



Ngethe v Kenya Anti-Corruption Commissions & another (Civil Appeal E375 of 2020) [2024] KECA 1608 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1608 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E375 OF 2020
F TUIYOTT, JW LESSIT & GWN MACHARIA, JJA
NOVEMBER 8, 2024**

BETWEEN

PAUL MOSES NGETHE APPELLANT

AND

KENYA ANTI-CORRUPTION COMMISSIONS 1ST RESPONDENT

**SAM N GACHAGO, CHAIRMAN GEORGE MULI MWALABU, SECRETARY
ALEXANDER JOHN OGUTU, TREASURER (SUING ON BEHALF OF
WOODLEY RESIDENTS WELFARE SOCIETY) 2ND RESPONDENT**

*(Being an appeal from the Judgment of the Environment and Land Court
(Okong’o, J.) delivered on 27th February 2020 in ELC Case NO. 2054 OF 2007)*

JUDGMENT

1. This appeal arises from the judgment of Okong’o, J. delivered on 27th February 2020 in the Environment and Land Court (ELC) in ELC Case No 2054 of 2007. In his memorandum of appeal dated 3rd September 2020, Paul Moses Ngethe, the appellant, faults the learned judge on nine (9) grounds, that the learned judge erred in law and in fact:
 - i. By failing to consider the appellant’s submissions and authorities, thus arriving at an erroneous judgment;
 - ii. By finding that the appellant unlawfully acquired the parcel of land known as LR No 209/13539/154 Grant No 80454 situate at Woodley/Joseph Kangethe Estate Nairobi and in subsequently ordering cancellation of the appellant’s title;
 - iii. For finding that the resolution by the City Council of Nairobi to dispose the suit property did not meet the threshold under the LGA, Cap 25 Laws of Kenya;



- iv. For misinterpreting section 12 of the *Government Land Act (GLA)* on the mode of communication of a presidential directive/order under the Act;
 - v. By failing to appreciate and apply the provisions of section 112 of the *Evidence Act* on which party was in control of the evidence and/or had special knowledge and access to evidence of consent from the Commissioner of Lands and the approval from the Minister for Local Government;
 - vi. For ignoring the evidence given by PW4 and PW5 during the oral examination that confirmed that relevant consent was obtained and all legal procedures were followed in the sale of the parcel of land known as LR No 209/13539/154 Grant No 80454 situate at Woodley/Joseph Kangethe Estate Nairobi;
 - vii. In giving undue weight to the oral evidence of PW3 and distinguishing the official Hansard Reports where PW3 while serving as Minister for Local Government had confirmed that the sale of Woodley Estate properties followed the due legal process;
 - viii. For failing to distinguish between the preliminary process of making of offer and acceptance regarding parcel of land known as 209/13539/154 Grant No 80454 and the actual sale transaction which took place after the payment of consideration and the signing of a sale agreement; and,
 - ix. For finding that the appellant was not a bona fide purchaser for value without notice.
2. The appellant seeks three orders that:
 - i. the appeal be allowed;
 - ii. the judgment of the Environment and Land Court dated 27th February, 2020 be dismissed; and
 - iii. that the appellant be awarded costs of the appeal and costs in the Environment and Land Court.
 3. A brief background of this matter is that Kenya Anti- Corruption Commissions, the 1st respondent herein filed a suit via a plaint dated 6th October, 2006 against the appellant challenging the instrument of lease dated 22nd April 1999, issued by the Nairobi City Council (Council) to the appellant in respect of a portion of Woodley/Joseph Kangethe Estate known as LR No 209/13539/15, Grant No I.R. 80454 measuring 0.1280 hectares (the suit land) for the remainder of the term of 99 years that the council held in original Grant and on terms and conditions which were set out in the lease.
 4. Sam. N. Gachago, George Muli Mwalabu and Alexander John Ogutu, the Chairman, Secretary and Treasurer respectively of Woodley Residents Welfare Society were enjoined as interested parties but sued collectively as the 2nd interested party.
 5. The suit was first filed in the High Court and assigned High Court Civil Case No 1143 of 2006 before being transferred to the Environment and Land Division in 2007 and acquiring a new number- ELC Case No 2054 of 2007.
 6. The 1st respondent in its plaint pleaded that the Council was the registered owner as a lessee from the Government of Kenya for a term of 99 years from 1st July 1948 of all that parcel of land known as LR No 209/13539, Grant No I.R. 76717 measuring 34.63 hectares situated in the City of Nairobi at a place commonly known as Woodley/Joseph Kangethe Estate. The Grant in respect of the said property in favour of the council was registered on 9th June 1998.



7. The 1st respondent pleaded that the Council granted a lease over the suit property to the appellant without obtaining a written consent of the Minister of Local Government as required by the Local Government Act (LGA) and without obtaining a consent from the Commissioner of Land and that it caused the invalid lease to be registered against the certificate of title for Woodley/Joseph Kangethe Estate.
8. The 1st respondent pleaded that the Council acted in excess of its statutory authority and, as such, the grant issued to the appellant was null and void. Further, that the lease could not confer upon the appellant any estate, interest or right in the suit property. In addition, the subdivision and subletting of a portion of Woodley /Joseph Kangethe Estate by the Council to the appellant was done fraudulently with the objective to improperly alienate public land vested in the Council and, as such, the purported lease to the appellant was invalid, null and void. Moreover, it was urged that the Council breached the law and the terms and condition of the Grant.
9. The breach of the law and terms & conditions of the Grant as particularized in the plaint included;
 - i. the lease was granted without a resolution of the grantee or the Council;
 - ii. neither the appellant nor the grantee nor the Council sought or obtained the requisite ministerial consent;
 - iii. the lease was granted in breach of covenants binding upon the grantor and the grantee;
 - iv. the lease was sealed without authority or resolution of the Council or the grantee;
 - v. the appellant and the Council had no authority to deal with the suit property;
 - vi. the appellant knowingly accepted a void lease;
 - vii. the City Council of Nairobi is not the alter ego of the grantee,
 - viii. the Council and the appellant were not ad idem;
 - ix. the appellant was arbitrarily selected and favoured in contravention of section 82 of the *Constitution*; and,
 - x. that the appellant knowingly and dishonestly presented the void lease for registration against the title registered in the name of the grantee.
10. It was the 1st respondent's position that the said fraud and illegality in the process of alienation of the suit property were not discovered until the 1st respondent undertook investigations in 2006, and that following the investigations, brought the suit in the public interest.
11. Particulars of fraud as particularized in the plaint included:
 - i. the Council and the appellant knowingly dealt with the suit land without authority or the requisite resolution(s) and consent(s) from the Minister in charge of Local Government or the Commissioner of Lands;
 - ii. the Council knowingly granted a lease to the appellant without the requisite consents in breach of the covenants binding on the grantor and the grantee;
 - iii. the Council knowingly granted a lease to the appellant contrary to the law and the terms and conditions governing the suit property;



- iv. the appellant knowingly and dishonestly took a lease from the Council without following the requisite statutory processes, thereby facilitating illegal alienation of public land;
- v. the council knowingly granted a lease in respect of the suit property in spite of actual and/or constructive notice of the statutory provisions, the grantee of the land and the special conditions of the Grant;
- vi. the appellant all along knew the land was registered in the name of the grantee and that the Council had no interest capable of being passed to him;
- vii. the appellant all along paid rent for the premises;
- viii. the Council had no interest in the parcel it purported to lease to the appellant; and,
- ix. the appellant and the Council knowingly contrived to illegally alienate public property.

12. The 1st respondent sought judgment against the appellant thus:

- a. A declaration that the lease made on the 22nd April 1999 between the City Council of Nairobi and the appellant in respect of LR No 209/13539/154 is invalid, null and void for all intents and purposes for fraud and being ultra- vires, and thus conferred no interest, right or title on the appellant.
- b. A declaration that the registration of the lease instrument dated 22nd April 1999 against LR No 209/13539 Grant No 76717 as entry No 4 under presentation Book No 1028 of 25th May, 1999 was wrongful and illegal.
- c. An order directing the Registrar to cancel and expunge from the registry entry No 4 on the Grant made under presentation Book No 1028 of 25th May 1999 so as to restore the land comprised in LR No 209/13539/154, IR. No 80454 to the grantee.
- d. An order directing the registrar to cancel the original lease instrument and certificate of lease issued upon registration of subdivision known as LR No 209/13539/154, IR. No 80454.
- e. An injunction restraining the appellant by himself, his servants or agents or otherwise howsoever from dealing with the properties known as LR No 209/13539, Grant No I.R. No 76717 and LR No 209/13539/154, IR. No 80454 otherwise than by delivery or transfer to the grantee.
- f. Vacant possession.
- g. General damages.
- h. Costs of the suit
- i. Interest on (g) and (h) above at court rates.”

13. The appellant entered appearance and filed his defence. He pleaded that he had been a tenant of the Council on the suit property since 1971. He also stated that the Council had offered to sell the suit property to him at a consideration of Kshs.1,110,000/- which offer he accepted and was issued with a lease. The appellant further averred that the Council passed the necessary resolutions and obtained all the ministerial authority and approval before offering the suit property for sale.

14. The appellant denied any breach by the Council in the said sale and averred that the sale was made pursuant to a directive by the then President of the Republic of Kenya, in exercise of his constitutional and executive authority. In addition, he stated that he was neither privy to, nor involved in, any alleged



- fraud and lastly, he denied that the 1st respondent had locus- standi to bring the suit and therefore posited that the suit was fatally defective and should be struck out.
15. On 19th June, 2015 the 2nd respondent was joined as an Interested Party on claims that its members had beneficial interest in the suit property as they were tenants of the Council in Woodley/Joseph Kangethe Estate from the 1950s. In addition, that they had useful information on the suit property that could assist the court in adjudicating the case before it.
 16. The matter proceeded for hearing, and was first heard by Mutungi, J. before Okong'o, J. took it over as partly heard. The parties agreed that the matter proceeds from where Mutungi, J. had left it. The 1st respondent called five (5) witnesses: Karisa Iha, Director of Legal Services City Hall; Nzioki, Judge, then serving as an Attorney of the 1st respondent and was one of the investigators involved in the investigations into Woodley Estate; Hon. Ole Ntimama, then Minister for Local Government; Elizabeth Gicheha; and Rosinah Ndila, both then working as Senior Registrars of Titles. The gist of the testimony of the 1st respondent was that in the case of the suit property, not all procedures were followed. That no resolution had been passed by the Council for the sale of housing within Woodley/Joseph Kangethe Estate and the property in the Estate. Further, that the Minister of Local Government had not sanctioned and approved the sale of the houses. In addition, it was contended, the Council could not subdivide or sell Woodley/Joseph Kangethe Estate without the consent of the Commissioner of Lands. Registrar Rosinah Ndila confirmed that she had registered a number of leases against the title of Woodley/Joseph Kangethe Estate.
 17. After the close of the 1st respondent's case, one Samson Njuguna Gachago, Chairman of Woodley Residents Welfare Society, the Interested Party therein, testified that he had lived in Woodley since 1966 and has been the chairman for the welfare society for fifteen (15) years. The gist of his evidence was that the members of the 2nd respondent learnt that houses in Woodley/Joseph Kangethe Estate had been sold to persons that were not tenants in the estate and that the sale had taken place when tenants were in occupation of the houses. It was the testimony of the 2nd respondent that they were not involved in the sale of the houses and that their Member of Parliament raised the matter in Parliament and the sale of the houses in Woodley/Joseph Kangethe Estate was declared illegal. It was their position that they were joining the 1st respondent in the suit to ensure that their own interests were protected.
 18. The appellant on his part gave his testimony and the same was a reiteration of his defence. The gist of his testimony was that he purchased the suit property from the Council, having executed a sale agreement with the Council and paid both the purchase and legal fees in full and thereafter was issued with a certificate of title. He testified that the process through which he acquired the suit property was proper and lawful. He further stated that it was only until the year 2003 that the Council demanded rent from him and threatened to evict him from the suit property which forced him to sue the Council and obtain an injunction to restrain the Council from continuing with the interference. Lastly, he testified that it was then that the Council used the 1st respondent to file the suit against him.
 19. After considering the pleadings, the evidence adduced in the case and the submissions put forth by the parties, Okong'o, J., identified five issues for determination arising from the 12 issues proposed by the 1st respondent and the 21 proposed by the appellant. These issues were: whether the plaintiff's suit is competent; whether the defendant acquired the suit property lawfully; whether the defendant has a valid title over the suit property; whether the plaintiff is entitled to the reliefs sought in plaint; and, who is liable for the costs of the suit.
 20. The learned Judge, in his judgment found that the 1st respondent had *locus standi* to sue for the recovery of public land. The learned Judge found that there was no dispute that the suit property was public land before the same was sold to the appellant, and that the suit had been brought by the 1st respondent



to recover the land from the appellant on behalf of the public. The learned Judge found that the Council did not obtain consent of the Commissioner of Lands to subdivide Woodley/Joseph Kangethe Estate and sell a portion thereof to the appellant. On the issue of the resolution of the Council, the learned judge held that he did not think that the resolution passed on 4th August 1992 and the consent/approval of 10th September, 1992 met the threshold that was required for the disposal of the land owned by the Council. On the issue of ministerial consent, the learned Judge found that there was no consent by the Minister of Local Government to sell the houses in Woodley/Joseph Kangethe Estate and if consent was given, the same was not for sale of the said houses.

21. The learned judge observed that he was not convinced that the appellant was an innocent purchaser for value without notice. However, that even if he had acquired the suit property innocently without notice of illegality, the process through which the Council went about in selling the houses on the suit property was illegal and the title created through that illegal process was a nullity. He declared the title acquired by the appellant a nullity.
22. Regarding the appellant's tenancy over the Council house he occupied, the learned Judge held that the appellant had a right under the tenancy agreement between him and the Council to occupy the house and that the court would not grant an injunction restraining the appellant from dealing with the said house, as sought by the 1st respondent. Further that, the appellant shall remain in the said house unless his tenancy was lawfully terminated.
23. The learned Judge entered judgment for the 1st respondent against the appellant in terms of prayers (a), (b) (c) and (d) of the plaint dated 6th October 2006.
24. Aggrieved and dissatisfied with the said judgment, the appellant preferred this appeal to this Court. We have set out the grounds in the appellant's memorandum of appeal in this judgment.
25. This appeal was heard through this Court's GoTo virtual platform on the 24th April, 2024. Present for the appellant was Senior Counsel Dr. Fred Ojiambo (hereafter SC) who appeared alongside learned counsel Ms. Sang. Present for the 1st respondent was learned counsel Ms. Shamalla. Although served with a hearing notice, there was no appearance by the 2nd respondent either by themselves or by their representative Messrs. Odero Osiero & Company Advocates. The appellant and the 1st respondent filed submissions which were briefly highlighted before us. We shall get back to this at a later stage.
26. This being a first appeal, it behooves this Court to re-evaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. In the case of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212, this Court espoused that mandate or duty as follows: -

“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.” See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and also *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR.”

27. We are also mindful that we can only depart from the findings by the trial Court if they were not based on the evidence on record; where the said court is shown to have acted on wrong principles of law as held in *Jabane v Olenja* [1986] KLR 661; or if its discretion was exercised injudiciously as held in *Mbogo & another v Shah* [1968] E.A.



28. We have considered the evidence that was adduced before the trial court, the submissions by counsel and the cases and the law relied on. We have considered the issues raised by the parties for our consideration and we think that three issues fall for our determination, which are:
1. Whether the learned Judge erred to find that the City Council of Nairobi did not pass a Resolution for the sale of the suit property, and if it did, whether it met the requisite threshold under the Local Government Act, (repealed by the County Government Act No 17 of 2012).
 2. Whether the learned Judge erred for finding that there was no consent from the Minister for Local Government as required under sections 12 and 13 of the Government Lands Act, (repealed by the Lands Registration Act No 3 of 2012).
 3. Whether the learned Judge erred for finding that the Commissioner of Lands never granted his consent.
29. SC stated that the appellant was relying on the written submissions dated 26th February 2021, together with the various documents of even date and the further supplementary written submissions dated 13th June 2023. He argued that the learned Judge erred in four (4) major ways in arriving at a conclusion that the sale of the suit land was illegitimate and wrong. These were:
1. failing to take into account the totality of the evidence and instead looked at strands of information independent of each other;
 2. finding that the resolution which had been passed by the Nairobi City Council was not a resolution;
 3. finding that that there was no ministerial consent as required under sections 12 & 13 of GLA; and,
 4. finding that the Commissioner of Lands had not granted the consent.

Whether the City Council of Nairobi passed a Resolution for the sale of the suit property, and if it did, whether it met the requisite threshold under the Local Government Act.

30. Turning now to submissions of counsel based on the issues for determination; On the question of the authorization of the transaction by the Council, SC submitted that there was clear evidence that the Council passed a resolution on 4th August 1992 by which it approved the sale of land, which would have included the suit property, and the same was confirmed on 10th September 1992 when a full committee of the Council confirmed those minutes and again in October 1993.
31. SC argued that prior to the said meeting, the resolution could not have been of any use because the sale would have to be by public auction as required by section 12 of GLA, however, that was not the case as the then President had ordered that the sale be done otherwise than by public auction. He maintained that the said directive by the then President met the provisions of the Constitution then, and that there was no requirement that the same be written in any particular form or written at all. Lastly, SC contended that the sale was perfectly proper as there was clear evidence of the Minister then in-charge of Local Government confirming in Parliament that the Council was enabled by law to pay, sell, lease or subdivide or to do whatever it was that it could do with its land. He relied on the Minister for Local Government statement in Parliament quoted to have approved the sale during parliamentary debates of 15th July, 1993. The official Hansard Report is contained in the record of appeal.
32. Ms. Shamalla relying on the 1st respondent's written submissions dated 6th June 2023, she started off by indicating that it was not in contention that the suit property was public land. She stated that



on the issue whether the process followed to allocate the suit properties to private individuals was proper. She maintained that no legal process was followed. She submitted that Minute 3(c) of the Minutes of the Council of 4th August 1992 which the appellant was clinging on, was an approval given for identification of non-profitable establishments and mapping of the same and not their disposal, and that the particular resolution was to be extracted and an abstract sent to the then Minister of Local Government under section 144(3) of the LGA. She urged that the same was confirmed by Hon. Ole Ntimama who was then the Minister of Local Government. Ms. Shamalla argued that a general resolution like that as seen in Minute 3(c) could not suffice for the sale of Woodley and submitted that the learned trial Judge properly held that there was no proper Council resolution stating that Woodley can be disposed of.

Whether there was consent from the Minister for Local Government as required under section 12 and 13 of the Government Lands Act.

33. On the issue of ministerial consent, SC submitted that there was evidence of an endorsement on a letter requiring the ministerial consent on 3rd September 1992 and that the endorsement was on 10th September 1992. Further, that the endorsement was confirmed by the Minister himself.
34. Ms. Shamalla reiterated that there was no ministerial consent as required under section 143(3) of the LGA, a position which she argued was confirmed by Hon. Ole Ntimama.

Whether the Commissioner of Lands granted his consent.

35. On the issue that there was lack of consent by the Commissioner of Lands, SC submitted that the Registration of Titles Act (RTA) clearly provides that the consent for Commissioner of Lands would be endorsed on the document itself, and argued that indeed it was endorsed on the document itself.
36. SC emphasized that the process was properly followed. He contended that there was identification by the Council of the properties to be sold and the authority given. Subsequently, the Minister's authority sought and granted. Thereafter, Presidential directive made it possible for the suit property to be sold and the Commissioner of Lands consent also given. In sequence, that there was no doubt at all that the process was followed. Counsel relied on section 23 of the RTA for the proposal that a title to land can only be challenged on grounds of fraud. This section stated 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.

37. To buttress his submission further, SC relied on the five Judge Bench decision of the Court of Appeal in Embakasi Properties Limited & another v Commissioner of Lands & another [2019] eKLR.
38. On her part, Ms. Shamalla submitted that when they called upon Nzioki wa Makau, J. who then was working with the 1st respondent as an investigator, he categorically confirmed that when they went to the Ministry of Lands and took the deed file together with the corresponding file, no consent was found.



39. Ms. Shamalla submitted that the appellant during the hearing of the matter at the High Court gave three (3) different versions of how he was given the suit property. She argued that the first version was that he clung onto Minute 3 (c) of the resolution of 4th August 1992. Second version was that he relied on the Presidential directive. Third version was that he relied on a letter dated 29th August 1992. Ms. Shamalla contended that if one looked at the sequence of the explanations given, the appellant could not explain how he was identified as one of the persons to purchase Woodley if at all there was any purchase that was done.
40. Ms. Shamalla in conclusion submitted and maintained that there was no proper procedure followed in the purported sale of Woodley Estate houses and placed reliance on the Supreme Court case of *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) KESC 30 (KLR) (21 April 2023) (Judgment) which sets out the process of alienating public land to a private individual and this Court's decision in *Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others* [2014] eKLR.
41. In rejoinder, SC tacked three (3) issues. Firstly, he submitted that there has not been any evidence that was given of what led to the resolution of 4th August 1992. Secondly, that the Minister of Local Government knew that it was Woodley that was intended to be sold. Thirdly, on the issue of the consent for the Commissioner for Lands, SC submitted that there was no argument as to what kind of consent was required and stated that under form 2 in the *RTA* required the Commissioner to endorse the consent on the document in so many ways.
42. In the appellant's supplementary written submissions, the appellant introduced the doctrine of estoppel and submitted that the 1st respondent's witness, PW5, Rosinah, having stated categorically that the consent must have been provided at the time she registered the lease, she was estopped from subsequently denying that the consent was not there or from asserting that the sale was irregular. Further, that PW3, Minister for Local Government, was also quoted severally confirming that Woodley Estate Properties were subject of a legal and a valid sale process by the Council. That therefore the Minister was estopped from denying what he had by his own previous utterances led the appellant to believe was the truthful position regarding the sale.
43. On the issue of allegation of fraud, the appellant submitted that all the particulars of fraud pleaded in the plaint were never proved. It is the appellant's submissions that although the 1st respondent was mandated to recover assets, it was also obliged under section 35 of the *Anti-Corruption and Economic Crimes Act* to report to the Director of Public Prosecution on the results of the investigations, and to include any recommendations on prosecution of the person so investigated. The appellant submitted that the 1st respondent had confirmed that no such recommendation was made hence reinforcing the appellant's contention that the issue of fraud on his part was never proved.

Analysis and Determination

44. We note that the 1st respondent, in its plaint before the ELC, sought several declarations to the effect that the lease made on 22nd April 1999 between the City Council of Nairobi and the appellant in respect of LR No 209/13539/154 is invalid, null and void for fraud, and being ultra-vires the purported sale of the suit property by the Council to the appellant conferred no interest, right or title on the appellant; that the registration of the lease instrument was wrongful and illegal, and that the registration should be cancelled and expunged from the register where it was entered. It is clear then that central in the dispute in this case was the validity and legality of the impugned title.



45. We must clarify an issue to avoid confusion. The appellant was a tenant in one of the houses within Woodley/Joseph Kangethe Estate owned by the Council and situate within the same location as the suit property before the impugned sale of the suit property to him. It was the learned Judge's finding that the cancellation of the title issued to the appellant by the Council over the suit property did not have the effect of terminating the lease tenancy he had with the Council. Thus, the learned Judge declined to grant the order of injunction sought by the 1st respondent to restrain the appellant from accessing the tenancy premises.
46. We have carefully considered the appellant's case and find that he asserts his right to the suit property under the Resolution passed by the Council on 4th August 1992, a Ministerial consent granted to the Council by the Minister of Local Government on the 10th September 1992, the consent of the Commissioner of Lands and the Presidential directive/order. The 1st respondent successfully challenged the validity and the legality of the appellant's title to the suit property.
47. A consideration of the evidence adduced before the ELC shows that Woodley/Joseph Kangethe Estate was granted to the Council established and administered in accordance with the Local Government Act, by the government for a term of 99 years with effect from 1st July, 1948 under Grant No I.R 76717 issued under the *Registration of Titles Act*, (now repealed), and was subject to the provisions of the Government Lands Act (now repealed) and the special conditions that were set out therein.
48. The issue before the ELC was whether the disposal of a portion of Woodley/Joseph Kangethe Estate to the appellant complied with the conditions of the Grant and the provisions of the Registration of Titles Act, the Government Lands Act and the Local Government Act. The validity or otherwise of the sale of the suit property by the Council to the defendant must therefore be considered in light of the said conditions of the Grant and the provisions of the said statutes.
49. A copy of the lease granted to the Council in 1948 was exhibited before the Court. We have seen the same. The lease has special conditions 7 to 10 which states that "the grantee shall not subdivide, charge, sublet, sell or transfer the land or part with the possession of the land or any part thereof or any building thereon without the written consent of the Commissioner of Lands."
50. SC, counsel for the appellant interpreted this condition, and correctly so in our view, to imply that the grantee (Council) had the mandate to obtain the necessary consents from the Commissioner of Lands before it could subdivide, charge, sublet, sell or transfer the suit parcel. It is the appellant's submissions that the same was sought but the documentations were in the possession of the Council and not the appellant herein.
51. The requisite process that had to be undertaken before dealing with the suit property was, first for the Council to comply with the special terms and conditions under the 1948 Grant by passing a Resolution allowing it to subdivide, sell and transfer the suit property in clear, unambiguous terms. Once that was successful, the Council was then to seek the approval/consent of the Minister for Local Government and thereafter the consent of the Commissioner of Lands.
52. Regarding the Resolution, it was the appellant's contention that the Council passed a Resolution on 4th August, 1992. We have gone through the Minutes of the Council on the given day. The Resolution of the Council that the appellant relied on is Minute 3 (c) of 4th August 1992 which provides thus:

“Minute 3 (c) stated:

‘The Chairman of the Commission reported that in pursuance with the Government's current policy of reducing the number of unprofitable non-



strategic establishments and public assets, it would be pertinently imperative for the Commission to similarly employ such prudent financial management technics. He proposed that the Chief Officers be authorized to identify and dispose of such unprofitable non-essential services properties and assets with a view to improving Commission's financial position. The same proceeds would also be utilized for redevelopment and rehabilitation of such old estates as Ziwani, Kaloleni, Shauri Mayo, Bahati, Gorofani, etc."

53. The Minute 3(c) is not a resolution for the sale of Woodley/Joseph Kangethe Estate. It clearly states that the Chairman of the Commission (as the Nairobi Council was under the management of a Commission at the time) who was chairing that meeting made a proposal 'that the Chief Officers be authorized to identify and dispose of such unprofitable non- essential services, properties and assets with a view to improving Commission's financial position.' It is clear that the Chairman of the meeting made a proposal to the Commission. This implies that a process had to be started with the Chief Officers being given authorization, after which they would proceed to identify Council's properties and then disposal. We have considered the evidence adduced before the ELC, as well as the exhibits adduced before it. There was no evidence to show that the process of authorization of Chief Officers ever took place.
54. There is no dispute that the Council had power under sections 144 and 145 of the Local Government Act to dispose of land through sale or lease. Section 144 (3) and (6) of the Local Government Act however imposed conditions to that right. The sale could only be done with the consent of the Minister of Local Government. The appellant testified that the Council obtained the requisite Ministerial consent/approval on 10th September, 1992, and to prove it, he produced a letter to the Minister signed by the Town Clerk seeking approval. It was the appellant's evidence that the Minister gave his consent by endorsing on the letter the word 'approved.'
55. Reliance was placed on the statement attributed to the Minister of Local Government made during Parliamentary debates of 15th July 1993. The official Parliament Hansard Report of 15th July, 1993 quoted the Minister for Local Government, Hon. Ole Ntimama as saying:
- "Mr. Speaker Sir, a Local Authority is a legal entity; a corporate body which can be sued and can sue. I want to quote one Section of chapter 265 of the Act which says: "a Local Authority may sell any land, may possess any land it sees fit". I am reading the law. That is Section 145 (2a) if you want to read. It says:
- "A Local Authority can sell, let, dispose of plots, and subdivide".
- Mr. Speaker Sir, a Local Authority has administrative authority and financial authority in control of administrative and financial affairs in its own area of jurisdiction. They have got powers to sell, buy or even donate land. They have powers even to give free without any payment. The law is here. I want to say very clearly that whatever was given by the Nairobi City Council was legally given since there is always a resolution that has been approved by the Minister for local Government; and that is the law!"
56. The above statement was made ten months after the purported approval. The common feature in the statement is that it is a general statement explaining the powers a local authority has administratively, and financially, and touching on land, the power to deal with land to buy, sell or give way for free. That statement lacked specificity, not mentioning any specific local authority or any specific parcel of land.



57. The one who served as the Minister for Local Government then was Hon. William ole Ntimama. He was PW3 for the 1st respondent. He informed the trial Judge that he was very well conversant with the process the Council follows in disposal of its assets. He testified that the Council had to seek approval for disposal of any asset. He explained that the full Council had to meet and come up with a detailed proposal of the Council Resolution which was passed over to the Permanent Secretary [PS], who in turn briefed the Minister. He was shown the letter the appellant relied upon as proof of approval/consent by him. PW3 testified that there was never a Resolution by the Council for the disposal of Woodley/Joseph Kangethe Estate, and that none came to him. He also stated that where he gave approval, the same was communicated by the PS.
58. The learned Judge found that the purported approval given by the Minister of Local Government on 10th September, 1992 did not satisfy the conditions of section 144(6) of the Local Government Act with regard to the disposal of the houses in Woodley/Joseph Kangethe Estate. The learned Judge's conclusion was supported by evidence. The appellant's claim that the Minister gave an approval was denied by the one who should have given it. The evidence of PW3 was direct evidence. Additionally, the documents relied on by the appellant did not support his case.
59. As we started by saying, SC argued that prior to the Council meeting, where the Resolution could have been made, the President gave a directive in which he ordered that the sale to the appellant be done otherwise than by public auction as required under section 12 of *GLA*, that as a result of that directive, the Resolution was no longer necessary. SC maintained that the said directive by the then President met the provisions of the *Constitution* then, and that there was no requirement that the same be written in any particular form or written at all.
60. We have a difficulty considering this explanation. We find that this argument changed the appellant's case which was to the effect that the Council made a Resolution to sell the suit property, and that the requisite consents from the relevant Minister and the Commissioner of Lands were given. Worse still, it was not made as an alternative argument, and further the SC's wanted us to accept that the Presidential directive needed not be in written form. We do not find this argument tenable. This is more so, given the far reaching effect of the directive, of waiving and or suspending a statutory requirement of sale by public auction. The burden of proof lay with the appellant to show how he acquired the suit property. We are not persuaded that there was ever such a directive. Such a suggestion is asking us to see the final product and ignore the process through which it was obtained.
61. The appellant claimed that he was an innocent purchaser for value and that the learned Judge should have given the appellant the benefit of doubt. SC urged that the learned Judge erred by refusing to exercise his discretion in favour of the appellant especially having found in his view that the Council was to blame for the alleged illegal process if any. In the Judgment, the learned Judge held that "The title for the suit property came about as a result of an illegal process that was undertaken by the council. Further, in determining the issue of costs, the Court rendered itself as follows:
- "In the circumstances of this case, I am of the view that the council was largely to blame for the circumstances that led to the filing of this suit. For that reason, although the plaintiff has succeeded in its claim and would in normal circumstances be entitled to costs, it would be unfair to condemn the defendant to pay the costs of the suit. A fair order would be for each party to bear its own costs of the suit."
62. We have perused the judgment of the learned Judge. We find that the paragraph highlighted by the SC was made to justify the Judge's decision not to order the appellant to pay costs to the 1st respondent.



The learned Judge's finding is unequivocal that the due process in the acquisition of the title was not followed and that the title was invalid.

63. Let us not end before we comment on the appellant's argument that he was a bona fide purchaser for value without notice. We do not wish to dwell on this issue much for one reason. The appellant admitted that he did not pay for the suit property within the period given in his lease, but waited five (5) years to finalize the payments, meaning he paid in instalments for five years. Most importantly however is the fact that the document he presented to court as proof of payment had material alterations as a result of which the court rejected the same as being unreliable. As the case stands, the appellant did not adduce any proof that he paid for the suit property, and we would have no basis upon which to declare him an innocent purchaser for value.
64. It is clear that the due process for the acquisition of a valid title to the suit property was not followed. The necessary Council Resolution was not proved to have been made and the consents/approvals of the Minister for Local Government and the Commissioner of Lands were not sought or obtained prior to the transfer in the appellant's name. As the Court held in *Daudi Kiptugen v Commissioner of Lands & 4 others* [2015] eKLR:
- “...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”
65. We also rely on case of *Funzi Development Ltd & others v County Council of Kwale*, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR where the Court of Appeal, differently constituted stated that:
- “...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.]
66. We have considered this appeal and have found that the learned trial Judge took into account the totality of the evidence and arrived at the right conclusion of the case. He cannot be faulted for the findings he arrived at and the final orders that he made.
67. The result of this appeal is that the appellant failed to establish that he acquired a valid title to the suit property; or that the process of obtaining it was regular and lawful and that he is deserving of the orders sought in this appeal. Save to say that the learned Judge declined to order costs in favour of the 1st respondent. However, the 1st respondent did not challenge it in this appeal. The orders which commend themselves to us to make are the following:
1. The appellant's appeal against the judgment of Okong'o, J. delivered on the 27th February 2020 in ELC No 2054 of 2007 has no merit and is hereby dismissed.
 2. The judgment of Okong'o, J. is confirmed in its entirety.
 3. The 1st respondent will have the costs of the appeal.

DATED AND DELIVERED IN NAIROBI THIS 8TH DAY OF NOVEMBER, 2024.

F. TUIYOTT



.....
JUDGE OF APPEAL
J. LESIIT

.....
JUDGE OF APPEAL
F. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

