



**Oyugi & 2 others v Cheptarus; Oyugi & another (Third party) (Environment & Land Case 211 of 2018) [2024] KEELC 3292 (KLR) (23 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3292 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 211 OF 2018  
FM NJOROGE, J  
APRIL 23, 2024**

**BETWEEN**

**JOB OKUNA OYUGI ..... 1<sup>ST</sup> PLAINTIFF**

**DOUGLAS ODHIAMBO OYUGI ..... 2<sup>ND</sup> PLAINTIFF**

**JOSHUA OGANGO OYUGI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**LABAN CHEPTARUS ..... DEFENDANT**

**AND**

**DOREEN ARIBETA OYUGI ..... THIRD PARTY**

**HON. ATTORNEY GENERAL ..... THIRD PARTY**

**JUDGMENT**

**Introduction**

1. In this suit the plaintiffs are the administrators to the estate of their deceased father. Their claim is that the 1<sup>st</sup> third party dealt with the deceased’s land by selling it to the defendant without any capacity, having not taken out any grant of letters of administration to his estate.

**Pleadings**

**Plaint.**

2. In the plaint dated 28/10/2008 the plaintiffs sought the following orders against the defendant:
  - i. An injunction to restrain the defendant by himself, his servants or agents or otherwise howsoever from remaining on or continuing in occupation of the said property;



- ii. Possession of the said property;
  - iii. Damages or mesne profits;
  - iv. Further or other relief.
3. The plaintiffs averred that they are the joint administrators of the estate of the late Hezekiah Nelson Oyugi Ogango (hereinafter also referred to as “Hezekiah”); that the late Hezekiah was the registered owner of land parcel No. Nakuru Municipality Block 12/30; that in October 2002 the defendant unlawfully trespassed onto the suit property and refused to vacate; that they have been denied usage of the said property and have suffered a loss in terms of mesne profits at the rate of Kshs.25,000/= per month from October 2002 until possession is delivered.
  4. The defendant filed his statement of defence dated 18/11/2008 where he denied the averments in the plaint and stated that he was a bona fide purchaser for value without notice of Nakuru Municipality Block 12/30 from one Doreen Aribeta Oyugi (later named in this suit as the 1<sup>st</sup> third party), widow to the late Hezekiah Oyugi; that he obtained a valid title for the same at an agreed price of Kshs.2,500,000/= which he paid in full; that he shall seek indemnity from the said vendor and the Land Registrar Nakuru if the title is impeached; that in the year 2004 he was a tenant in the said house for a period of three months before he purchased the suit property. He sought that the plaintiffs’ suit against him be dismissed with costs.

## **2<sup>nd</sup> Third Party Defence**

5. The 2<sup>nd</sup> third party filed its statement of defence dated 26/06/2009 where it stated that if it issued the defendant with a title deed, then the same was issued upon compliance with due procedure; it denied that the Defendant had any claim or right of indemnity against it in respect of the alleged rent and purchase price; it denied knowledge of the existence of a sale agreement and payment of the purchase price as pleaded by the defendant; it stated that the suit as drawn and the third party notice does not disclose any reasonable cause of action against it and that the third party notice against it be dismissed with costs.

## **Evidence**

### **Plaintiffs’ evidence.**

6. Job Okuna Oyugi testified as PW1 on 23/5/2023 and adopted his witness statement dated 29/1/2013 as part of his evidence. He testified that he is one of the Administrators of the estate of the late Hezekiah Nelson Oyugi the 3 plaintiffs having been granted such mandate in Probate & Administration Cause 2291/92 – Nairobi; that the late Oyugi died on 7/8/1992 in London; that the suit property is Nakuru Municipality Block 2/30; that the sale by Doreen was baseless as she did not have the capacity to sell the said property. He produced the documents attached to the list filed on 29/1/2013 as PExh.1 (grant), PExh.2 (the letter dated 21/5/2009) and PExh.3 (the Certificate of Lease).
7. PW1 proceeded to testify that the official search certificate dated 25/6/2008 bore entry No. 3 (a restriction by Sunray Merchants), Entry No. 4 (a restriction by the Probate & Administration Cause) and an entry of a charge to Thabiti Finance; that he did not know whether the cautions and restrictions had been removed; that he did not have the original of the search certificate issued in 2008; that the suit property was a rental single family residential dwelling in Milimani Estate in Nakuru; that Laban Cheptarus the defendant was a tenant; that despite requests to pay rent, he has not paid rent since



2002; that instead he said he had paid a third party some money to purchase the house; that as at 2002 the rent was Kshs.25,000/=.

8. Upon cross-examination he stated that they demanded for rent arrears before the suit was filed; that he did not have any evidence to show that the amount of rent paid was Kshs.25,000/=; that initially an agent known as Mungai was involved in the leasing and later the Bank of Credit and Commerce was involved; that the estate has over twenty eight properties and it is yet to be distributed and that his late father had four wives, with Doreen being one of them; that the said Doreen was allocated a house in Section 58 Nakuru and 200 acres in Muhoroni; However, he did not have any assets distribution list or anything to show that she had been allocated the said property; that his father died intestate and Doreen was not allocated the suit property. He requested for rent through his advocates; that the 1<sup>st</sup> defendant stated that he purchased the suit property for Kshs. 1,500,000/=; that he did not have the original title to the land as they were in the process of redeeming it from Thabiti Finance (hereinafter “Thabiti”) which had become insolvent; that the amount of money owed to Thabiti was Kshs. 1,500,000/=; that someone forged a certificate of confirmation of grant and tried to plant it in the lands office. He stated that the sale was illegal and Doreen had never informed him that he had sold the house.
9. Upon cross-examination by counsel for the 2<sup>nd</sup> third party, he stated that he did not have any issue with the Land Registrar or the Attorney General. That evidence marked the close of the plaintiffs’ case.

#### **Defendant’s evidence.**

10. Laban Cherutich Kiptarus, the defendant, testified as DW1. He adopted his witness statement dated 12/9/2018 as part of his evidence-in-chief and testified that in the year 2000 he met a relative of his who was living on the suit property which was being managed by Muigai Commercial Agencies on behalf of Doreen Oyugi; that he met with Doreen who told him to pay rent to the Muigai Commercial Agencies; he paid rent for sometime before Doreen informed him that she was selling the house; he was interested in buying it and so between the year 2002-2003 he approached his advocate Enock Cheronu who drew an agreement; that the said Doreen brought a title for the property which was in her name; that on 10/3/2004 he conducted a search and 1/4/2004 a sale agreement was drawn; he then paid the consideration of Kshs.2,500,000/= through his lawyer and title was processed in his name; however, sometime later someone by the name Job went to look for him at his workplace; that the said Job informed him that the suit property belonged to him; that he later called Doreen who told him that the house belonged to her as she had been given the same by her husband; that he tried to follow up on the succession cause but he could not find it and that if the court found that the title was questionable, he wanted Doreen to undertake the proper process and obtain for him a title. He produced the documents listed and attached to the list dated 23/5/2023 as DExh.1 – 9 in the order they were listed save for item No. 7.
11. Upon cross-examination by counsel for the 2<sup>nd</sup> third party, he stated that he was indeed a tenant in the house before purchasing it; that he paid a lawyer who conducted due diligence; that DExh.5 was a search done in the year 2008; that it was not DW1 who conducted the said search; that the Land Registrar did not mislead him; that the property belonged to Doreen; he had a title and that there was no collusion between him and anyone else to irregularly introduce documents in the Lands Registry.
12. Upon cross-examination by counsel for the plaintiff he confirmed that as per DExh.8, he did not write to the court to find out if there was a succession cause but he had sent Cheronu & Co. Advocates to find that out; he acknowledged that DExh.5 had an entry of 27/9/1984 in favour of Nelson Oyugi and entry No. 3 which was in respect of a caution and entry No. 4 which was a restriction order issued in P & A Cause No.1591/1992, while item No. 4 was a charge; that as per DExh.1 he paid Kshs.1,000,000/= in cash; however, he lacked any acknowledgment of payment of that sum. Item No. 3 indicated that



- he was to pay the balance after the transfer and registration in his name; that his title was issued on 23/5/2002 and yet he entered into the sale agreement in 2004; that he neither had the transfer nor the receipt for payment of stamp duty in court; that he moved to the house in the year 2000; that he paid the balance of the purchase price but Doreen did not give him any acknowledgment of payment; that he did not try to defraud anyone and he solely blames the Land Registrar and Doreen.
13. Upon re-examination he stated that he did not owe Doreen any money.
  14. The defendant's case was then closed.
  15. DW2, Collins Liyai Allela, Land Registrar Nakuru, testified and stated that that he had in court the parcel file for Block 12/30 which had both the green card and the white card (produced as 2DExh.2); that the green card (produced as 2DExh.1) is a 1<sup>st</sup> registration Edition No.1 opened on 27/9/1984 and the first lessee was Hezekiah Nelson Oyugi Ogango for a term 99 years with effect from 1/5/1976.
  16. DW2 also testified that that the white card had the same date and dimensions, and it also reflects the Lessee as Hezekiah N. Oyugi for a term was 99 years from 1/5/1976; that entry No. 1 in the proprietorship section is in the name of Hezekiah Oyugi of P.O Box 28 Nakuru and is dated 27/9/1984; the record shows that a certificate of lease was issued to Hezekiah; that there is an entry No. 3 dated 14/3/2000 showing lodging of a caution by Sunray Merchants Ltd. P.O Box 59228 Nairobi while entry No.4 dated 6/7/2001 is a restriction arising from P&A 1581/1992 (HC); that all the above entries were signed; the green card also reflected the registration of a charge to Bank of Credit & Commerce International (Overseas) Ltd for Ksh.1.5 million which was discharged on 28/9/1984 vide entry No. 2; that entry No. 3 dated 12/2/1985 was a charge to Thabiti Finance Co. Ltd. for Kshs.1.2 million.
  17. DW2 also stated that he also had a second white card (2DExh.3) for the suit land opened on 27/9/1984; that it indicated the area to be 0.1793; that the Lessor was the Government of Kenya while the Lessee was Hezekiah O. Oyugi for a term of 99 years with effect from 1/5/1976; that entry No. 1 on that white card read H. O. Oyugi P.O Box 3054 Nairobi; that entry No.2: dated 20/4/1996 showed a certificate of lease had issued; entry No. 3: 15/2/2001 showed Doreen Aribeta Oyugi, the 1<sup>st</sup> Third Party as lessee and she had been issued with a certificate of lease on 15/2/2001. Entry No. 5 dated 23/5/2002 showed Laban Cherutich Cheptarus of P.O Box 156 – Nakuru as owner and he had been issued with a certificate of lease. The card reflected no encumbrances.
  18. DW2 admitted that he had produced two white cards for same property which was not the norm since a property only has one white card and not two.
  19. He however explained that of the two cards produced, one has its origin in the green card while the smaller card (2DExh.3) does not have any root in any green card and that made all the difference.
  20. The witness also added that during the period indicated in the smaller card, the series of cards being issued were larger in size; that the smaller cards were produced later, from the year 2000 onwards; that on the small card, though entry No.1 was Hezekiah's and the 3<sup>rd</sup> entry was Doreen's, he did not have any records that could show how the property was transferred from Oyugi to Doreen; that RL7 and RL19 relate to registration by succession; that in his opinion the property is still under charge to a Finance entity and has a caution; that 2DExh.1 and 2DExh.2 are the genuine cards.
  21. Upon cross-examination by counsel for the defendant, DW2 stated that that LR7 and LR 19 were not in the parcel file; that there was no grant and no payment receipts regarding issuance of the lease to Aribeta in the land office records; though 2DExh.3 came from the Land Registry and was from the parcel file it had gotten into the land office records through dubious means; he added that for leasehold



properties, one cannot rely on a search alone and one must seek the root of the title; that the search relied on by the defendant and the lease issued to Aribeta lacked authenticity. According to him, the issuance of title to the defendant is reflected in the impugned 2DExh3.

22. Upon cross-examination by counsel for the plaintiff he confirmed that the parcel file is under custody; that the office deals with sensitive matters and that he works with clerical officers but the monitoring system was not effective. He admitted that documents like those can vanish; that sensitive records are kept under lock and key in a safe; that there is provision to have transfer of lease forms, consents, clearances which documents he did not have in respect of Aribeta's transactions; that he did not also have evidence of payment of stamp duty in his record which was not normal; that where a Registrar does not have any document which is normally brought to the Registry in Triplicate, the holder of those documents should have a copy.
23. That marked the close of the 2<sup>nd</sup> third party's case. The 1<sup>st</sup> third party's case was also marked closed.

### **Submissions**

24. The plaintiffs filed their submissions on 22/06/2023 while the 2<sup>nd</sup> third party filed its submissions on 6/06/2023.

### **Plaintiff's submissions**

25. The plaintiffs in their submissions outlined the evidence produced during trial and submitted that the Land Registrar produced two white cards; that one white card was supported by a green card while the other white card was not supported by a green card; the second white card was in the name of the 1<sup>st</sup> third party and it transferred the property to the defendant; that there were no documents to support the transmission. The plaintiffs relied on the case of *Re Estate of M'Ajogi M'Ikiugi (deceased)* [2017] eKLR, Sections 45, 55(1), 71 and 82 of the Succession Act and submitted that the 1<sup>st</sup> third party did not have any title to pass to the defendant. Further, the plaintiffs relied on the Latin doctrine of *nemo dat quod non habet* (one cannot give what they do not hold) and on *Diamond Trust Bank Kenya Ltd v Said Hamad Shamisi & 2 Others* [2015] which set out the exception to the said doctrine and urged that the exception was not applicable to the defendant because he was evidently not an innocent purchaser for value. It was the plaintiff's further submission that there was an inconsistency in the documents that the defendant produced as the title deed in his name was apparently issued on 23/05/2002 and yet records reflected that he entered into the land sale agreement with the Doreen two years later on 1/04/2004. The plaintiff submitted that the defendant did not have the transfer documents and neither did he have evidence of payment of stamp duty. The plaintiffs relied on the cases of *HCC No. 956 of 1991 Nelson Kivuvani v Yuda Komora & another*, *Kimotho v KCB* [2003 1 EA 108 among other cases and submitted that as the administrators of the estate of Hezekiah Oyugi, they did not consent to the said sale and so they sought that the orders in the plaint be allowed as prayed.
26. The Attorney General in his submissions identified the following issues for determination:
  - a. Whether there was a valid transfer of land from the deceased – Hezekiah Oyugi to the first third party (Doreen Aribeta Oyugi) and later on to the 1<sup>st</sup> defendant herein?
  - b. Whether the defendant can validly hold onto the defence of an innocent purchaser for value?
  - c. Whether the second 3<sup>rd</sup> party herein is liable to indemnify the 3<sup>rd</sup> defendant herein for any losses that might have accrued by virtue of purchase of the disputed piece of land from the first third party?
  - d. Who should pay for the costs of the suit?



27. On the first issue, the Attorney General relied on the evidence that was adduced during the hearing and submitted that its witness testified and produced two white cards and a green card. The Attorney General further submitted that the Land Registrar's evidence was that there cannot be more than two white cards for a property at any given moment and that any white card must have its foundation in a green card; that the Land Registrar pointed out that the small white card that showed that the property had been transferred from Hezekiah Oyugi to Doreen Aribeta was not supported by a green card and there were no documents that supported the said transmission; that the Land Registrar had concluded that the suit property belonged to Hezekiah Oyugi. The Attorney General further submitted that the suit property was registered in the name of Hezekiah Oyugi in 1984 and that he died on 7/08/1992; that it was not disputed that the succession proceedings with regard to his estate had not been concluded and it was therefore not clear how Doreen obtained registration in the year 2001 without any grant having been issued. The Attorney General relied on the Latin doctrine *nemo dat quod habet* as expounded in the case of *Diamond Trust Bank Kenya Limited vs Said Hamad Shamisi & 2 Others* [2015] eKLR.
28. With regard to the second issue, the Attorney General relied on Section 26 of the [Land Registration Act](#), the cases of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & another* [2013] eKLR, *Esther Ndegi Njiru & another vs Leonard Gatei* [2014] eKLR among other cases and submitted that defendant had not demonstrated that he obtained the title from a party who had interest to pass on, and that since there was fraud in the transfer of the suit property, the defendant cannot be said to be an innocent purchaser for value. The Attorney General further relied on the case of *Weston Gitonga & 10 others vs Peter Rugu Gikanga & another* [2017] eKLR and submitted that that the defendant was not an innocent purchaser for value because he failed to conduct due diligence; that the defendant claimed that he conducted an official search on the suit property but the purported copy of certificate from the said search had no seal and neither was its original produced; further, the Land Registrar had disowned the said search. The Attorney General submitted that the defendant did not prove his claim against him and sought that the suit be dismissed with costs. On the issue of costs, the Attorney General relied on the case of *Levben Products vs Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR)* as cited in the case of *Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 Others* [2013] eKLR.

### **Analysis And Determination**

29. After considering the pleadings, the evidence and the submissions, it is my view that the only issue that arises for determination is whether land parcel No. Nakuru Municipality Block 12/30 was fraudulently and illegally transferred to the defendant.
30. The plaintiffs' case that they are the administrators of the estate of the late Hezekiah Oyugi who died on 7/08/1992 and who was the registered owner of land parcel No. Nakuru Municipality/Block 12/30 or that it is the defendant who is in current occupation of the suit property and he has a certificate of lease in his name is uncontroverted. So is their claim that the defendant was a tenant in the house on the suit property in the year 2000, paid rent for some time and then stopped, and that when they followed up on the rent payments, the defendant informed them that he had purchased the suit property from Doreen Oyugi their step-mother. The parties did not also dispute that the estate of Hezekiah Nelson Oyugi Ogango is yet to be fully distributed. What is disputed is the process by which the defendant became the registered owner of the suit property. Thus, the issue to be tried is whether, as the plaintiffs argued, the said Doreen had the standing to sell the said house while the succession proceedings for the estate of Hezekiah Oyugi had not been concluded.



31. In support of their case the plaintiffs produced a copy of the grant issued in Nairobi High Court Succession Cause No. 1581 of 1992 in the matter of the estate of the Late Hezekiah Nelson Oyugi Ogango on 1/02/1994. The plaintiffs also produced a certificate of lease of the suit property issued on 28/09/1994 to the deceased Hezekiah Nelson Oyugi Ogango. The plaintiffs further produced a certificate of search dated 25/06/2008 which showed that Hezekiah was the lessee. I am thus satisfied that the suit land belonged to Hezekiah's estate prior to the impugned sale.
32. The defendant admitted that he purchased the house from Doreen after the latter informed him that she was selling the house and so they entered into a land sale agreement dated 1/04/2004; that he paid the entire purchase price and was issued with a title deed on 23/05/2002. The defendant could not however explain the discrepancy between the date he entered into the land sale agreement and the date he was issued with the title deed. The date of issue on the title deed preceded the date of the agreement. To this court, this discrepancy is an attempt to create evidence out of nothing to support the defence. The defendant appeared quite attached to the property and argued that Doreen had a title deed to the suit property and if the court finds that that was not the case, then it should order Doreen to procedurally sell the land to him.
33. In support of his case, the defendant produced a land sale agreement dated 1/04/2004 entered between him and Doreen, a certificate of lease for land parcel No. Nakuru Municipality Block 12/30 issued to Doreen Aribeta Oyugi on 15/02/2001 and a certificate of lease for the suit property issued to him on 23/05/2002.
34. Did Doreen did not have the capacity to sell the suit property to the defendant? The Land Registrar in his evidence produced one green card and two white cards with respect to the suit property. The contents of each of the said documents were set out extensively by the Land Registrar in his evidence.
35. The Land Registrar gave insight into some mundane details that could otherwise have passed unnoticed. In his experience, the size of the white card mattered in determining when it was issued, because long ago, white cards were larger in size than the document currently being issued. He testified that one white card (2DExh.2) which was big in size indicated that it was opened on 27/09/1984 and the lessee Hezekiah Oyugi Ogango was registered as the owner on the same date. The size of that card corresponded with the then practice during that period of issuing large cards. The said card indicated the existence of a caution and a restriction. The second, smaller white card (2DExh.3) indicated that it was opened on 27/9/1984, and that on 20/4/1996 Hezekiah Oyugi was registered as the owner and a certificate of lease was issued on the same date; that further on 15/2/2001 Doreen Aribeta Oyugi was registered as the owner; that on 23/5/2002 the defendant was registered as the owner of the suit property. The latter smaller card is the one that could not have been issued in the 1980s if the evidence of the Land Registrar regarding size of cards issued in that period is anything to go by.
36. The Land Registrar also pointed out that for each parcel of land there is usually one green card and one white card. He further pointed out that it was unusual that the suit property had two white cards. He disowned the second white card that indicated that Doreen Aribeta Oyugi had been registered as the owner of the suit property on 15/2/2001 on the ground that there were no supporting documents to the said registration. It was his conclusion that the owner of the suit property was Hezekiah Oyugi.
37. I am inclined to agree with the conclusion of the Land Registrar for several reasons. First, the very unusual presence of two white cards for the suit property and the unexplainable discrepancy between the date on the defendant's sale agreement vis a vis his title document is evidence of irregularity and fraud.



38. Secondly, it is evident that the second white card was planted in the land registry records and backdated. This must be so because it is a small white card while in or around 1984, white cards opened by land registries were, according to the Land Registrar's evidence which is quite reliable, were large in size. The only white card that is valid therefore is the larger one which does not reflect transfer of the suit property to Doreen.
39. Thirdly, admittedly, at the time the suit property was purportedly transferred to Doreen Aribeta on 15/02/2001, the registered owner of the suit property Hezekiah Oyugi was deceased, having died on 7/08/1992. It is not disputed that his estate is yet to be distributed. Transfers from the estate of a deceased person to a beneficiary are in a certain defined format and arise from a grant and are executed by the administrators of the estate. No such transfer to Doreen was produced and this further cements my view that the purported transfer was fraudulent.
40. Fourthly, there was also a discrepancy in the defendant's documents that he could not explain. The discrepancy regarding the dates of the sale agreement and the date of the certificate of lease issued to him were crucial yet they were not addressed. The defendant alleged that he entered into a land sale agreement with Doreen Aribeta on 1/04/2004 and yet he was issued with a certificate of title on 23/05/2002. It is not clear how the alleged transfer took place prior to the purported sale.
41. Fifthly, both Doreen and the defendant had an interest in the matter of the sale and were the persons in control of the process and can not feign ignorance of any step undertaken in the process. If there was any planting of documents in the land registry to favour them, for example the smaller white card (PEXh 3), it must have been with their knowledge collusion or express or implicit consent since they must have known that no transfer could occur while Hezekiah's estate had not been distributed by the Succession court. Therefore, it is clear that the purported transfer of lease from the name of Hezekiah to Doreen and from the latter to the defendant were engineered by the latter two persons. Hezekiah could not have transferred the land to Doreen since he was long since deceased by the time the alleged transfer took place. As I have stated earlier, no transfer form was produced to show the validity of the purported transfer from Hezekiah's estate to Doreen.
42. Section 26 of the *Land Registration Act* provides as follows:
- “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. The court in the case of *Elijah Makeri Nyangw'ra V Stephen Mungai Njuguna & another* [2013] eKLR held as follows:
- “Is the title impeachable by virtue of Section 26(1) (b)? First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally



or through a corrupt scheme. The heavy import of Section 26(1)(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26(1)(b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

44. It is therefore the case that regardless of the involvement of the defendant or otherwise in the activities that led to the irregular and fraudulent transfer, under Section 26(1)(b) of the Land Registration Act, the tainted title so procured is null and void and of no effect in granting the defendant any interest in the land that can be protected by the law.
45. It is thus my finding that since the title of the defendant was obtained illegally and unprocedurally, the Estate of the deceased Hezekiah Oyugi is still the rightful proprietor of land parcel No. Nakuru Municipality Block 12/30. The plaintiff is therefore entitled to prayers (a) and (b) of the plaint. The plaintiff is also seeking for mesne profits.
46. The Court of Appeal in the case of Peter Mwangi Mbuthia & another v Samow Edin Osman [2014] eKLR held as follows:
- “We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”
47. In the present case the plaintiffs claimed Kshs 25,000/- per month as mesne profits. The defendant on the other hand admitted that he was a tenant in the premises but asserted that the rent he used to pay was in the sum of Kshs 16,000/- per month. The defendant has therefore admitted that the property used to generate rent for its owners and there was no other burden of proof that was on the plaintiff's shoulders to discharge regarding the capacity and habit of the premises to bring in income save if they wished to demonstrate an increase in the rent payable over the years which they did not do.
48. In this court's view, mesne profits can be awarded in this case on the basis of the defendant's admission. If, as per plaint, the last time the defendant remitted rent to the estate of the late Hezekiah or to Doreen was in March 2004 (as he states in his admission in paragraph 10 of the defence) -and I am inclined to take the date in that admission in preference over the date of year 2002 alleged by PW1 as the last date of payment of rent- then the defendant has not paid rent for 20 years (240 months). Rent for all those months at the lower rate of Kshs 16,000/= which I have adopted as above amounts to Kshs 3,840,000/=.
49. In conclusion, the plaintiffs are entitled to the orders sought in the plaint. I therefore enter judgment in favour of the plaintiffs against the defendant and I order as follows:
- i. A declaration is hereby issued declaring that the suit land comprised in parcel No. Nakuru Municipality Block 12/30 rightfully belongs to the estate of Hezekiah O. Oyugi (deceased);
  - ii. A mandatory injunction is hereby issued compelling the defendant Laban Cheptarus to vacate the suit land known as parcel No. Nakuru Municipality Block 12/30 and to give vacant possession thereof to the plaintiffs within 90 days of this judgment;



- iii. A permanent injunction is hereby issued restraining the defendant by himself, his servants or agents or otherwise howsoever from remaining on or continuing in occupation of the said property after the expiry of 90 days from the date of this order or re-entry thereafter;
- iv. The Land Registrar Nakuru shall cancel the registration of the defendant from the land registry records and reinstate Hezekiah O. Oyugi as proprietor of parcel No. Nakuru Municipality Block 12/30;
- v. The defendant shall pay to the administrators of the estate of Hezekiah O. Oyugi represented by the plaintiffs herein the total sum of Kshs 3,840,000/= being mesne profits for the period March 2004 up to March 2024 which sum shall continue to increase monthly at the rate of Kshs 16000/- per month after March 2024 and the amount owing shall attract interest at court rates till paid in full;
- vi. The plaintiff's costs of the suit shall be borne jointly and severally by the defendant and Doreen Aribeta Oyugi.
- vii. The 2<sup>nd</sup> Third Party shall not be entitled to any costs of the suit.

**JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 23<sup>RD</sup> DAY OF APRIL, 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

