilee also received a consent from the Commissioner of Lands for the transfer. Subsequently, Intercountries Limited repaid the charge in full and on 4<sup>th</sup> December, 2006, the charge registered against the suit property, was discharged.



20. Park Investments relied on the evidence of its Director one, Ken Boit (Boit), who stated that the company is the lawful owner of the suit property; that the purported transfer of the suit property to InterCountries Limited was null and void; that the company charged the suit property to the Bank as security for a loan of Ksh.40 million; that the Bank fraudulently and secretly sold the suit property to InterCountries Limited without issuing any statutory notices as required; and that the Bank sold the suit property at an undervalue, thereby defrauding Park Investments.
21. On its part, the Bank relied on the evidence of Adam Boru (Boru), who was its liquidation agent. Adam Boru confirmed that the Bank gave Park Investments a loan of Kshs 40 million on the security of the suit property which was charged in favour of the Bank. He asserted that the Bank realized its security in accordance with the law after Park Investments defaulted in the repayment of the loan and statutory notices were issued and duly served upon it. The Bank realized the security by selling the suit property by private treaty to InterCountries Limited for Kshs.28 million. Boru maintained that in selling the suit property the Bank exercised due diligence, obtained all necessary approvals for the transfer, and there was no collusion between the Bank and InterCountries Limited. He explained that a deed of indemnity was signed to confirm that InterCountries Limited and the Bank had taken all precautions in ensuring that the purchase was lawful.
22. In her judgment, the learned Judge found that the case turns on two interrelated issues. First, the validity of vesting orders made by Gazette Notices of 1988 and 2001, conferring ownership of both movable and immovable property of East African External Telecommunications Company Limited, to KPTC and its successor Telposta respectively. Second, the effect of the allotment of the suit property to Park Avenue Investments by the Commissioner of Lands vide the letter of allotment dated 30<sup>th</sup> April, 1996, and subsequent registration on 23<sup>rd</sup> May, 1996, by the Land Registrar.
23. The learned Judge found that the Act under which the 1988 vesting orders was made, was still subsisting and the notice made under it had not been revoked and therefore, until the repeal of Kenya Post and Telecommunications Act through Section 103(1) of the Kenya Communications Act, property that was vested in the former East African Ex-Telecom remained the property of its successor KPTC, and Telposta its predecessor, and the same was not available for further allocation.
24. In addition, the learned Judge found that the 2001 vesting order had its grounding on Kenya Posts & Telecommunications Corporation Act, a statute established specifically to determine the disposal of assets and liabilities and related communication matters. The vesting order was therefore not ultra-virus, as jurisdiction was expressly conferred on the Minister by the relevant Act of Parliament. The learned Judge rejected InterCountries Limited's contention, that, Telposta lacked the locus standi to sue, maintaining that paragraph 5(4) of the third scheduled to the repealed Act, under which the vesting order was made, anticipated that KPTC's cause of action, if any, would be continued by, or against, Telposta, the company or corporation upon which the property is transferred.
25. The learned Judge found that the Minister made the order for transfer of assets and liabilities on 24<sup>th</sup> August, 2001 which, was about 5 years after the Commissioner of Lands had issued a grant in regard to the suit property to Park Investments. The suit property was not therefore one of the assets available for transfer by the Minister at the time the vesting order was made in 2001, the suit property having already been allocated to a private entity.
26. Another significant finding made by the learned Judge was that at the time of allotment of the suit property to Park Investments by the Commissioner of Lands, no registration of title to the suit property had been made in favour of Telposta or its predecessor. The first registration of the suit property was therefore to Park Investments, and there was no evidence that the suit property was fraudulently acquired by Park Investments. The learned Judge concluded that InterCountries Limited



- was a bonafide purchaser for value without notice and was therefore the lawful proprietor of the suit property. Consequently, the court issued an order for Telposta, its agents and servants to vacate the suit property within 60 days from the date of the judgment, but dismissed the claim for mesne profits by Intercountries Limited, finding that the same was not proved.
27. Telposta being aggrieved by the judgment of the High Court, lodged an appeal to this Court in which it filed a memorandum raising 20 grounds. In brief, Telposta faulted the learned Judge of the High Court for, inter alia, narrowing down the issues in dispute to two, and ignoring several other important issues; in holding that the appellant did not prove the allegation of fraud; in holding that the title to Intercountries Limited was valid without considering the alienation process with respect to the suit property; in finding that Intercountries Limited was a bonafide purchaser for value; in failing to find that the suit property was vested on Telposta for pension funds for its members; in failing to consider the provision of the guarantee and indemnity between Intercountries Limited and the Bank; and in failing to address an alternative prayer pleaded by Telposta for an alternative property of similar market value to be allocated to it to raise pension funds for its members.
  28. Telposta filed written submissions which were highlighted during the hearing of the appeal by learned counsel Mr. Bundotich who together with Ms. Mathenge appeared for Telposta. In highlighting the written submissions, Mr. Bundotich consolidated Telposta's twenty grounds of appeal into four. These were, whether the suit property had been alienated for a public purpose to Telposta; whether the suit property was available for alienation to Park Investments and sold to Intercountries Limited; what is the legal effect of the legal notice vesting the suit property upon Telposta; whether Intercountries Limited was a bonafide purchaser for value without notice and whether title to the suit property is indefeasible.
  29. In the written submissions, Telposta compressed the grounds of appeal into two issues. Firstly, whether the Commissioner of Lands had powers to allot government land held by a public entity to private individuals; and secondly, whether the Telposta proved fraud on the part of the Commissioner of Lands and the Attorney General. Allied to the second issue is whether Intercountries Limited was a purchaser for value without notice. We shall highlight the submissions on the issues as compressed in the written submissions.
  30. In regard to the first issue, Telposta argued that the suit property was owned by KPTC as a public corporation owned by the government of Kenya; that the suit property was held for a public purpose and in pursuance of Telposta's public functions, that no evidence was adduced to demonstrate that the public purpose for which the suit property was held by Telposta, had ceased such as to warrant the Commissioner of Lands offering the suit property to a private individual; that the Commissioner of Lands had a legal duty to inquire from Telposta and all other interested stakeholders whether the property was still in use; and that it was only upon satisfaction that the suit property was no longer required for public use that the Commissioner could deal further with the suit property.
  31. Telposta relied on Commissioner of Lands –vs- Kunste Hotel Limited [1997] eKLR, where the Court held that it was necessary for the Commissioner of Lands to involve all parties before allotting public land to private individuals. It argued that there was no evidence before the trial court to prove that the laid down procedures for allocating land to a private individual, and or entity, was undertaken in regard to the suit property; that Park Investments only produced a letter of allotment issued in its favour by the Commissioner of Lands without any information on the procedures that were undertaken before the suit property was allocated to it; that there was no legitimate reason to allocate the suit property which was required for public purpose or which was held and occupied by a public corporation for a public purpose to a private individual, without following the laid down procedures; and that the



Commissioner of Lands breached the provisions of Sections 9, 12 and 13 of the repealed Government *Land Act*, by allotting the suit property to Park Investments.

32. In addition, that the ownership by Park Investments is unlawful and irregular and cannot be protected under Article 40 of *the Constitution* or Section 26 of the *Land Registration Act*; that the transfer to InterCountries Limited was null and void; that the learned Judge in her judgment analyzed the validity of Legal Notice No. 183 of 1988 and 131 of 2001 which vested the suit property to Telposta from its predecessor KPTC and found that the legal notices were valid and had not been revoked. Telposta argued that the suit property was not available for further allocation. Telposta reiterated that the suit property was vested to it through Legal Notice No. 131 of 2001. This conferred title and ownership to it, pursuant to which it has been in occupation since the same was vested upon it. The acquisition of the title to the suit property by Park Investments was irregular, null and void.
33. On the second issue, Telposta asserted that the suit property was irregular and un-procedurally allocated to Park Investments in 1996. This was because the property had already been vested on Telposta from KPTC its predecessor for the purpose of meeting its pension obligation to former employees of KPTC. In addition, that InterCountries Limited was not an innocent purchaser for value because at the time of acquiring the title from the Bank through its chargee's power of sale, the Bank undertook to refund InterCountries Limited the full purchase price of the suit property in case the title it was acquiring was found to be irregular.
34. Telposta contended that by executing the deed of indemnity, InterCountries Limited was taking precaution on the validity or otherwise of the title that it was acquiring from the Park Investments. Telposta relied on *Arthi Highway Developers Limited -vs- Westend Butchery Limited & 6 others [2015] eKLR*, in which this Court (differently constituted) addressed the issue of fraud and doctrine of "innocent purchaser" and expounded on the issue of innocent purchaser for value without notice. Also referred to was the definition of "bonafide purchaser" in Black's Law dictionary as:

"one who buys something for value without notice of another's claim to the property, and without actual or constructive notice of any defeats or infirmities, claims or equities against the seller's title, one who has in good faith paid valuable consideration for property without notice or prior adverse claims."
35. Telposta submitted that the execution of the deed of indemnity by InterCountries Limited to protect itself from any adverse claims, was a clear indication that InterCountries Limited was not an innocent purchaser for value without notice. Consequently, InterCountries Limited acquired title to the suit property by fraudulent means as due process was not followed. Telposta relied on *Denis Noel Mokhwo & another -vs- Elizabeth Murungaru Njoroge & another [2018] eKLR*, for the proposition that allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt; that the fraudulent and illegal activities relating to the acquisition and registration of the suit property in favour of Park Investments, without following due process, and the subsequent transfer to InterCountries Limited, was proved at the trial to the required threshold; that Park Investments not having legally acquired title to the suit property, could not pass any better title to InterCountries Limited; and that therefore the learned Judge erred in finding that the allegations of fraud were not proved.
36. On indefeasibility of title, Telposta argued that the learned Judge erred in holding that Park Investment's title was indefeasible and that InterCountries Limited was an innocent purchaser for value without notice. In this regard, Telposta placed reliance on the following passage from *Chemei Investments Limited -vs- Attorney General & others, Nairobi Petition No. 94 of 2005*, cited with



approval by Waki, JA, in Kenya National Highway Authority -vs- Shalien Masood Mughal & 5 others [2017] eKLR:

“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 accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on the principle and has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”

37. Intercountries Limited opposed Telposta’s appeal but also filed a cross appeal against the judgment of the High Court on the grounds that the High Court erred in fact and in law in failing to assess and award mesne profits to it; and in finding that mesne profits had not been proved by Intercountries Limited and in failing to award it costs despite being successful in the suit. Intercountries Limited filed written submissions praying that Telposta’s appeal be dismissed and its cross appeal be allowed.
38. In the written submissions filed by its advocates Kilonzo and Company Advocates, Intercountries Limited identified six issues for determination in the appeal. These were: whether Legal Notice No. 131 of 2001 was ultra-virus, unconstitutional and unlawful; whether the title of Park Investments was a first registration and therefore protected under Section 23 of the repealed Registration of Titles Act; whether Intercountries Limited was a purchaser for value without notice of any defect in the title; whether Telposta established fraud on the part of any respondents; whether Intercountries Limited was entitled to mesne profits and whether the High Court addressed the issues it had before it.
39. Intercountries Limited submitted that contrary to Telposta’s assertion, that Legal Notice No. 131 of 2001 dated 14<sup>th</sup> September, 2001 conferred legal title and ownership of the suit property to it, as held in Hasan Ali Joho & Another -vs- Suleiman Said Shabaan & 2 others [2013] eKLR, a Gazette notice by itself cannot confer legal title; that Telposta failed to produce any registration documents or any documents to prove that the suit property was registered in the name of KPTC under any regime of law at the time the suit property was allocated and registered in favour of Park Investments.
40. Intercountries Limited relied on Kuria Greens Limited -vs- Registrar of Titles & another [2011] eKLR, for the proposition that there is no provision under the Registration of Titles Act or any other Act that bestowed on the government, or any of its officers, the power to revoke registered title in the absence of a court order to that effect. Similarly, Intercountries Limited cited Registrar of Titles Mombasa & 2 others -vs- Exparte Emfil Limited [2012] eKLR, where the Court held that the Registrar of Lands has no authority in law to revoke or cancel titles to land whether in public interest or otherwise, and that it is the courts which must order the revocation of title or refuse to uphold the private individuals title to land in case of public interest where the applicant has committed fraud or other illegalities with regard to the title, and the government cannot revoke land even for public need or for allege illegality but must move the court for appropriate orders.
41. Intercountries Limited urged that Legal Notice No. 131 of 2001 flies in the face of the law, *the Constitution* and the rights of Intercountries Limited to its property; that the vesting order in Legal Notice No. 131 of 2001 was issued by the then Minister of Finance under the Kenya Communication’s Act and that law does not concern or affect land or its ownership, and therefore the legal notice was ultra-virus the jurisdiction of the Minister for Finance; that the actions of the Minister was in breach of the rules of National Justice and void ab initio; that Park Investments who had acquired title in 1996 was not afforded any opportunity to be heard and was therefore prejudiced by the order made by the Minister; and that no reason was given by Telposta for the failure to register the legal notice against the title.



42. Intercountries Limited asserted that it is the proper registered owner of the suit property; that it is protected by Section 23 of the Registration of Titles Act under which its title is indefeasible, and Section 26(1) of the [Land Registration Act](#) under which its certificate of title is conclusive evidence; and that it is the absolute and indefeasible owner of the suit property. The sanctity of title having been bestowed upon it under the repealed Registration of Titles Act.

It maintained that the allocation of the suit property by the Commissioner of Lands to Park Investments was lawful and procedural so was the sale by the Bank to it.

43. Intercountries Limited argued, that Telposta did not establish any fraud against it or the Bank. It relied on the definition of fraud in Section 2 of the Repealed Registration of Titles Act, as proved knowledge of the existence of the unregistered interest on the part of some other person, whose interest one knowingly and wrongfully defeats by that registration. Intercountries Limited submitted that the registration of Park Investments was a first registration and the evidence adduced did not support any allegations of fraud against that registration; that the circumstances in the appeal are the same as those in Nairobi Permanent Market Society & others -vs- Salima Enterprises & others [1995 -1998] EA 232, in which the Court found that the respondent therein had purchased the land for valuable consideration and that the land had been lawfully registered.

44. In addition, it was submitted that Intercountries Limited is an innocent purchaser for value without notice; that there was no notice on the grant or the title to the suit property which could have put Intercountries Limited on notice and no cause of action therefore lies against it. Reliance was placed on Wreck Motor Enterprises -vs- The Commmissioner of Lands & 3 others [1997] eKLR, in which the Court held that the title of bonafide purchaser for value take precedence and is supreme over all other alleged equitable rights of title. That the burden was upon Telposta to prove that Park Investments and Intercountries Limited had notice of defect in the title to the suit property but it failed to discharge the burden. Intercountries Limited also relied on [Charles Karathie Kiarie & 2 others -vs- Administrators of the Estate of John Wallace Mathare \(deceased\) & 5 others, Civil Appeal No. 12 of 2013.](#)

45. On the cross appeal, Intercountries Limited submitted that the High Court erred in failing to award it mesne profits for the trespass on its property by Telposta. That there was evidence before the High Court that Telposta had let out the property to tenants and was earning an income from the suit property. That there was evidence before the High Court that at the time of the purchase of the suit property, Intercountries Limited had conceptualized, drawn and finalized plans for the conversion of the suit property into several high-rise apartments; and that Intercountries Limited lost revenue and has not enjoyed the rights to the suit property.

46. Finally, Intercountries Limited submitted that the High Court did not unlawfully narrow down the issues or ignore any issues that were framed by the parties. It maintained that the High Court answered all the issues as framed by the parties.

47. The Commissioner for Lands and the Attorney General responded to the appeal through joint written submissions that were prepared by Mr. Oscar Eredi, Chief State Counsel in the Attorney General's office. The two parties opposed the appeal and urged the Court to uphold the judgment of the High Court.

48. In the written submissions, Mr. Eregi argued that the letter dated 20<sup>th</sup> January, 1997, from the then Commissioner of Lands, Mr. Gachanja to the Managing Director of KPCTC, duly informed KPCTC that the suit property reverted back to the Government in 1977 upon the winding up of the East African Community Services Limited. Subsequently, the suit property was duly and procedurally allocated to Park Investments. It was submitted that the Commissioner of Lands in an act of good faith identified



a plot in Thika and issued an allotment letter to KPTC. However, Telposta failed to disclose what became of that plot that was duly allotted to KPTC.

49. Mr. Eregi submitted that the evidence of Gordon Ochieng was clear that the vesting order issued through Legal Notice No. 131 of 2001 published pursuant to the provision of the Kenya Communication Act of 1998 vesting the property on Telposta, came long after the title to the suit property had been issued to Park Investments on 23<sup>rd</sup> May, 1996. Counsel reiterated that upon the winding up of the then East African Community Services the suit property reverted to the government as un-alienated government land; that the Commissioner of Lands in allotting the suit property to Park Investments had all the powers under the law; and that the procedure was followed to the letter and all the requisite payments were duly made to the government.
50. Counsel asserted that Legal Notice No. 131 of 2001, referred to properties that were vested on KPTC as at 30<sup>th</sup> June, 1999; that by this time, the suit property was already registered in the name of Park Investments; that there was no evidence that the vesting orders relied on by Telposta were never registered against the title to the suit property; and that the vesting orders were never lodged with the Ministry of Lands for registration.
51. In regard to the claim by Intercountries Limited, Mr. Eregi submitted that Intercountries Limited never paid the sum of Ksh. 28,000,000/- (which was said to be the purchase price), to the Bank; that the High Court erred in failing to find that want of consideration was a relevant issue as it vitiated the title held by Intercountries Limited. Counsel drew the Court's attention to paragraph 6 of the deed of indemnity dated 13<sup>th</sup> December, 2006, signed between the Bank and Intercountries Limited, wherein it was indicated that:

“The purchaser has withheld payment of the balance of the purchase price pending the hearing and determination of the suit”.
52. Mr. Eregi contended that Intercountries limited cannot be an innocent purchaser for value as it was incumbent upon it to undertake due diligence before purchasing the suit property, and that if Intercountries Limited had undertaken due diligence, it would have discovered that Park Investments was never in actual possession of the suit property, but that Telposta is the one who had always been in possession. He submitted that Intercountries Limited paid Mr. Rodgers Kipngetich Ng'otwa a sum of Ksh. 5,000,000/- as a bribe or inducement for him to vacate the suit property to allow Intercountries Limited to take it over. He cited Daniel Kipruto Metto -vs- Chase Bank (Kenya) Limited [2018] eKLR, for the proposition that due diligence should not stop at a search, but should include a background check on the owner of the suit property, a visit to the property, an inquiry from neighbours and or even establishing a history of the property.
53. In addition, counsel submitted that according to a valuation done by Mwaka Musau consultant on behalf of the Bank, and a report dated 28<sup>th</sup> November, 2001, the suit property was given the current market value of 33, 500,000/- and a reserve price of Ksh. 28, 500,000/-, and therefore, the purported sale by the Bank in exercise of a statutory power of sale at Kshs 28,000,00/- two years later through private treaty, was a sale at an undervalue and is a fraud. Counsel found support for this proposition, in the deed of indemnity signed between the parties three years later, which was implicit of an acknowledgment that there could be circumstances that could impeach the Bank's power of sale.
54. Further, Mr. Eregi argued that there was no evidence tendered nor any approved architectural design or building plans produced in regard to the proposed apartment developments; that the purported letter of consent to transfer and charge the suit property issued to Intercountries Limited on 27<sup>th</sup> November, 2006, was irregular as it related to a transfer that was done on 23<sup>rd</sup> February, 2004; that



- although Telposta set out the particulars of fraud against the Commissioner of Lands, Telposta did not prove either common law fraud or statutory fraud against the Commissioner of Lands or the Attorney General, as the allegations and particulars of fraud were not supported by the pleadings or cogent evidence. Mr. Eregi urged the Court to dismiss Telposta's claim against the Commissioner of Lands and the Attorney General as no basis had been laid upon which the Commissioner of Lands could be ordered to compensate Telposta for the market value of the suit property.
55. Jubilee which was represented by Daly Inamdar Advocates also filed written submissions in which it opposed the appeal. Jubilee submitted that contrary to Telposta's pleading of the claim and the prayers against it, Telposta's witnesses did not adduce any evidence in support of allegations of fraud that it made against it. Jubilee drew the Court's attention to its defence wherein it set out the measures it took as part of its due diligence, prior to accepting the charge over the suit property as security for financial facility to Intercountries limited.
56. Jubilee maintained that the charge created in its favour over the suit property was legal; that it called evidence during the trial that demonstrated the financial facility to Intercountries limited, the agreement to secure the financial security against the suit property, and the various steps that were taken in a bid to ascertain the validity of Intercountries title to the suit property before executing the charge. Jubilee pointed out that it registered the charge against the title to the suit property as well as the company's registry in accordance with the *Companies Act*; and that Intercountries Limited subsequently made full payment of the financial facility as a consequence of which Jubilee executed a discharge of the charge over the suit property.
57. Jubilee argued that the High Court found that the allegation of fraud against it were not proved and Telposta has not demonstrated in what way the learned Judge erred in reaching that finding. It asserted that the learned Judge of the High Court was correct in finding that Jubilee could not be faulted for relying on the land Register to ascertain Intercountries Limited's interest in the suit property and accepting a charge over the suit property as security for funds advanced to Intercountries Limited. Jubilee argued that there was no evidence adduced to show that it had any prior knowledge of Telposta's unregistered interest in the suit property and that even assuming Park Investments fraudulently acquired title to the suit property in 1996, it would not necessarily follow that Jubilee which obtained a charge over the suit property in November, 2004, was equally guilty of fraud. Jubilee relied on this Court's decision in *Charles Karathe Kiarie & 2 others -vs- Administrators of the Estate of John Wallace Mathare (deceased) & 5 other, Civil Application Sup. No. 12 of 2013*, for the proposition that even where it is shown that past registration was obtained illegally, the title/interest of the last bonafide purchaser for value was indefeasible under Section 23(1) of the Registration of Titles Act unless fraud was first proven in a court of law.
58. Park Investments also filed a notice of cross appeal dated 12<sup>th</sup> April, 2017, in which it faulted the learned Judge for refusing to entertain its counterclaim and terming it an afterthought; completely ignoring the fact that there was no evidence showing the statutory notice of sale of title from Park Investments; failing to find that the Bank fraudulently transferred the suit property from the name of Park Investments; and misdirecting itself in finding that Park Investments had failed to prove that it was not served with the requisite sale notice, yet the burden of proving the issuance of the notice was on the Bank.
59. Park Investments through their advocates Guandaru, Thuita & Company Advocates also filed their written submissions in which Park Investments gave a background to the dispute contending that the suit property was allocated to it through an allotment letter dated 30<sup>th</sup> April, 1996 and a grant subsequently registered in its favour. Thereafter it charged the property to Trust Bank Limited in liquidation as security for a loan facility of Kshs.40 million. The Bank then fraudulently and without



- the knowledge of Park Investments purported to transfer the suit property to Intercountries Limited under its statutory power of sale; that the Bank did not notify Park Investment of the purported sale and no auction or advertisement was ever done thereby violating the Bank's right of redemption.
60. Park Investments maintained that the Bank acted illegally and irregularly in failing to issue statutory notices or any demand notices to it as required by law. It accused the Bank of committing mortgage fraud, by secretly selling the subject property at an undervalue thereby defrauding Park Investments; failing to conduct an auction and or proper valid sale; failing to issue a 48 days' notification of sale or to advertise the property so as to attract the best market price; and acting in bad faith in breach of applicable laws.
  61. Park Investments argued that the purported transfer of the suit property by the Bank to Intercountries Limited was null and void. It pointed out that the vesting orders did not automatically vest the assets and liabilities on the successor of KPTC; and that the vesting order by the Minister was done four years after the 2<sup>nd</sup> respondent had properly allocated the suit property to Park Investment.
  62. Park Investments complained that the learned Judge dealt with its counterclaim in a casual manner and declined it audience hence the cross appeal filed. Park Investments pointed out that the learned Judge erred in ignoring the fact that there was no evidence showing service of the statutory notice of sale upon Park Investment; in failing to find that the Bank fraudulently transferred the suit property to Intercountries Limited; and that the learned Judge misdirected herself when she found that Park Investments had failed to prove that it was not served with the requisite sale notice yet the burden was on the Bank to prove that it issued and served the notice.
  63. Park Investments identified the issues for determination in the cross appeal as follows:
    - i. Whether the High Court erred in dismissing the counterclaim as an afterthought.
    - ii. Whether the 5<sup>th</sup> respondent was right in challenging the statutory sale from the 6<sup>th</sup> respondent to the 1<sup>st</sup> respondent through the counterclaim dated 15<sup>th</sup> July, 2011, and
    - iii. Whether the exercise of statutory sale by the 6<sup>th</sup> respondent was proper and regular.
  64. On the first issue, Park Investments pointed out that the learned Judge at paragraph 114 of the judgment, found that the suit property was transferred to Intercountries Limited on the basis of a sale agreement dated 6<sup>th</sup> February, 2003; that Section 19(2) of the Limitations of Actions Act limits actions arising from foreclosure of mortgaged property to 12 years from the date that the right of foreclosure accrued; that Intercountries Limited pleaded that it bought the suit property from the Bank on the 6<sup>th</sup> February, 2003, and confirmed that the suit property was transferred to it on 23<sup>rd</sup> February, 2004; that the cause of action by Park Investments therefore arose on or about 23<sup>rd</sup> February, 2004 and any cause of action had to be brought before the end of 12 years from that date; and that the counterclaim in which the issue against the sale of the suit property to Intercountries Limited by the Bank, was raised, was brought within the required time and the suit ought not to have been dismissed as an afterthought.
  65. On the second issue, Park Investments noted that the learned Judge opined that its action, ought to have been filed in a separate suit against the Bank, and not brought as a counterclaim. Park Investments drew the Court's attention to Order 7, Rule 3 of the Civil Procedure Rules, that provides for a defendant filing a set off or counterclaim, against the claim of a plaintiff, and Order 7, Rule 8 of the Civil Procedure Rules which provides for counterclaims against persons who are not already parties in the suit, and submitted that this was provided in order to avoid multiplicity of proceedings.
  66. Park Investments contended that the issue of ownership of the suit property by Intercountries Limited was the main issue for determination, it being alleged on the one hand that the suit property was



- transferred to InterCountries Limited by the Bank through a statutory power of sale, and Telposta on the other hand challenging the first allotment of the suit property to Park Investments who was the mortgagor from whom the statutory power of sale arose. It argued that it was incumbent that the trial court determines whether the suit property was owned by InterCountries Limited or Park Investments or Telposta, and the institution of a separate suit against InterCountries Limited and the Bank would have resulted in a confusing situation and mismanagement of judicial time. Hence, the issue was properly before the trial court by way of counterclaim.
67. As to whether the exercise of statutory power of sale by the Bank was proper and regular, Park Investments argued that the Bank's remedy of sale at the material time was governed by Section 69A of the Indian Transfer of Property Act (ITPA, 1882) (repealed). Under that section, a mortgagee cannot exercise its statutory power of sale before serving a notice on the mortgagor requiring payment of the mortgage money, and there being default in payment for three months after such service. It was submitted that the Bank did not issue the requisite notice. In addition, that the Bank failed to use a licensed auctioneer to sell the mortgage property and to comply with Rule 15 of the Auctioneers Rules, 1997. Consequently, the procedure laid in law was never followed and the sale of the suit property was not proper. In particular, the failure to issue the statutory notices was fatal and the sale was void as Park Investments' right of redemption was not granted.
68. Finally, Park Investments submitted that the dismissal of its counterclaim was an infringement of the principles of natural justice and that no statutory notice under Section 69A of the ITPA having been served, the purported statutory sale of the suit property was null and void.
69. The Bank also filed written submissions through its advocates Ochieng, Onyango, Kibet and Ohaga Advocates, in which it opposed the appeal. The Bank identified the issues for determination by the Court as follows:
- a. Whether the title of Park Investments was a first registration and therefore protected under Section 23 of the repealed Registration of Titles Act.
  - b. Whether InterCountries Limited was a purchaser for value without notice of any defect in the title.
  - c. Whether Telposta established fraud on the part of any of the respondents.
70. On the first issue, the Bank urged the Court to find in favour of the respondents and uphold the sanctity of title, by holding that the registration of the title to the suit property in the name of Park Investments was a first registration protected under Section 23 of the repealed Registration of Titles Act. The Bank submitted that the title of Park Investments being a first registration, it was from the outset protected under Section 23 of the repealed Registration of Titles Act and Section 26(1) of the current Land Registrations Act; that the certificate of title is conclusive evidence that Park Investments is the absolute and indefeasible owner of the suit property; that such title is not subject to any challenge except on the ground of fraud or misrepresentation to which Park Investments was party; that the allocation of the suit property to Park Investments by the Commissioner of Lands was procedural and lawful and as such, all the subsequent transactions regarding the suit property, were lawful; and that Telposta admitted that as at the time the title was registered in the name of Park Investments, no registration of title to the suit property had been made either in its favour or in favour of its predecessor.
71. On whether InterCountries Limited was a purchaser for value without notice of any defect in the title, the Bank relied on *Wreck Motor Enterprises -vs- Commissioner of Lands & 3 others* [1997] eKLR (supra), arguing that no fraud was proved and that the charge process as undertaken between Park Investments and the Bank was at all times regular and in accordance with the laid down procedures, and



a valid charge was created at law between the Bank and Park Investments; that Section 69(1) of ITPA donated to the Bank the option to realize the security under the charge by way of private treaty; and that the Bank undertook all due verifications and ascertained that Park Investments was the registered owner of the suit property and that the Bank passed a good title to Intercountries Limited.

72. On the issue whether Telposta established fraud on the part of any of the respondents, the Bank aligned itself to the findings of the High Court, and urged this Court to hold that Telposta failed to establish fraud on the part of any of the respondents in regard to the material transactions. The Bank urged the court to find that the disposal of the suit property to Intercountries Limited in realization of the security under the charge, was lawful, procedural and unimpeachable; and that the Bank issued statutory notices in accordance with the law and served the notices on Park Investments. Consequently, the Bank passed a good title to Intercountries Limited who remains the lawful owner of the suit property.
73. This being a first appeal, as has been reiterated in several decisions of this Court, it is this Court's primary duty to re-appraise the evidence and the law, in accordance with Rule 31 of the Court of Appeal Rules, 2022 and draw its own inferences of fact and conclusions. This duty was well stated in *Selle & another –vs- Associated Motor Boat Co. Ltd & others* (1968) EA 123. It has been reiterated in many decisions of this Court including *Kenya Ports Authority versus Kuston (Kenya) Limited* (2009) 2EA 212 wherein the Court stated:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

74. In discharging our duty as afore stated we have carefully perused the evidence and considered the record of appeal in total, in light of the written and oral submissions highlighted above, as well as the principles of law relied upon by the respective parties. It is not disputed that Intercountries Limited is the current registered proprietor of the suit property, but Telposta is in possession of the suit property. According to the evidence adduced by Ochieng, the suit property was originally allotted to the East African Community, but was surrendered back to the government following the disbandment of the East African Community. This is disputed by Telposta who contends that the suit property which was formally owned by East African Community Common Services, later East African External Telecommunications Company Limited (now defunct), were vested in KPTC (Telposta's predecessor) and its successors, through vesting order notices published in the Kenya Gazette in 1988 and 2001, and that the suit property was never surrendered back to the government. On the other hand, there is Park Investments who according to the evidence of Ochieng, and Ken Boit, was allotted the suit property by the Commissioner of Lands, and title issued in the name of Park Investments in June 1996. Park Investments though admitting to have charged the suit property to the Bank, claims that the Bank through irregular use of its statutory power of sale purported to sell the suit property to Intercountries Limited.
75. The main issues that we discern for determination in this appeal, are as follows:
- i. Whether the vesting orders made through Gazette Notices of 1988 and 2001, conferred any ownership rights to KPTC and its successor Telposta respectively, in regard to the suit property.
  - ii. whether the suit property was available for alienation, and if so whether the allotment of the suit property to Park Investments by the Commissioner of Lands vide the letter of



allotment dated 30<sup>th</sup> April, 1996, and subsequent registration of Park Investments as registered proprietor on 23<sup>rd</sup> May, 1996, was a first registration protected under Section 23 of the repealed Registration of Titles Act

- iii. Whether the suit property was properly charged to the Bank, and whether the Bank regularly and procedurally exercised its statutory power of sale in regard to the suit property
- iv. Whether Inter countries limited was a bonafide purchaser for value without notice of any defect, and whether its title to the suit property is indefeasible.

On the cross Petition we discern the following issues:

- i. whether Intercountries Limited was entitled to mesne profits
- ii. Whether the counterclaim by Park Investments was properly before the court, and whether the Bank is liable to Park Investment for irregular and fraudulent sale of the suit property to Intercountries Limited.

76. As can be deduced from the above issues, the bottom line in this litigation is the issue of sanctity and indefeasibility of title. From the evidence on record, the history of the title to the suit property begins with the possession of the suit property by the East African Community Common Services. No title was produced, but it was not disputed that the suit property was formerly being used and managed by East African External Telecommunications, and known as LR No.209/2397. Telposta contends that it is the sole owner of the suit property by virtue of a vesting order issued in 2001 by the then Minister of Finance pursuant to the provisions of the Kenya Communications *Act 1998 (No.2 of 1998)* now repealed, having acquired it from its predecessor KPTC who acquired it from the East African External Telecommunications.

77. KPTC was established under the Kenya Post & Telecommunication Act Cap 411. According to that Act which came into effect on 31<sup>st</sup> December 1977, KPTC was established for the transfer of the undertaking of the East African Post & Telecommunications Corporation in Kenya, for the functions of the Corporation established under the Act, that is, KPTC. Sections 116 of that Act provides the transitional and savings provisions.

78. In relation to this dispute that involved property, Sections 116(12) provided that the Minister may by order from time to time, provide that any property by or against East African External Telecommunications Company Limited, shall on a day to be specified in the order, and by virtue of the order, become property by or against KPTC. It is pursuant to this specific provision that the Minister issued Legal Notice No. 183 of 1988 in which he ordered all the movable and immovable property and assets which on 3<sup>rd</sup> June, 1982 were vested and or possessed by the East African External Telecommunications Corporation, to be vested on KPTC without further conveyance, transfer or assignment.

79. At paragraph 85 to 86 of the judgment the learned Judge had this to say about Legal Notice No. 183 of 1988:

The 1988 Notice by the Minister for Transport and Communications, carried on (sic) in the Kenya Gazette Supplement of 11th March, 1988. Paragraph 3(1) of the said Notice read as follows:

“All the movable and immovable property and assets which on the 3rd June 1982, were vested and possessed by the E.A. Extelcoms and were, under section 116(12)(b) of the Act, managed, operated, used and dealt with by the Kenya Extelcoms, shall from that date by



virtue of this Order be vested in the Corporation without further conveyance, transfer or assignment”.

86. A finding that the suit property was among the listed properties in the Notice would mean that it was not available for allocation to Park Investments in the year 1996. This Court finds that the Act under which the 1988 Notice was made was still subsisting and the Notice made pursuant to it had not been revoked. Thus, until the repeal of the KPTC Act (vide Section 103(1) of the Kenya Communications Act), property vested in the former E.A. Extelcoms remained the property of its successor, the Kenya Posts and Telecommunications, Telposta’s predecessor, and therefore was, unavailable for further allocation.

80. We agree with the analysis and appreciation of Legal Notice No.183 of 1988 by the learned Judge, and her understanding of the implication of the vesting order. Paragraph 3(1) of the Legal Notice is clear, that all the movable and immovable assets which were vested and possessed by the E.A. Extelcoms, and were managed, used and operated by KPTC were from 3<sup>rd</sup> June, 1982 vested in KPTC without further conveyance, transfer or assignment. Following this vesting order, the property vested in the former Extelcoms remained the property of its successor KPTC.

81. The suit property being one of the immovable properties, that E.A. Extelcom was in possession of, it remained vested in KPTC and did not need further conveyance, transfer or assignment. Therefore, the suit property was unavailable for further allocation. It was not un- alienated land available for alienation by the Commissioner of Lands. In addition, E.A. Extelcoms and KPTC were all public corporations and it is evident that the suit property was public land placed at the disposal of KPTC for the purposes of KPTC, and it could only be surrendered back to the government in accordance with Section 14(4) of the KPTC Act that stated as follows:

4. The Corporation may at any time convey, transfer or surrender any land surplus to both its existing and future requirements by a conveyance or a deed of surrender either for or without, consideration:

Provided that land which was public land or trust land shall be surrendered to the Government and shall not be conveyed or transferred to any other person unless the Minister responsible for lands shall consent and so direct

4. The provisions of subsection (4) shall apply to land vested in the Corporation by any written law, including this Act, as well as to land conveyed to it or otherwise placed at its disposal.

Although it was alleged that the suit property was surrendered back to the government after the repeal of the Kenya Post & Telecommunications Act, no evidence of such surrender was produced before the trial court.

82. The learned Judge made an excellent analysis and arrived in our view, at what was a correct conclusion, when she stated at paragraph 86 of her judgment, which we have already reproduced above, but find necessary to reproduce again:

“until the repeal of the KPTC Act (vide Section 103(1) of the Kenya Communications Act), property vested in the former E.A. Extelcoms remained the property of its successor, the Kenya Posts and Telecommunications, Telposta’s predecessor, and therefore was, unavailable for further allocation.”



83. The learned Judge unfortunately contradicted herself when she arrived at a different conclusion at paragraph 94 of her judgment as follows:

“It is important to note that the provisions of the repealed Act do not automatically vest the former assets and liabilities on the successor to the KPTC, rather, the provisions are only enabling and empower the Minister to make such an Order. In line with the provisions of the repealed Act, the Minister made such Order on 24th August 2001. Notably, this was about five years since the Commissioner of Lands had already issued a grant to Park Investments, way in 1996. It would appear that the suit property was not one of the assets available for transfer by the Minister, at the time the Vesting Order was made, having already been allocated to a private entity”

84. We reiterate that as at 1996 the suit property was vested on KPTC as per LN 183 of 1988 which remained in existence until the KPTC Act was repealed by the Kenya Communication [\*Act \(No 2 of 1998\)\*](#). The suit property was therefore not unalienated land available for allocation to Park Investments in 1996. The learned Judge correctly reiterates this position at paragraph 95 of her judgment as follows:

“The epitome of this Court’s finding is that at time of allotment of the parcel of land to Park Investments in 1996, the same belonged to Kenya Posts and Telecommunications Corporation, Telposta’s predecessor. The subsequent Notice of 2001 only further solidifies the ownership of the suit property by the plaintiff, Telposta”.

85. According to Legal Notice No. 131 of 2001, the Minister for Finance determined:

“that with effect from 1st July, 1999-

- a. The movable and immovable property and assets specified in the Schedule hereto, which on the 30th June, 1999 were vested in the Kenya Posts and Telecommunications Corporation shall, without further conveyance, transfer or assignment, be deemed to have been transferred and vested in the Trustees of the Telposta Pension Scheme for the purpose of discharging pension liability in respect for-
  - i. Any person who, on 30th June 1999, was entitled to the receipt of a pension from Kenya Posts and Telecommunications Corporation;”

86. Legal Notice No. 131 of 2001 was made pursuant to the transition provisions provided under paragraph 5(6) of the Third Schedule to the repealed Kenya Communications Act, 1998. According to the preamble to that Act, it was enacted inter alia:

“to provide for the transfer of the functions, powers, assets and liabilities of the Kenya Post & Telecommunications Corporation, to the Commission, the Telcom Kenya Limited, and the Postal Corporation of Kenya and for connected purposes.”

87. Under the Third Schedule to the Act which provided the transitional provisions, Section 5(1) empowered the Minister for Finance by Notice in the Gazette, to:

“Specify the date or dates and the manner in which the assets and liabilities of the former corporation shall be transferred to and vested in



- a. the Commission .....
- b. the Company and
- c. the Corporation in respect of the assets and liabilities.”

88. Section 1 of the transitional provisions defines assets to include:

“all property movable or immovable and all estates, easements and rights whether equitable or legal in, over or out of property, choses in action, money or goodwill of the former corporation whether situated in Kenya or elsewhere.”

89. Section 1 of the transition provisions also defines “Company” to mean, the Telkom Kenya Limited and “Corporation” to mean, the Postal Corporation of Kenya established under the *Postal Corporation of Kenya Act*, 1998 and “the former Corporation” to mean, KPTC established under Kenya Post & Telecommunications Corporations Act, which was repealed through Section 103 of the Kenya Communication Act.

90. Through Legal Notice No. 131 of 2001, the Minister exercised his power under Section 5(1) of the transitional provisions, and vested on Telposta specific movable and immovable properties and assets that were as at 30<sup>th</sup> June, 1999, vested on KPTC. The legal notice included a schedule which specified the suit property as immovable property vested on Telposta.

91. Given the definition of assets as defined in the transition provisions, the suit property having been already committed to the E.A. Extelcoms and vested on the KPTC through Legal Notice No.183 of 1988, it was an asset belonging to KPTC, and it is only the Minister under the Kenya Post & Telecommunications Act, who had the power to transfer it in accordance with the transition provision as provided under Section 5(1) of Schedule Three, or provide for any other mode of transfer as provided under Section 5(6) of Schedule Three. The transition provisions did not provide for surrender of any property placed at the disposal of KPTC to the government nor is there any evidence that the suit property was surrendered to the Commissioner of Lands. The suit property was vested in Telposta for purposes of meeting an obligation that KPTC had of paying pension to its former employees.

92. The upshot of the above is that the Commissioner of Lands had no right to cause the suit property to be resurveyed or allocated as un- alienated land, and the allotment of the suit property to Park Investments by the Commissioner of Lands through the letter dated 30<sup>th</sup> April, 1996, and subsequent registration of Park Investments as the registered proprietor on 23<sup>rd</sup> May, 1996, was irregular and unprocedural. As was stated in the old case of *Said Bin Seif -vs- Shariff Mohammed Shatry*, (1940) 191 KLR 9, an action taken by the Commission without legal authority is a nullity such an action however, technically correct, remains a nullity and not only voidable but void with no effect.

93. It was argued that neither Telposta nor KPTC nor E.A. Extelcoms were registered as proprietors of the suit property and that Park Investments was the first registered proprietor and its title is therefore protected under Section 23 of the repealed Registration of Titles Act.

94. Section 23(1) of the Registration of Titles Act (RTA) (now repealed) embodied the principle of indefeasibility of title. The section provided as follows:

“23(1) The certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained



therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

95. The main principle of Section 23 of the said Act is the sanctity of the register. Prima facie, the title of a person appearing on the register as proprietor is, as against third parties, conclusive evidence of proprietorship except where fraud or misrepresentation is established and the registered proprietor is proved to be party to the fraud or misrepresentation hence the conclusion that the title is indefeasible.

96. The issue of indefeasibility of title in relation to Section 23 of RTA has been addressed in several decisions of this Court. In *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR this Court stated as follows:

“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.”

97. In *Funzi Island Development Ltd & 2 others v County Council of Kwale & 2 others* [2014] eKLR; Maraga JA (as he then was) had this to say:

“As I have pointed out, the 3<sup>rd</sup> respondent, relying on Section 23(1) of the Registration of Titles Act, Cap 281 of the Laws of Kenya, contended that the Grant of the suit land conferred on it an absolute and indefeasible title. I hasten to point out that that Section refers to a certificate of title issued to a purchaser. In the case of allocated land, even if the section is applicable, a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot, on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title (emphasis added)

98. In *Chemey Investment Limited vs Attorney General & 2 others* [2018] eKLR; this Court stated thus:

“Decisions abound where courts in this land have consistently declined to recognize and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example Kenya National Highway Authority v. Shalien Masood Mughal & 5 Others (2017) eKLR; Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others [2015] eKLR; Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Milan Kumarn Shah & Others v. City Council of Nairobi & Others, HCCC No. 1024 of 2005. The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense (emphasis added)

99. In *Embakasi Properties Limited & Anor. v Commissioner of Lands & Anor* [2019] eKLR, in a 5 Judge Bench, this Court rendered itself as follows:

“Although it has been held time without end that the certificate of title is; “...conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof”, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party.



See section 23 of the repealed Registration of Titles Act. Section 26 of the [Land Registration Act](#), 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme”. (emphasis added)

100. The principles that emerged is that indefeasibility of title under Section 23 of RTA is only prima facie, and cannot be used to perpetuate a fraud or illegality. Therefore:

- i. When a registered proprietor’s root of title is under challenge, 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.
- ii. A registered proprietor only acquires an absolute and indefeasible title “if and only if” the allotment was legal, proper, and regular, and a court of law cannot on the basis of indefeasibility of title, sanction illegality or give its seal of approval to an illegal or irregularly obtained title.
- iii. Courts will not recognize or protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor.

101. The above position is consistent with the current Section 26 1. of the [Land Registration Act](#), No. 3 of 2012 which not only retained the provision in the repealed Section 23 of RTA but in addition embodied the development in the jurisprudence, by introducing Section 26(1)(ii) as follow:

- “26 (1) The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-
- i. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - ii. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.” (emphasis provided)

102. Thus, the certificate of title issued by the Registrar is subject to challenge on an additional ground that the title was acquired illegally, unprocedurally or through a corrupt scheme. Of note is that, the stricture under Section 23(1) of the RTA, that the registered proprietor must be proved to have been party to the fraud or misrepresentation is not required under Section 26(1)(ii) which means that proof of illegality or corrupt scheme is sufficient even if the registered proprietor was not party to the same.

103. It was conceded by Telposta that there was no title to the suit property issued either in favour of KPTC or Telposta. Park Investments therefore argued that it was the first registered owner of the suit property and its title was indefeasible. According to the evidence that was before the trial court, E.A. Extelcoms used and managed the suit property which had a Land Reference number 209/2397. The suit property



- was not vacant land but was land placed at the disposal of E. A. Extelcoms and its successor KPTC, and committed for its use as a public institution.
104. The suit property was not vacant land but had buildings that were in use. This was a matter within the knowledge of the Commissioner of Lands, as Mr. Ochieng who testified on behalf of the Commissioner conceded that E.A. Extelcoms owned the land but had no registered title. He also conceded that there was correspondence showing that E.A. Extelcoms was granted permissions to develop two residential units on the suit property. Although there was no title issued, it is clear that the suit property was under the use and control of E.A. Extelcoms and that it was vested on KPTC and Telposta through Legal Notice No. 183 of 1988 and Legal Notice No. 31 of 2001 pursuant to statute. The Commissioner of Lands could not ignore the unregistered interest of KPTC and Telposta more so, since the suit property had buildings and was not vacant.
105. Section 2 of The Government Lands Act, Cap 280, defined “unalienated government” land as:
- “land which is not for the time being leased to any other person or in respect of which the Commissioner has not issued any letter of allotment.”
106. KPTC may not have had a formal lease but it had an unregistered interest on the suit property that allowed it to use the suit property for its purpose. Section 14(6) of the KPTC Act defined “public land” to mean:
- “all public land in Kenya, excluding trust land, which is vested in the Government for public purposes or for the purposes of the Corporation or its predecessors in title, and for the purposes of the proviso to subsection
- (4) includes land previously so vested;”
107. Section 2 of the Registration of Titles Act, states that:
- “Fraud” shall on the part of a person obtaining registration “include a proved knowledge of the existence of an unregistered interest on the part of some other person whose interest he knowingly and wrongfully defeats by that registration.” (emphasis added)
108. Park Investments having applied for allocation of the suit property, it could not feign ignorance of the interest of KPTC on the suit property as there was even a Tenant on the premises, and there was publication of the gazette notice in 1988 vesting all the property belonging to EA Extelcom and EA Posts and Telecommunications Corporation, on KPTC. Park Investments is the one which initiated the process by applying to the Commissioner for allocation of the suit property. It was upon it to confirm the history of the suit property, and confirm that the property was indeed “public land” by establishing, given its history, that the suit property had been surrendered back to the government. Park Investments failed to do this and in accordance with definition of fraud in Section 2 of the Registration of Titles Act, its registration as proprietor of the suit property was fraudulent as the property was not available for allocation.
109. As observed earlier in this judgment, the Court cannot protect a title that is irregularly obtained. In this case, the Commissioner of Lands had no jurisdiction to reallocate land that was placed at the disposal of a public body by the government and vested on the public body through powers emanating from an Act of Parliament. The registration of Park Investments as the registered proprietor of the suit property was therefore fraudulent, irregular, null and void. As was stated in Chemey Investments Ltd (supra), although Section 23(1) guarantees sanctity of title, title to property that is obtained illegally and in



violation of statute does not enjoy protection of the law, and therefore, Park Investments cannot hide under its purported first registration as its registration was null and void.

110. As regards the charge of the suit property by Park Investments to the Bank, this was not denied by Park Investments. However, Park Investment had no valid title to the suit property that it could charge to the Bank. The purported exercise of the statutory powers of sale by the Bank in selling the suit property to InterCountries Limited was no more than “hot air” as the Bank had no proper charge in its favour and had no statutory powers of sale to dispose of the suit property. Nor did the Bank pass any proper title to InterCountries Limited.
111. Park Investments took issue with the exercise of the applicants’ statutory power of sale contending that the power of sale had not arisen, that statutory notices were not served and that the Bank secretly sold the suit property to InterCountries Limited at an undervalue. We do not find it necessary to go into the process of the exercise of the statutory power of sale. These issues are not of any consequence, as Park Investments’ purported title to the suit property was null and void; the Charge upon which Park investment’s claim was anchored, invalid; and its claim against the Bank a nonstarter. For this reason, we uphold the dismissal of Park Investment’s counterclaim against the Bank.
112. As for InterCountries Limited, was it an innocent purchaser for value without notice? We find the fact that the Bank signed an indemnity protecting InterCountries Limited in the event that the transaction did not go through telling. Apparently, the two parties were conscious of the fact that the transaction may not go through. For if indeed InterCountries Limited was an innocent purchaser for value without notice, then it would not have required such an indemnity. In our view, the only reason as to why InterCountries Limited would require such an indemnity, is the recognition that there could be an issue with the title. We are not therefore, persuaded that InterCountries Limited was an innocent purchaser for value without notice. Moreover, assuming InterCountries Limited was an innocent purchaser for value without notice, having found that Park Investments did not have a proper title to the suit property, the security to the Bank did not confer a proper charge upon which a statutory power of sale could arise, that could pass any valid title to InterCountries Limited.
113. On the issue whether the title of an innocent purchaser for value without notice is indefeasible, where it originates from an irregular and illegal allocation, the Supreme Court in *Dina Management Limited vs Mombasa County Government & 5 others* [2023] KESC 30 KLR, rendered itself as follows:
  108. As we have established above, before allocation of unalienated Government land, there ought to have been processes to be followed prior. Further, we cannot on the basis of indefeasibility of title sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property.....  
.....
  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, H.E. 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.
  11. ....The root of the title having been challenged as we already noted above, the appellant could not benefit from the doctrine of bona fide purchaser.
114. On the same premises, the allocation to Park Investments having been irregular and illegal, Park Investments had no valid legal interest in the suit property that it could secure to the Bank, and the Bank



had no valid legal interest that it could pass to Intercountries Limited. The title held by Intercountries Limited is worthless. Its remedy can only lie against the Bank.

115. The upshot of the above is that:

- i. We allow the appeal by Telposta, to the extent that we set aside the orders issued by the High Court and substitute thereto the following orders:
  - a. That a declaration shall issue that the ownership of the suit property by Intercountries Limited and the Charge by Trust Bank Limited (In liquidation) are irregular, illegal, null and void;
  - b. An order shall issue directing the Commissioner of Lands to cancel the title issued in favour of Intercountries Limited and issue a new title in favour of Telposta;
- ii. We dismiss the cross appeal by Intercountries Limited and uphold the order dismissing its counterclaim.
- iii. The cross appeal by Park Investments is also dismissed.
- iv. We award costs of the main appeal and the cross appeal to Telposta.

Those shall be the orders of the Court.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF JULY, 2024**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MATIVO**

.....

**JUDGE OF APPEAL**

**G.W. NGENYE-MACHARIA**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

