Tarabana Company Limited v Sehmi & 7 others (Civil Appeal 463 of 2019) [2021] KECA 76 (KLR) (8 October 2021) (Judgment)

Neutral citation: [2021] KECA 76 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 463 OF 2019

MSA MAKHANDIA, P NYAMWEYA & JW LESSIT, JJA

OCTOBER 8, 2021

BETWEEN

TARABANA COMPANY LIMITED ..... APPELLANT

AND

HARCHARAN SINGH SEHMI ..... 1ST RESPONDENT

HARBHASHAN SINGH SEHMI ..... 2ND RESPONDENT

JASWARAN SEHMI ..... 3RD RESPONDENT

ROSPATECH LTD ..... 4TH RESPONDENT

CHIEF LAND REGISTRAR, NAIROBI ..... 5TH RESPONDENT

NATIONAL LAND COMMISSION ..... 6TH RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 7TH RESPONDENT

ATTORNEY GENERAL ..... 8TH RESPONDENT

(An Appeal arising from the judgment and decree of the Environment and Land Court of Kenya at Nairobi by K. Bor J. dated 22nd July 2019 in ELC Case No.1311 of 2014)

JUDGMENT

Background

1 The Appellant is dissatisfied by the whole decision of K. Bor J. dated July 22nd, 2019. The Appellant was the 2nd defendant in a suit filed before the Environment and Land Court (ELC) at Nairobi by the 1st to 3rd Respondents, who are brothers. The dispute was in respect ownership of the property known as L.R NO. 209/2759/9 (I.R NP. 12263 (the suit property) situate at Ngara area within Nairobi city. The 1st to 3rd Respondents' case was that they purchased the suit property from one Elizabeth Ann

Maria Estreta Rodrigues for Kshs. 25,000/- and were registered as tenants in common on December 7th, 1968. At the time of the purchase, the suit property had a lease term of 59 years commencing 1st October 1942 to 1st October 2001. The dispute arose after the expiry of the lease.

2 The 1st to 3rd Respondents' case was that before the expiry of the lease they had applied for extension of lease. The 1st, 2nd and 3rd Respondents indeed produced a letter dated July 13th, 2001 by the Commissioner of Lands seeking for any objection or lack of it, to the extension of lease from the Director of City Planning and Architecture, and Director of Survey. The file in respect of the suit property at the lands office could not however be traced only for them to later realize that the 4th Respondent had been registered as the owner of the suit property who later sold it to the Appellant.

They challenged the procedure used by the 4th Respondent to acquire the suit property on grounds that at the time of the transfer, they had obtained approval for the extension of the lease from both the Director of Physical Planning and the Director of Survey.

3 The 1st to 3rd Respondents gave particulars of fraud against the Appellant and 4th, 5th and 7th Respondents. The 1st to 3rd Respondents sought for orders of a permanent injunction restraining the Appellant and the 4th Respondent from dealing with the suit property; an order that the entry on the register of the suit property in favour of the Appellant and the 4th Respondent was illegal; and that an order be entered in the register in favour of the 1st to 3rd Respondents; immediate and vacant possession and occupation of suit property; punitive damages; general damages; and special damages for loss of use of property; and costs of the suit.

4 The Appellant on the other hand claimed that it bought the suit property from the 4th Respondent and contends that it is a bona fide purchaser for value without notice. The appellant filed an amended statement of defence and counterclaim on 3rd March, 2017. It averred that the suit property was registered in its name by virtue of a transfer dated 29th May, 2014 and registered at the Land Registry on 26th June, 2014. It averred that the 4th Respondent who was the vendor and registered owner at the time of sale, granted vacant possession of the suit property to it upon completion of sale. The Appellant contended that at the time he took over the suit property, there weren't any habitable residential houses where the 1st to 3rd Respondents could reside or carry on business.

5 In its counterclaim, the Appellant sought a declaration that it is the rightful owner of the suit property; a permanent injunction to restrain the 1st to 3rd Respondents from interfering with its quiet possession of the suit property; and an order that the costs of these proceedings be paid by the 1st to 3rd Respondents.

6 The 4th Respondent in its statement of defence denied illegally acquiring title of the suit property and averred that the 1st to 3rd Respondents' lease for the suit property was for 59 years, which expired on 1st October 2001. It averred that after expiry of the said lease, the suit property reverted back to the Government of Kenya. The 4th Respondent averred that it was legally allocated the suit property by the Government of Kenya. It contended that the 1st to 3rd Respondents were legally evicted from the suit property by the City Council of Nairobi in accordance with the Physical Planning Act. The 4th Respondent averred that it transferred the suit property to another party and denied any allegations of fraud.

7 The 5th, 7th and 8th Respondents filed their defence on 24th April 2017 where they denied any allegations of collusion and fraud on their part. They further denied any extension of the 1st to 3rd Respondents' lease for the suit property.

8. The matter was heard and the learned trial judge evaluated the evidence and delivered a judgement dated July 22nd, 2019, made a finding that the 1st to 3rd Respondents had proved their case on a balance of probabilities, and inter-alia issued orders that the proprietorship section of the suit property in the register be changed from the Appellant to the 1st to 3rd Respondents as the lessees, upon payment of the requisite registration and other fees. The Appellant was ordered to arrange to have the suit property discharged from Prime Bank Limited within 3 months. The court also ordered for eviction of the Appellant and the 4th Respondent, their agents, servants or tenants within 3 months from the date of the judgement and the 1st to 3rd Respondents were further awarded general damages of Kenya shillings twenty-five Million and costs to be borne by the 4th Respondent. The Appellant's counter-claim was dismissed with no orders as to costs.

The Appeal and Submissions of Counsel

9. Dissatisfied with the decision, the Appellant preferred this appeal on ten grounds as follows:

    1. THAT the Honourable Judge erred in fact and in law, and totally misapprehended the Appellant's Defence to the suit and thereby reached findings that took away the Appellant's property without compensation, and thereby abrogated the Appellant's right under the Constitution of Kenya.

    2. THAT the Honourable Judge erred in fact and in law, in failing to find and hold that the Appellant was not involved in the process leading to the acquisition of title by the 4th Respondent and was therefore a bona fide purchaser for value without notice of any defect in the title.

    3. THAT the Honourable Judge erred in fact and in law when she failed to find and hold that the appellant's title was indefeasible under section 26(1) (a) of the *Land Registration Act*, No. 3 of 2012.

    4. THAT the Honourable Judge erred in law and fact, when she ordered that the 1st,2nd and 3rd respondents herein be granted a lease to the property, and in so doing, acted without jurisdiction and usurped the role of the National Land Commission (the 6th Respondent herein) as prescribed under the *Land Act* , No. 6 of 2012.

    5. THAT Honourable judge erred in law and in fact in allocating the 1st, 2nd and 3rdrespondents rights of ownership that are unsupported by law.

    6. THAT Honourable judge erred in law and in fact in unilaterally attempting to rewrite the contracts between the appellant and its financier, Prime Bank Limited as captured in the Letter of Offer, Charge and Further Charge, to the detriment of both the Appellant and the said financier.

    7. THAT Honourable judge erred in law in failing to appreciate or consider very succinct legal points, which were pointed out to her, and supported by authorities that were binding upon her, and some that should have persuaded her.

    8. THAT Honourable judge erred in law in granting orders for injunction against the appellant, which amounted to a court of equity acting in vain because the appellant is in possession of the property and has charged it to a financier.

9. THAT Honourable judge erred in law and in fact in dismissing the Appellant's Counterclaim.

10. THAT the Honourable Court erred in arriving at a decision that had no legal basis, and which amounted to a travesty of justice against the Appellant.

10 During the plenary hearing of this appeal, the parties relied on their written submissions and lists of authorities. The Appellant submitted that it was a bona fide purchaser for value without notice, and there was no proof that it had been a party to any fraud that denied the 1st to 3rd Respondents' ownership of the suit property. It was submitted that the Appellant purchased the suit property from the 4th Respondent and remains in possession as the registered owner who was advanced a loan of sixty-one million Kenya shillings by Prime Bank Ltd, and has constructed a storied building after the property was discharged.

11 The Appellant submitted that the 1st to 3rd Respondents were the registered proprietors of the suit property as lessees from the Government of Kenya, but at the time the term lapsed, the lease had not been renewed and therefore the suit property reverted to the Government which then allocated the same to the 4th Respondent vide a letter of allotment dated October 30th, 2009 and thereafter issued it with a title.

12 The Appellant contended that the trial judge had no powers to divest it of ownership rights and vest them on the 1st to 3rd Respondents, and that the court usurped the role of the 6th Respondent. That in the mind of the judge, the reason the Appellant lost its suit property was because the 4th Respondent had acquired it wrongfully and not because it (the appellant) had been involved in any wrong doing. It was further submitted that the Appellant's title was indefeasible under section 26(1)(a) of the *Land Registration Act* and protected by Article 40 of the *Constitution of Kenya*.

13 On the order to have the suit property discharged within 3 months, it was submitted that the order was inequitable, impractical and unjust as it amounts to rewriting a contract between the Appellant and its financier who was not a party to the suit. That the financial facility against the suit property is serviced by the rental income from the suit property and it may not be possible to discharge the charge to facilitate execution of the order.

14 In reference to the injunction orders issued against the Appellant and the 4th Respondent, it was submitted that an injunction cannot issue against a proprietor who is in possession as that would amount to equity acting in vain. It was also submitted that the dismissal of the Appellant's counter claim was in total disregard to the evidence tendered by the Appellant and that if there was any impropriety at all, then it happened before the Appellant come to the scene, and the 1st to 3rd Respondents can therefore only be compensated by the 4th Respondent and the relevant Government agencies who were party to the suit.

15 The 1st to 3rd Respondents in opposing the appeal submitted that when their lease was about to expire, they duly applied for its extension on July 13th, 2001, which application was duly accepted vide a letter dated December 17th, 2001 from the Ministry of Lands and the Director of Physical Planning.

Therefore, that they had duly exercised their pre-emptive rights over the suit property, which was therefore not available for further allotment to the 4th Respondent on October 30th, 2009 as alleged. Accordingly, that the learned Judge correctly found the alleged allotment of the suit property to the 4th Respondent by the Government and eventual issuance to it of a new grant wanting and cancelled the same.

16 It was further submitted that the learned Judge correctly found that despite the fact the file relating to the suit property could not be traced, the reference for the said file was the same reference under which the letter of allotment to the 4th Respondent was issued, though the endorsement on the deed read "extension of lease" as opposed to "new grant , further confirming that the lands officials were seized of the matter relating to the extension of their lease over the suit property. That at the time of the alleged allotment to the 4th Respondent, the 1st to 3rd Respondents had not surrendered the original tittle deed and they continued to pay rates and the rent, and therefore the 4th Respondent had no property which it could sell to the Appellant.

17 The 1st to 3rd Respondents contended that the Appellant was not a bona fide purchaser for value without notice. It was submitted that the value of the suit property is not known as the sale agreement indicated Kenya shillings twenty four million while the transfer document indicated Kenya shillings twelve million five hundred thousand, and that the Appellant had knowledge of the fraud as it bought the suit property when the 1st to 3rd Respondents were in occupation, and forcefully demolished the suit property on October 2nd, 2014 and that it ought to have established that the purported seller was not the one occupying the suit property.

18 They submitted that the vendor was unable to explain how they became aware of the suit property to enable them apply for the lease, and that the 6th Respondent's witness informed the court that the person who allegedly allotted the suit property to the 4th Respondent denied allotting the same. Finally, they submitted that the judge had powers and jurisdiction to cancel the tittle, that no property of the Appellant was taken away as it had none in the first place, and that its recourse was against the 4th Respondent.

19. Arguing along similar lines to the Appellant, and in support of the appeal, the 4th Respondent submitted that the learned Judge erred when she ordered cancellation of the Appellant's title yet the lease issued to the 1st to 3rd Respondents had expired and they never applied for its extension, that any purported extension of lease after October 1st, 2001 would be a nullity, and that the 1st to 3rd Respondents had no statutory pre-emptive rights of renewal of lease which were only provided for in the *Land Registration Act*, which came into force in May 2012 after the lease had expired.

20 The 4th Respondent contended that the sanctity of its title deed and that of its successor, the Appellant, was protected under Section 23(1) of the Registration of Titles Act (now repealed) and adopted in Section 26(1) (a) and (b) of the *Land Registration Act*, 2012. Further, that under Sections 60 and 61 of the repealed Registration of Titles Act, the court could only order cancellation of a title on an action by the registrar upon him being satisfied that the same was fraudulently or wrongly obtained, which was not the case herein.

21 The 4th Respondent further submitted that the 1st to 3rd Respondents did not prove any fraud, impropriety or corrupt scheme on its part, and faulted the learned Judge for condemning it to pay general damages without evidence.

22 The 5th, 7th and 8th Respondents also made submissions in support of the appeal. They contended that the trial Judge erred in dispossessing the appellant of the suit property despite it being a purchaser for value without notice. They faulted the learned judge for purporting to renew a lease in favour of the 1st to 3rd Respondents on behalf of the Government, and further submitted that no evidence was adduced to prove that the lease was ever extended to the 1st to 3rd Respondents capable of being protected under the law. The 6th Respondent did not make or file any submissions either before the trial court or in this appeal.

23 We wish to state from the onset that we note that the 2nd Respondent died on August 28th, 2019 while the appeal was still pending before this court and has since not been substituted by a legal representative. Pursuant to Rule 99(2) of this Court's rules the appeal automatically abates as against him and we so order.

24 As the first appellate court, it is our duty to re-analyze and re-evaluate afresh the evidence adduced before the trial court, and ascertain if the learned Judge came to the correct conclusion in respect to both facts and the law. See *Abok James Odera t/a A.J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates* (2013) e KLR. Having evaluated the record of appeal as well as submissions by parties to the Appeal, the issues for determination by this court are:

i. Whether the Appellant is a bona fide purchaser for value without notice;

ii. Whether the trial Judge had powers to divest the Appellant ownership rights of the suit property and vest them in the 1st, 2nd and 3rd Respondents;

iii. Whether the Appellant proved its counterclaim against the Respondents to the required standard.

Whether the Appellant is a bona fide purchaser for value without notice;

25 It is not in dispute that at the time the 1st to 3rd Respondents purchased the suit property in 1968, it was a government lease with a period of 59 years with effect from October 1st, 1942 and was set to expire on October 1st, 2001. The 1st and 2nd Respondents told the trial court that before the lease expired, they applied for its extension on July 13th, 2001. They testified that the Director of Physical Planning and Director of Survey gave approval for the extension of lease vide their letters dated December 17th, 2011 and November 15th, 2007 respectively. They stated that they were however never issued with the extended lease certificate but were informed that the correspondence file was missing from the lands office. They however continued paying rates to the City Council and occupying the suit property.

26 The 1st to 3rd Respondents did not provide the application document for the extension of the lease alleged to have been done in July 13th, 2001 before expiry. They instead produced correspondence in relation to renewal of the lease which occurred after the date of expiry of the lease. Among them was a letter from the Commissioner of Lands dated July 13th, 2001 which acknowledges receipt of an application for extension of the lease for the suit property, and seeks comments from the Directors of City Planning & Architecture, Physical Planning and Surveys. The said letter was copied to the 1st Respondent.

27 The other correspondences produced were inter alia, letters from the Director of Physical Planning dated December 17th, 2001 and the Director of Surveys dated November 15th, 2007.

28 Both letters made reference to an application letter by the 1st to 3rd Respondents dated July 13th, 2001 which sought extension of the lease over the suit property. The said letters indicated that the Director of Surveys and the Director of Physical Planning had no objections to the extension of the lease of the 1st to 3rd Respondents over the suit property.

29 On this issue, the learned trial Judge at paragraph 48 of the judgment found:

> "The court finds that the Plaintiffs (1st to 3rd respondents) commenced the process of extending their lease over the Suit Property before the lease expired. The Plaintiffs continued

to occupy the Suit Property from 2001 when their lease expired until 2010, when the plot was allocated to the 1st Defendant."

30 While there was sufficient evidence before the trial court to establish that the 1st to the 3rd Respondents applied for the renewal of the suit lease before its expiry, and that their request was received and acted upon by the Commissioner for Lands, there is however no evidence placed before the trial court to show that the Government renewed or extended the lease made to the 1st to 3rd Respondents, or that the application for renewal was declined.

31 As to how the 4th Respondent acquired the title to the suit property, the said respondent produced a letter of allotment dated October 30th, 2009. No evidence was adduced before the trial court to show that the 4th Respondent applied for the allocation of the suit property. The letter of allotment of the suit property issued to the 4th Respondent was alleged to have been signed by one Mr. Isaac Atandi Machuka, an officer from Ministry of Lands. The Deputy Director of Investigations and Forensic Services at National Land Commission, Mr. Antipas Nyanjwa, as well as Cpl. Gilbert Okello, testified that they interviewed Mr. Machuka who disowned the allotment letter and denied signing the same.

32 There is also the issue of the deed plan that was issued to the 4th Respondent when it was allotted the suit property.

The deed plan indicated that it was an extension of a lease as opposed to a new grant. Gordon Ochieng, a Senior Assistant Director, Land Administration at the Department of Lands testified that this was irregular and the deed plan issued to the 4th Respondent ought to have indicated "new grant". Further, the original land registry correspondence file No. 34031 for the suit property, and which is said to have contained correspondence relating to the application for extension of lease by 1st to 3rd Respondents went missing, and a new file No.272940 was opened, which was used to grant the suit property to the 4th Respondent.

33 Cpl. Okello stated that upon investigations, they established that the signature appearing on the 4th Respondent's allotment letter belonged to Mr. Machuka, and that he had no authority from the Commissioner of Lands to sign the same. Cpl. Okello stated that he preferred criminal charges against Martin Njuguna and Isaac Machuka relating to the registration of the 4th Respondent as the proprietor of the suit property.

34 The learned trial Judge dealt with the process through which the 4th Respondent acquired title to the suit property and had this to say:

> " The procedure for allocating town plots under the Government Lands Act was not followed when the Commissioner of Lands allocated the suit property to the 1st Defendant (4th respondent) who subsequently sold it to the 2nd Defendant (appellant)."

35 The 1st to 3rd Respondents' application for renewal should have been responded to. The court found that the said respondents had developed the suit property and were not in breach of the terms of the lease for which the suit property was leased to them, which would have automatically militated against renewal. They were also in occupation of the suit property, had buildings/structures and machinery, and were doing business on the suit property. The court found that the 4th Respondent used bulldozers to demolish buildings and structures on the suit property belonging to the 1st to 3rd Respondents. That has not been challenged as there is no cross or counter appeal on the same. In fact, the 4th Respondents case was that it evicted the 1st to 3rd Respondents from the suit property in order to give vacant possession to the Appellant, which would not have been necessary if they had no property on the suit property.

36 It is true that the suit property belonged to the government and that the government had a right to either renew or decline to renew the lease. Apparently the government did not respond to the 1st to 3rd Respondents request, but proceeded to allocate the suit property to another party. We however note that the lease had expired by the time the allocation to the 4th Respondent was made. The suit property had in the circumstances reverted back to the government by operation of law following the expiry of the 1st to 3rd Respondents' lease. However, even though there was nothing to prevent the government from making the allotment to another party, the allotment should have followed due process and should have been made in accordance to the *Government Lands Act*, (GLA). See *Suleiman Murunga vs Nilestar Holdings Limited & another* [2014] eKLR.

37 The issue then would be; which process should have been followed in allocation of the lease to the 4th Respondent. The procedure of distribution of government land and leases which was applicable at the material time is the one prescribed under the GLA since repealed by the *Land Registration Act* of 2012. The law is clear on the procedure to be applied in allocating town plots, of which the suit property was. Section 9 of the GLA provides:

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

38 The prescribed manner of disposing town plots is provided under Sections 12, 13 and 14 and emphasize on the due process for allocation of government land and sale by auction. Section 12 of the said GLA provides that:

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

39. Section 13 of the GLA further provides that the place and time of the auction/sale shall be notified in the Gazette not less than four weeks nor more than three months before the day of sale. Section 14 provides that the terms and conditions of sale by auction should be read out to the bidders before commencing the sale.

40 No evidence was placed before the trial court to prove that this process was followed and that it was what culminated with the title to the suit property being issued to the 4th Respondent. The director of the 4th Respondent, Mr. Martin Njuguna told the trial court that the 4th Respondent applied for allocation of the suit property to the Commissioner of Lands in 2009. He however did not avail a copy of the said application. He did not allege that he purchased the suit property in an auction. It is evident that the manner in which he obtained title to the suit property is strange to the process provided by statute. It therefore follows that due process as prescribed in the law was not followed when the title to the suit property was issued to the 4th Respondent, and that the issuance of the suit property to the 4th Respondent was irregular.

41 The issue then is whether the Appellant's title is protected by law. Section 23 of the *Registration of Titles Act* (RTA) now repealed, and adopted in Section 24 (1) (a) and (b) of the *Land Registration Act* 2012 (LRA) answers to it. Section 24 (1) (a)& (b) of the LRA provides:

> 24. Subject to this Act—

a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

42 Section 26 of the LRA provides for interest conferred by registration and provides thus:

(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—

"a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme..."

43 It is clear from these provisions that a certificate of title issued by the Registrar to a purchaser of land upon a transfer, is prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, except where it was obtained through fraud or corrupt deal. The Appellant obtained title to the suit property after purchase from the 4th Respondent. We note that the learned trial Judge found:

> The 2nd Defendant's Director (appellant) confirmed that he had had no peace from the Plaintiffs after acquiring the Suit Property as they persisted in claiming the land still belonged to them. Nevertheless, the 2nd Defendant proceeded to construct a multi-storied structure on the land in dispute and charged it to a bank. A prudent person would not undertake such a ventures until such time as he has confirmed that the land he acquired is not being challenged and he can therefore invest massively in that land."

44 With due respect to the learned trial Judge, the means of determining whether the Appellant's title was indefeasible and not subject to challenge is spelt out under Section 26 of the LRA. What was required was to determine whether the Appellant was in any way involved in the process through which the 4th Respondent obtained title, which the learned Judge found was irregular and with which we agree. There was no evidence adduced before the trial court to show that the Appellant played any role, or was involved in any way in the said process. If title was acquired by fraud, or misrepresentation, illegal, unprocedural or corrupt scheme, the same was before the Appellant came into the picture. We therefore find that the appellant was a bona fide innocent purchaser for value for these reasons, and its title could not and cannot be challenged.

45 In any event, issues pertaining to irregular allotment and acquisition of government or public land falls squarely within the mandate of the 6th Respondent. For reasons that we might not never know the 6th

Respondent chose not to investigate the complaint and take remedial measures. The Appellant cannot therefore take a fall for this inaction.

Whether the trial Judge had powers to divest the Appellant ownership rights of the suit property and vest them in the 1st, 2nd and 3rd Respondents.

46 We have found that the 1st to 3rd Respondents lease expired in 2001, which is not disputed. The title issued to the Appellant was so issued in 2014, after purchase from the 4th Respondent who had acquired it in 2009. All these are undisputed facts. We have also found that the Appellant was an innocent purchaser for value and that its title was protected under Section 26 of the LRA. It follows that the learned trial Judge had no powers to divest the Appellant's ownership of the suit property and to vest it on any party, including the 1st to 3rd Respondents. To do so would be contrary to statute and would present a serious challenge as the law specifically prohibits such action.

47 What the 1st to 3rd Respondents lost in this case was not the suit property, as the same belonged to the government and had reverted to it upon expiry of their lease. What they lost was the structures or developments on the suit property, as well as any machinery or other property on the suit property at the time their lease expired. We note that the learned Judge considered the loss they suffered and gave an award in the form of damages and costs of the suit. There is no counter or cross appeal on this aspect of the judgment and we therefore leave it at that.

Whether the Appellant proved its counterclaim against the Respondents to the required standard.

48 In the counter claim, the Appellant stated that the suit property was registered in its name as a bona fide purchaser for value; that the appellant was in possession of thereof and had erected a storey house with financing from a financial institution; that the proceeds from the rent are used to service the loan; and that despite being registered owners and despite having developed it and occupied it, the 1st to 3rd Respondents have continued to harass the Appellant. The particulars of the harassment were stated in the defence.

49 The Appellant sought three orders in its counter claim thus:

i. A declaration that the 2nd defendant (appellant) is the rightful and legal owner of the property known as Land Reference Number 209/2759/9:

ii. An order of permanent injunction to restrain the Plaintiffs, whether by themselves or through their agents from interfering with the defendant's quiet possession of the property known as Land Reference Number 209/2759/9;

iii. An order that the costs of these proceedings be paid by the Plaintiffs.

49. We have perused the pleadings, proceedings of the ELC, together with the judgment of the learned trial Judge. We find that the Appellant's director who testified in support of the Appellant's case gave details of how he acquired the suit property through a transfer by the 4th Respondent in favour of the Appellant. His whole testimony, written and oral made no reference to any incident(s) of harassment suffered by the Appellant at the hands of the 1st to 3rd Respondents, whether directly or through servants or agents or proxy. No other evidence was given to support the Appellant's case. The learned trial Judge also made no reference of any evidence of such nature, which was in order as none was given before her.

50. Apart from proof that the Appellant was an innocent purchaser of the suit property for value, which was the core of the entire trial, and the subject of declaration in order one of its claim, the Appellant

did not prove its counter claim, and was undeserving of the orders two and three of the orders sought thereunder.

51. The result of this appeal is that the same has merit and is allowed in the following terms:

A. That the judgment and decree of Kossy Bor, J. in ELC Case No. 1311 of 2014 finding in favour of the 1st, 2nd and 3 rd Respondents, and ordering as follows:

1) A permanent injunction restraining the 2nddefendant (Appellant) by itself, servants, agents, tenants or persons claiming from it, from occupying, trespassing, entering, using, alienating, charging, encroaching or in any way interfering or dealing with Plot Number 209/2759/9 (IR No 6477);

2) that the proprietorship section of the land register for Plot Number 209/2759/9 (IR No 6477) is to be changed from the 1st and 2nddefendants to reflect the plaintiffs as the lessees of this land upon payment by the plaintiffs of the requisite registration and other fees;

3) that the 2nd defendant is directed to arrange to have the suit property discharged within three months from the date of this judgment to enable the 3rd defendant register the plaintiffs as the proprietors of this land;

4) That the 1st and 2 nd defendants and their agents, servants and tenants will be evicted by the plaintiffs three months from the date of this judgment. The eviction be done in strict compliance with the law; be and is hereby set aside.

B) The appellant shall have the costs of this appeal as well as of the ELC case, to be borne by the 1st and 3 rd Respondents.

DATED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2021

……..

ASIKE-MAKHANDIA,

JUDGE OF APPEAL

…….

PAULINE NYAMWEYA

JUDGE OF APPEAL

……

JESSIE LESIIT

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR