



Axel Engineering and Manufacturing v Kenya Airports Authority & 4 others (Environment & Land Case 440 of 2018) [2024] KEELC 3874 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3874 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 440 OF 2018**

JA MOGENI, J

MAY 16, 2024

BETWEEN

AXEL ENGINEERING AND MANUFACTURING PLAINTIFF

AND

KENYA AIRPORTS AUTHORITY 1ST DEFENDANT

THE ATTORNEY GENERAL 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

DIRECTOR OF SURVEYS 4TH DEFENDANT

DIRECTOR OF PHYSICAL PLANNING 5TH DEFENDANT

JUDGMENT

1. The plaintiff filed this suit vide a further amended plaint dated 25/02/2021 but moved to withdraw the suit vide a Notice of Withdrawal of Suit dated 6/05/2021 which was allowed on 6/07/2021. The 1st defendant having filed a counter-claim decided to pursue his counter-claim.
2. On its part, the 1st Defendant counterclaims against the Plaintiff for:
 - i. A declaration that hiving off, excision and/or curving out of LR No 209/121421 (Grant Number IR No. 71372) from LR No. 21919 owned by the 1st defendant was done irregularly and/or illegally.
 - ii. An order for revocation and/or cancellation of the Title held by the plaintiff in respect of parcel of land known as LR No. 209/121421 (Grant Number IR No. 71372)
 - iii. An order that the suit land forms part of LR No. 21919 which belong to the 1st defendant



- iv. An order for the removal and/or demolition of any development and/or structures on the suit property
 - v. Costs of this suit
 - vi. Interest on (vi) above at court rates
 - vii. Any other or further relief that this Honorable Court may deem fit and just to grant
3. The 1st defendant's case is that the suit property was party of the several properties which were illegally and irregularly acquired by allotted individuals by hiving off and excision of LR 21919
 4. Due to the illegal acquisitions unsafe structures were put on the suit property which the 1st defendant claims to be the registered owner of. As a result the 1st defendant sought help from the Multi-Sectoral Agency Committee to address the challenge. This led to the issuance of a Notice by the Committee to the parties that had encroached the alleged property belonging to the 1st defendant.
 5. That the 1st defendant then lodged a complaint with the National Land Commission who carried out investigations and following their findings made recommendations for cancellation of the titles issued and demolition of the private developments since the 1st defendant was found to be the owner of the suit property LR 21919
 6. The 1st defendant avers that with the findings the plaintiff's land was found to be overlapping on the 1st defendant's suit property and having been irregularly allocated. The first defendant has itemized the following particulars of illegality and irregularity:
 - a. Dealing with the 1st defendant's property in total disregard of its interests and title to/over the same
 - b. Unprocedural and irregular hiving off, excising and/or curving out of LR No. 21919/12421 from LR 21919 without regard to the 1st defendant's interest in title No. 21919
 - c. Having no authorized or official re-planning or subdivision of LR No. 21919
 - d. Failing/neglecting to follow due process including the laid down due process in acquisition and/or allotment of land meant for public utilities
 - e. Acquiring land meant for public use
 7. The 1st defendant also stated that the building structures on the suit property were not approved by the plaintiff and their construction violate the statutory provisions of the law and that the buildings are a serious risk to the general public since they are sitting right in the flight path and therefore they have to be demolished.
 8. The 1st defendant seeks to have the plaintiff's title LR 209/121421 (Grant No. 71372) revoked and/or cancelled and an order for removal of the illegal structures issued.
 9. The counterclaim is opposed the defendant who filed a defence to the Counterclaim dated 2/09/2019

1st Defendant's Case – Counter Claim

10. On its part, the Plaintiff (hereinafter plaintiff) in the counterclaim claims that the suit property was issued with an allotment dated 24/07/1996 following the communication from the Commissioner of Lands vide letter dated 23/07/1996. That vide a letter dated 10/09/1991 the boundary walls of the



plaintiff were to be gazetted to reflect the perimeter boundary of the airport as approximately 37,723 metres long and the area as 5098 hectares.

11. DW1 – Joseph Ng’ang’a Watheru, testified that he was a Surveyor working for Kenya Airports Authority he adopted the witness statement dated 20/01/2021 that had been filed by Charles Omwenga who had since retired. He also adopted the list of documents at pages 14-39 and pages 40-79 which he asked the court to adopt as his exhibits. It was his testimony that the land forming the airport has been augmented by way of compulsorily acquired land the latest being the acquisitions made in 1971 reflected in document 2 which contain gazette notices 1105 and 1106.
12. By the year 1991 the boundaries were well set and the Director of Aerodrome vide a letter dated 10/09/1991 asked that the land of the 1st defendant be gazette containing measurement of 5098 hectares so as to stop encroachment and the grant was registered on 13/08/1996 as IR 70118/1 and signed on 26/07/1996 as evidenced by document 6.
13. That five years after the said allotment the Commissioner of Lands vide a letter dated 27/08/1999 purported to have allotted only part of the plaintiff allotted land and this led the Commissioner starting to sign letters of allotment for other private individuals to land belonging to the plaintiff.
14. In cross-examination he stated that Gazette Notice (hereinafter GN) number 1149/1953 showed the acreage of the airport to be 4380 but the GN 1150/1953 is silent on acreage. For GN 1105 the government gazette notice of land acquisition and the showed the acreage as 209.64 hectares and 6658.34 acres. Yet the letter at pages 45 and 46 mention the land to be 5098 hectares. He testified that the acreage shown on the face of the title at page dated 1.08.1996 is 4674.60 but that it should be shown as 5098. He stated that despite the acreage being shown as 4674 including the survey plan, he did not have in his custody and records that showed that the airport property had been hived off.
15. It was his testimony that the boundaries map he produced at page 78 was clear and that a letter written in 1999 dated 27/08/1999 stated that the properties highlighted were erroneously marked as airport land but that the Kenya Airports Authority never responded to the said letter
16. He further testified that he was not aware of any Part Development Plan (PDP) and stated that he had not seen the ones produced at page 25. He referred in his testimony to the NLC report which he stated at paragraph 34 stated that the properties which were in contention including the plaintiff’s property had not been illegally or irregularly acquired
17. He stated that the plaintiff had issued notices to all property owners around the airport to demolish in 2019 and that they had been communicating since 2006 although they never filed any suit in court except for the counterclaim in the instant suit.
18. Upon re-examination he stated that it was the finding of National Land Commission that the plaintiff’s land overlapped parcel no. 21919 but that in his understanding the finding made at paragraph 37 of the same report was not conclusive. Further that according to the plan produced at page 46 of the bundle the plaintiff land measured 5098 acres but it was illegally allocated. That KAA after getting a vesting order decided to curb the vice by getting title.
19. He stated that from 1996 there has never been any sub-division of KAA land. That LR 21919 was surveyed and allotted on 24/07/1996 and a grant issued on 26/07/1996 whereas the alleged plaintiff’s property was surveyed on 4.10.1996 and title issued on 14/11/1996. That the plaintiff’s documents shows that the PDP was prepared on 14/07/1994.
20. With this the 1st defendant closed its case



Plaintiff's Case (Now Defendant in the counter-claim)

21. The plaintiff stated that it is and was at all material times the registered owner of parcel LR No. 209/12421 (IR 71372) measuring 0.200 hectares registered under Registered Titles Act (now repealed) Land Survey Plan number 208844 (the suit property). It was the defendant's contention that on or about 28/09/2018 the 1st defendant/ now plaintiff in the counter-claim issued a notice dated 25/09/2018 alleging the plaintiff's property had encroached on the plaintiff's land known as LR No. 21919. The 1st defendant alleged that the structures on the plaintiff's property were illegally developed and they needed to be removed, demolished and vacated since they were on the 1st defendant's flight path.
22. The plaintiff further contends that the impugned notice was however not specifically addressed to the plaintiff and does not identify the plaintiff's property but alludes to other earlier notices purportedly issued to the plaintiff which were however never served on the plaintiff. That following the notice the 1st defendant gave the plaintiff 14 days to remove the structures without affording the plaintiff a hearing.
23. DW1- Anthony Ndirangu testified that he is the director of the plaintiff company and was conversant with the matter and adopted his witness statement dated 12/05/2022 and a supplementary one dated 16/05/2022. He also adopted his list of documents dated 19/05/2022 and a supplementary one dated 7/06/2022.
24. On cross-examination he started that the plaintiff company acquired the suit property vide a sale agreement on 26/10/2009 between the company and advocate John Macharia. He stated that he did not have any documents in court to show that he was a director of the plaintiff company nor any authorization to show he was authorized to testify on behalf of the company.
25. It was his testimony that the property was acquired in 2009 it was registered in 2010 and that the survey was done on 4/10/1996 according to the deed plan. It was his evidence that they conducted a search prior to the purchase but the said search had not been produced in court and that they never did any other due diligence prior to the purchase. Further they never sought any approvals from the airport authority before construction.
26. DW2- Prof Gordon Wanyumba stated that he was a lecturer at Technical University of Kenya. He adopted his witness statement dated 12/05/2022. It was his testimony that he carried out the survey of JKIA in 1995 as stated and that the survey plan that he produced as document 3 has section B which is represented by survey plan No. 255/238 which is ground survey PDP but which is just a proposal.
27. He testified that the survey plan No. 255/238 was issued by the director of survey and the plaintiff's property is marked as 209/12421 and it shows that it was surveyed in February 1995. That the airport land is contained in survey plan number 265/27 and the survey was done in October 1995 and that by the time the cadastral survey of the airport was being done the plaintiff's survey had been done. That he is the surveyor who did the survey of the airport as is reflected on the FR Cadastral documents. It is his testimony that Survey Plan FR 265/27 was done in October 1995 whereas Survey Plan FR 255/238 was done in February 1995.
28. That at the time of undertaking the airport survey he was working with the airport and they went and marked the airport land identifying the beacons and the total acreage was 4674.6. That when this survey was done the plots for the plaintiff had already been mapped. That according to his drawing the plaintiff's plot should be outside the airport.
29. He referred to the map produced by the 1st defendant as an internal working map for the airport and that it is not a cadastral plan which needs to be authenticated by director of survey.



30. Upon cross-examination he testified that he did the survey no. 265/27 and that the plan survey number 255/238 are not in the insert of the earlier survey shown and are not the plots on survey 255/238 which was authenticated in September 1995. That Survey plan 265/27 was authenticated in May 1996.
31. It is his testimony that the 1st defendant's plan at page 46 show the area of its suit property as 5098 hectares but this working plan includes many other properties which had already been excised from the airport and also the area of the airport was not properly mapped using cadastral survey. The map 265/27 is the one used to create a deed plan of the airport.
32. He testified on re-examination that the survey plan 255/238 has two rows which should have been included from the airport land. With this the defendant closed its case.
33. The court had requested for a site visit which could not take place due to emerging security concerns that have recently come up whenever the Deputy Registrars have undertaken site visits.
34. The parties filed their submissions which I have had the opportunity to interrogate.

1st defendant's Submissions

35. It was the 1st defendant's (now plaintiff in the counter claim) submissions dated 3/04/2024 following the withdrawal of the plaintiff's suit on 6/07/2021 (now defendant), that on the strength of Order 7 Rule 13 to pursue its claim which challenges the validity of the plaintiff's purported title LR 209/12421. As being one of the property acquired by/allotted to individuals through hiving off of LR 21919 with survey plans overlapping the 1st defendant's property.
36. The 1st defendant identified four issues in its submissions and gave a detailed chronology and history of how the Kenya Airports Authority came to be vested with the suit property dating back to 1953. That in 1994 there was a vesting order which was shown in the document at page 47 which comprised of the plan NBI/C/018/1991 which vested the suit property LR 21919 in the 1st defendant.
37. That the plaintiff is a successor in title of the erstwhile Department of Aerodromes which was a department in the Office of the President. Pursuant to the provisions of section 4 (2) of the [Kenya Airports Authority Act](#) aforesaid, the Minister transferred all government property previously administered by the now erstwhile Department of Aerodromes, Office of the President, to the plaintiff through a Vesting Order known as the Kenya Airports Authority (Vesting) Order, 1994, ("the Vesting Order"). The Aerodromes (Control of Obstructions) Act of 1962, Chapter 396 Laws of Kenya sets out the schedule of properties previously managed by the Aerodromes Department that were transferred and vested in the plaintiff. L.R No. 21919 (the suit property) is part of the property that was vested in the plaintiff through the aforesaid Vesting Order.
38. The 1st defendant submitted that the boundaries and dimensions of aerodromes were, in the absence of title deeds, defined by the Aerodromes (Control of Obstructions) Act. To get the exact extent and size of aerodromes, the dimensions of airports (aerodromes) stated in the aforesaid Act were taken into account together with all additional land that was from time to time acquired by the Government for purposes of expanding the said aerodromes. In the case of what was known as Nairobi Airport (now Jomo Kenyatta International Airport(JKIA)), the additional land was acquired through Gazette Notice No. 1105 of 26th April 1971(See pages 27 – 29 of the Plaintiff's Exhibit). The size of Nairobi Airport (now JKIA) as at the time of the Vesting Order aforesaid was therefore what is stated in the aforesaid Act together with all land acquired subsequently by the Government.
39. This meant that the Vesting Order had the effect of transfer of the suit property and vest the same in the 1st defendant (now plaintiff in the counter-claim) land that was already in existence and whose



dimensions were known even though at the time, it was submitted that it was customary with land owned by Government departments, that no formal title had been issued. Consequently, in the case of JKIA, at the time of the Vesting Order, even though no title over the same had been acquired, the dimensions and extent thereof were known and the land was in existence. The import of Section 4 of the [Kenya Airports Authority Act](#) meant that that once land is vested in the plaintiff by the Government, the same vests in the 1st defendant without further assurance and that the ownership of the land by the 1st defendant is not dependent on the title issued by the Lands Office but is conferred by the Vesting Order.

40. The 1st defendant on their part in 1996 out of abundance of caution, caused a formal survey to be carried out on the land on which JKIA is situated and a Deed Plan and subsequently a title deed in respect thereof was issued. The land was given L.R. Number 21919(the suit property) that was issued with title No. I.R Number 70118.(document 6 in the 1st defendant's exhibits).
41. The 1st defendant (plaintiff in cc) submitted that the Deed Plan Number 205580 for the suit property was issued on 21st May 1996 (see document 6 above of the 1st defendant's exhibits) and the title on 26th July 1996 and registered on 13th August, 1996.. The plaintiff's parcel of land on which JKIA is situated therefore remain L.R No. 21919, Title No. I.R 70118(the suit property).
42. In cross examination and re-examination, DW1 explained how the plaintiff's land (who is now the defendant in the counter claim) was part of the several properties which were subsequently illegally and irregularly acquired by allotted individuals through hiving off and excision of LR 21919.
43. He had testified that unscrupulous people with the intention of grabbing parts of the suit property had connived with the office of the Commissioner of Lands to order a re-survey to be done on the suit property purportedly with the intention of curving out Mombasa Road from the Deed Plan of the suit property. He stated that the said fraudsters organized for the surrender of the title for L.R. 21919 and in exchange therefor they purported to issue the plaintiff with another title for L.R. No. 24937 whose acreage was less than the one in the title for L.R No. 21919. Some conscientious officers at the Land Registry refused to participate in the fraudulent scheme and refused to sign and endorse the surrender that was embossed as entry 13 in the title for L.R. 21919.

Plaintiff's Submissions (Defendant in the Counter Claim)

44. The plaintiff placed their reliance on the defence to counterclaim dated 2/09/2019. At the onset the identified five issues they addressed in their submissions:
 - a. Whether the plaintiff illegally and/or irregularly acquired the suit property
 - b. What is the actual size of the 1st defendant's property
 - c. Whether there is an overlap between the suit property and that of the 1st defendant
 - d. Whether the report by the National Land Commission is binding?
 - e. Whether the 1st defendant has proved its case on a balance of probabilities?
45. In their submissions the plaintiff submitted that there was no evidence on record showing that the title to the suit property was obtained through illegalities or that it was a forgery. That the plaintiff bought the suit property LR 209/12141 (IR 71372) registered under Registered Transfer Act Cap 281 (repealed) delineated on Land Survey Plan No 208844 evidence by the plaintiff's list at page 3-6. He submitted that the plaintiff bought for valuable consideration the suit property on 5/05/2010 and the transfer documents were annexed at pages 12-20. In support if this submission, the defendants cited the



cases of Joseph Arap Ngok vs Justice Moiwo Ole Keiwua & 5 Others Civil Application No. Nairobi 60 of 1997, Arthi Highway Developers Ltd vs West End Butchery Ltd & 6 Others [2015] Eklr, Lawrence Mukiri vs Attorney General & 4 Others [2013] Eklr among others.

46. That the report of National Land Commission (NLC) at paragraph 22 and 36 absolved the plaintiff from fraud, illegality or corruption. Therefore the property by the plaintiff he submitted was acquired in good faith as stated at paragraph 37 of NLC report and that the 1st defendant never led evidence to show that the plaintiff was involved in irregular hiving off and excision of the 1st defendant's parcel of land.
47. The official also submitted that there was a replanning via the Part Development Plan which gave rise to the survey plan number 255/238 which then supported the issuance of the title that became to be owned by the plaintiff. In their submission the plaintiff took issue with NLC and stated that paragraph 35 of the report failed to recognize that there was a replanning.
48. Further that vide the gazette notice number 1149 of 1953 the 1st defendant's suit property measured 4380 acres only but the uncertified copy of plan NBI/C/018 of 1991 which is document 46 of the 1st defendant's bundle and the letter to the Commissioner of Lands which is document 45 stated that the acreage was 5098 hectares. However, the title issued by the Commissioner on 1/08/1996 placed the size at 4674.60 hectares.
49. It is the plaintiff's submission that the 1st defendant did not know the size of its suit property since the uncertified plan was an internal document with no probative value. That the director of survey should have been called to testify on the size of the parcel of land belonging to the 1st defendant since he is the only one that can resolve boundary disputes.
50. Further that there cannot be said to have been an overlap over the 1st defendant's suit property since the title to the parcel had not been acquired. This is because following the re-planning of the Part Development which happened in 1995 the survey plan No. FR 255/238 dated 15/09/1995 produced LR 209/12417-12461. That the allotment letter to the plaintiff was issued in 1994 and the one for the 1st defendant in 1996.
51. On whether the NLC report is binding the plaintiff was of the view that the investigation and recommendations made are at variance further the NLC undertook investigations and inquiries well aware the instant suit was already in court. The actions of NLC were therefore subjudice. The plaintiff cited the cases of Nicholas Mwatika Mulei vs NLC & 3 Others [2018]eKLR and Re Matter of the Interim Independent Electoral Commission [2011] eKLR.
52. It was the plaintiff's submission that the 1st defendant had failed to proof their case and the counterclaim should be dismissed

Analysis and Determination

53. The main issues for determination in this suit are:
 - i. Whether there was fraud in the allocation of the Suit Property to the plaintiff in the counter claim;
 - ii. Whether the Commissioner of Lands had powers to reallocate land vested in Kenya Airports Authority.
 - iii. Whether the plaintiff is a bonafide purchaser of LR 209/12417?
 - iv. Who should pay the costs of this counter-claim?



54. It is clear from the evidence that the Plaintiff was issued with a title to LR 209/12417 By the 3rd defendant which was produced in court. The plaintiff claims to have bought the suit property from advocate John Macharia and he also produced a sale agreement and transfer instruments in court. The plaintiff alleges that the title was a result of a process he has dubbed as re-planning of the part development plan.
55. I checked out the law to understand what is known as re-planning so that I understand how the plaintiff's land relates to the 1st defendant's parcel if at all but this term does not appear in our laws. I have not seen it under any law nor any text book. It could be an emerging area. This being a case where the 1st defendant a public entity is claiming land which the plaintiff a private entity is also laying claim to, the court has to discern on a balance of probabilities based on the documents placed before it whether the 1st Defendant will prove its claim in the counterclaim.
56. Let me for argument sake take it that indeed there was a re-planning process which touched on the 1st defendant's parcel of land, was there communication to the 1st defendant to notify them that there shall be a re-planning of land that was already vested in the 1st defendant in 1994? If indeed there was a re-planning (whatever that means) what legal processes were supposed to be undertaken in order to now hive off land already vested? DW2 testified to having been the surveyor who did the survey for the 1st defendant, I am wondering why he did not take into consideration that the said parcel had been allocated in 1953 and vested in the 1st defendant in 1994 and therefore a title could not issue to the plaintiff in 1995.
57. Further, I have not seen any notification to the 1st defendant about the so called re-planning. As a matter of fact the 1st defendant testified that they were shocked to note despite there being no contest in 1991 that the size of the 1st defendant's land was 5098 hectares, the Commissioner of lands issued a grant showing the size as 4674.60 short 423.4 hectares.
58. The Commissioner of Land did not explain when issuing the title and the grant in 1996 why the land that had already been vested in the 1st defendant did not measure to what was passed down from the Nairobi Aerodrome which was the initial holder of the airport land in 1953.
59. Earlier the Director of Aerodromes had written to the Commissioner making him aware of the dimensions of JKIA on 10/09/1991 which he (Commissioner) wanted preserved from encroachment. The letter from the Commissioner dated 27/08/1999 document number 7 seemed to have formed a basis for further excision of the 1st defendant's land.
60. In order to determine the question whether the title held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a title document and assert that he has good title by the mere possession. Where there is contention that a title to land held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that what they hold, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material and important especially when there are doubts to the regarding the process.
61. It is therefore necessary for the court to determine how the plaintiff ended up having a Title document in its name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land. The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except



on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

62. I find it suspicious that land that was hived off the airport land had its survey plan done before the survey plan of the airport. If this is the case, then how did the plaintiff get a share hived off from the airport land before there was a survey plan? DW2 confessed that there was an error for mapping the survey plans which may have led to the overlap but that the plaintiff's property had not overlapped. This does not make legal sense.
63. DW2 testified that at paragraph 10 of his report he states that there is a mistake but that according to his view the 1st defendant's plot has indeed overlapped. It was his testimony that he did not know about the plan of the 1st defendant's plot overlap and that his plan 265/27 should not have been authenticated since there was already survey plan 255/238 and therefore the survey department should have returned his plan to him for correction. DW2's testimony seems to have been intended to create confusion yet the issues at hand are very clear. When the survey was being undertaken the land for the airport has already been vested in the Authority and none was available for hiving off.
64. DWI led elaborate evidence with documents in tow to prove that the suit parcel of land had been vested in Kenya Airports Authority as early as 1994 the dimensions having been identified and attributed to Nairobi Aerodrome in 1953 which was the predecessor of Kenya Airports Authority and therefore it was not available for reallocation. There must always exist a presumption against an intention to interfere with vested property rights as the law assumes it is unavailable for any other purpose but for what it was vested in public institution for.
65. The Commissioner of Lands also had no authority to alienate the suit land as Section 3 of the GLA, vests the power to alienate unalienated Government land in the President. The power to alienate is delegated to the Commissioner of Lands in limited circumstances for educational, charitable, sports and other purposes as set in the GLA. None of the exceptions set out therein empowered the Commissioner of Lands to alienate the suit property to the plaintiff or to the said John Macharia
66. Further if the said John Macharia had been issued with an allotment letter this should have been one of the documents that should have been produced in this court. The plaintiff produced the sale agreement between themselves and the said John Macharia and even an approval plan from the City Council but he did not show how the said John Macharia who was not called as a witness acquired the suit property which he eventually bought from him.
67. The Court in the case of NBI, HC. Misc. Appl. 1732 of 2004, James Joram Nyaga & Another v Attorney General & Another [2007] eKLR while referring to section 3 and 7 of the GLA observed thus:

“The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the president. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap. 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act Cap. 281 of the Laws of Kenya.”

68. The acquisition of title cannot be construed only in the end result, the process of acquisition is material and important especially when there are doubts to the regarding the process. It is therefore necessary



for the court to determine how the plaintiff ended up having a Lease and Certificate of Lease in its name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land. The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

69. The court in the case of *Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another* (2013) eKLR held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. Hon Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the *Land Registration Act* rendered himself as follows:-

“the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

70. Whereas the court in the case of *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others* [2015] eKLR stated that:

“It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market. Perhaps the provisions of the new Constitution 2010 and the *Land Registration Act*, 2012 will have a positive impact for land investors in future.”

71. It should be noted that at one time in the history of Kenya there was unprecedented land grabbing which is known in other parlance as large scale land based investment depending on which side you are in, meant to sanitize the illegal act. The courts had to stamp their authority to root out this vice in order to protect the public interest and individuals who would otherwise lose their land through these schemes.

72. In *Republic vs Minister For Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003* [2006] 1 KLR (E&L) 563 Maraga, J (as he then was) expressed himself as follows:

“Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...It is quite evident that should a constitutional challenge succeed either under the trust land provisions of *the Constitution* or under section 1 and 1A of *the Constitution* or under the doctrine of public trust a title would have to be nullified because *the Constitution* is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of *the Constitution*.”



73. Similarly, Nyamu, J (as he then was) in *Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443* held:

“Should the Land Acquisition Act give shelter to the land grabbers of public land or are the courts going to invent equally strong public interest vehicle to counter this. Should individual land rights supersede the communal land, catchments and forests? How for instance are the Courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title? Are the Courts going to stay away and refuse to rise to the greater call of unravelling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of *the Constitution*. I venture to suggest that such titles ought to be nullified on this ground and, thrown into the dustbins.”.....In my view there could be other constitutional challenges to reckless and unaccountable alienation of public land and other public resources based on the principle or concept of what is necessary in a democratic society. Sections 1 and 1A of *the Constitution* captures the vision of a democratic society. Take for example the human rights jurisprudence, one of the permissible limitations to the fundamental rights is what is necessary in “a democratic society.” This phrase also appears in most of the fundamental rights and freedoms provisions in chapter 5. These words have received almost internationally accepted meaning in so far as the human rights area is concerned. To my mind, section 1 and 1A are wider and cover the concepts of good governance accountability and transparency...A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and the spirit of s 1 and s 1A of *the Constitution* in my view...The doctrine of public trust as defined above is certainly a ready enemy of alienation of natural resources and land grabbing now and in the future and should serve as a perpetual protection to public land, forests, wetlands, riparian rights, riverbeds and “kayas” just to name a few. The doctrine shall constitute the cutting edge of any actual or threatened allocation of public resources including public land.”

74. Further in the same vein in *Chemei Investments Limited v The Attorney General & Others Nairobi Petition (Supra)* at para. 64 it was held:

“*The Constitution* protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of *Milan Kumar Shah & 2 Others vs. City Council of Nairobi & Another (supra)* where the Court stated as follows, “We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”

75. Also in the case of *Dr. Joseph Arap Ngok v Justice Moiwo ole Keiwua & 5 Others, Civil Appeal (supra)* the court stated thus that:

“Section 23 (1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title



bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

76. If violation of such sanctity which is guaranteed by the State is proved, then section 24 of the same Act states as follows:

“Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person as proprietor of the land or interest, or in consequence of any error or misdescription in any grant or certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through the fraud, error or misdescription.

77. The above judicial authorities are in consonant with the 1st defendant’s case. The Commissioner of Lands had no authority to alienate land that had been vested in the 1st defendant as has been proved by the evidence and the documents produced.. The plaintiffs claimed that they were bona fide purchasers for value without notice. For a person to rely on this doctrine, he must prove the following ingredients as was enunciated in the case of *Katende v Haridar & Company Limited* [2008] 2 E.A.173 where the Court of Appeal in Uganda held that:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;

SUBPARA g.

he was not party to any fraud.”

78. The plaintiffs therefore do not qualify as innocent purchasers for value without notice as the Commissioner of Lands had no authority to alienate the land. He could therefore not pass a good title to the vendor who sold the suit property to the plaintiffs. If they have any claim for the land then their remedy lies elsewhere, moreso at the doorstep of the persons who purportedly sold to them land which they did not have title to.

79. Section 26 of the [Land Registration Act](#) provides that 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, it also provides that such title can be impeached on the grounds of having been acquired fraudulently, through misrepresentation or illegally or unprocedurally.

80. Again as Justice Munyao put it in the case of *Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others* [2015] eKLR

... 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.

81. The assertion of the plaintiffs that they were innocent purchasers who were not aware of the fraudulent transaction does not hold water in this case as the purpose of section 26 is to protect the real title holders from the unscrupulous persons.

82. The court is also empowered under Section 80 (1) of the *Land Registration Act*, 2012 to order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. I find that the plaintiff irregularly, fraudulently and unprocedurally registered the suit land in their names and the same should not be allowed to stand. I therefore enter judgment for the 1st defendant against the plaintiff in the counter claim and grants prayers as follows:

- i. A declaration is hereby issued that hiving off, excision and/or curving out of LR No 209/121421 (Grant Number IR No. 71372) from LR No. 21919 owned by the 1st defendant was done irregularly and/or illegally.
- ii. An order is hereby issued for revocation and/or cancellation of the Title held by the plaintiff in respect of parcel of land known as LR No. 209/121421 (Grant Number IR No. 71372)
- iii. An order is hereby issued that the said suit property and for avoidance of doubt, LR 209/121421 (Grant Number IR No. 71372) forms part of LR No. 21919 which belong to the 1st defendant
- iv. An order is hereby issued for the removal and/or demolition of any development and/or structures on the said suit property and for avoidance of doubt I am referring to LR 209/121421 (Grant Number IR No. 71372).
- v. Costs of this counter claim shall be borne by the defendant in the counter-claim who is the Plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MAY 2024.

.....

MOGENI J

JUDGE

In the virtual presence of:

Mr. Ngugi holding brief for Mr. Kabaiku for Plaintiff



No appearance for 1st Defendant

Caroline Sagina: Court assistant

.....

MOGENI J

JUDGE

