



Vekariya Investments Ltd v National Land Commission & 6 others (Environment & Land Case 796 of 2014) [2024] KEELC 4649 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4649 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 796 OF 2014**

AA OMOLLO, J

JUNE 6, 2024

BETWEEN

VEKARIYA INVESTMENTS LTD PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

CABINET SECRETARY, LANDS 2ND DEFENDANT

KENYA AIRPORTS AUTHORITY 3RD DEFENDANT

HON.ATTORNEY GENERAL 4TH DEFENDANT

SENATOR SERVICES LTD 5TH DEFENDANT

REGISTRAR OF TITLES 6TH DEFENDANT

DIRECTOR OF SURVEYS 7TH DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit against the 1st-7th Defendants vide Plaint dated 18th June 2014 and amended on 25th July 2014 seeking for the following orders;
 - a. A declaration that the Plaintiff is the lawful owner of LR. No. 9095 within the meaning of Article 40(6) of *the Constitution*.
 - b. A declaration that the Plaintiff is a bona fide purchaser for value without notice of L.R No.9095 within the meaning of Section 14(7) of the *National Land Commission Act*, 2012.
 - c. This Honourable Court be pleased to issue a permanent injunction against the 1st and 2nd and 3rd Defendants, their agents, servants and/or anybody acting pursuant to their instructions



from trespassing, demolishing, forceful eviction, cancelling title and/or interfering with the suit property known as LR.No. 9095 (Grant No. I.R 89497).

- d. In the alternative an order for compensation of Kshs. 7,974,960,000/= do issue against the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants.
 - e. A declaration that the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants, their representatives, agents, servants or proxies do not evict the Plaintiff from the suit land until complete payment of compensation.
 - f. Cost of the suit and interest at court rates.
2. The Plaintiff averred that in the year 2008, it was interested in purchasing of land to construct commercial godowns and factories in Nairobi, to which the 5th Defendants herein referred to as “Senator” entered into negotiations with it as the land owner of LR.No.9095 registered under Grant Number I.R 89497/1 herein after referred to as “the suit land/property”. The Plaintiff further averred that it carried out a search on the suit property on 15th December 2008 with the Registrar of Titles which search revealed that Senator was the owner of the suit land. That also it carried out a broad historical search of the suit land and the adjacent land at the Ministry of Lands and discovered the following;
- a. On 15th December 2008, G.G. Gacih (Registrar of Titles) issued the Plaintiff with a certified official search of the suit land.
 - b. Kilimo Jotham executed a Letter of Allotment (Ref. No.51776/XVII on behalf of the then Commissioner of Lands (C.O.L) over the suit land.
 - c. Various land officers processed the forwarding form for execution of documents by Commissioner of Lands (C.O.L) of the suit land.
 - d. Virginia (for Registrar of Titles) signed the Memorandum of Registration of Transfer (“M.R.T”) of the suit land.
 - e. Department of Lands issued Receipt No.768042 dated 23rd February 2001, for payment of inter alia, stand premium for the suit land.
 - f. The Director of Surveys; authenticated, sealed and signed Land Survey Plan Number 230666 attached to Grant Number I.R 89497)
 - g. On 12th August 2002, Geoffrey Birundu (Registrar of Titles) registered Grant No. I.R 89497/1 over the suit land for Senator.
 - h. Caleb T.Muhuyi witnessed the execution of Grant No.IR.89497 by Sammy Silas Komen Mwaita.
 - i. Sammy Silas Komen Mwaita executed Grant No. IR. 89497 in favour of Senator.
 - j. The land adjacent to the suit land is referenced as LR. No. 24937.
 - k. The K.A.A is registered as a Grantee of the adjacent land via Grant No. I.R 90243/1 measures 4459.1 hectares as delineated on Deed Plan No. 234878.
 - l. The Land granted to K.A.A as comprised in Grant Number I.R 90243/1 measures 4459.1 hectares as delineated on Deed Plan No. 234878.



- m. Sammy Silas Komen Mwaita signed the said Grant No. I.R 90243, issued to K.A.A
 - n. Sarah Mwenda (Registrar of Titles) drew the Grant issued to K.A.A.
 - o. E.N Gicheha (Registrar of Titles) registered the said Grant.
 - p. On 11th March 2003, K.A.A caused the Registrar of Titles to register a Leasehold tenure (for a term of 10 years from 1st July 2002) on Grant No. I.R 90243 over part (2,047.23 sqm) of L.R No.24937, for World Duty Free Complex Ltd (“World Duty Free”).
 - q. On 11th March 2003, K.A.A caused the Registrar of Titles to register a Leasehold tenure (for a term of 10 years from 1st July 2002) on Grant No. I.R 90243 over square metres of L.R No.24937, for World Duty Free.
 - r. On 28th March 2003, K.A.A caused the Registrar of Titles to register a Leasehold tenure (for term of 30 years from 1st July 2002) on Grant No.IR. 90243 over 37,460 square metres of L.R No.24937, for Greenlands Agroproducers Ltd (“Greenlands”).
 - s. On 23rd November 2004, KAA caused the Registrar of Titles, to register a Leasehold tenure (for a term of 45 years from 1st November 1997) on Grant No. IR 90243 over 6 acres of L.R. No.24937 for African Cargo Handling Ltd (“African Cargo”).
 - t. On 1st February, 2007 K.A.A caused the Registrar of Titles to register five (5) surrenders of Leasehold tenure on Grant No. I.R 90243.
3. The Plaintiff stated that relying on the issued searches and material representations by the Ministry of Lands and K.A.A, it purchased the suit land from Senator for Kshs.25,000,000/= on 10th February 2009. That on 25th February 2009, C.S. Maina (Registrar of Titles) registered the Instrument of Transfer (dated 10th February 2009) for it.
 4. The Plaintiff further stated that after the transfer was effected, it extensively developed the suit land (5 acres) to its current state and commercial usage with the following improvements; twenty two (22) godowns, a three (3) floors office block, water tanks (overhead and underground tanks), borehole, KPLC (630KV) power connection, transformer house, guard house, septic tanks, generator and big crane.
 5. The Plaintiff posited that on 24th November 2011, it instituted Petition No. 263 of 2011, Nairobi, Vekariya Investments Ltd v Kenya Airport Authority & 2 others because K.A.A threatened to demolish its property erected on the suit land alleging the same to be contained in an unknown Grant No. I.R No.70118. That despite a court order barring the said demolitions, K.A.A demolished the Plaintiff’s godowns.
 6. The Plaintiff stated that in the filed petition, Hon. Justice Majanja reckoned that the Petitioner, (the Plaintiff herein), having been issued with a title by the State, is entitled to turn to it for relief for a breach of warranty. That the Hon. Judge dismissed the filed Petition with no orders as to costs and directed the Plaintiff to pursue compensation. The Plaintiff contended that K.A.A who is the 3rd Defendant failed to materially disclose to the trial court in the Petition that they had been in possession a presently existing Grant No. I.R 90243 over L.R No.24937 which Grant has not been revoked and used it to lease its land and derived colossal rent therefrom. That both L.R No.24937(I.R 90243) and L.R No.21919



(I.R 70118) physically refer to the same piece of land on which inter alia, Jomo Kenyatta International Airport is located.

7. Further, that K.A.A failed to disclose that it caused the Registrar of Titles to register a 45 years lease for African Cargo which Lease, K.A.A created over L.R No.24937 and registered on Grant No.IR 90243. That also, K.A.A surrendered Grant Number I.R 70118 to the Government of Kenya in exchange for a new Grant Number I.R 90243,which surrender was recorded on Grant Number I.R 70118 as “..surrender to the Government of Kenya in exchange of New Grant I.R 90243.”The Plaintiff explained that since January 2003 to date, K.A.A has been exhibiting two Grants (I.R.70118 and I.R 90243) over the same piece of land and has obtained colossal leasehold rents from the two Grants.
8. It stated that the Director of Surveys issued the Plaintiff with a Survey Plan (Referenced F/R 295/95) which represented the existence of L.R No. 9095 in the Survey records and throughout the Plaintiff knew K.A.A’s tenure to 4459.1 Hectares was as represented, delineated and registered in Grant No. I.R 90243 and Deed Plan No.234878. The Plaintiff stated that from the year 2002 to 28th July 2009, K.A.A registered all leases and surrenders of lease on Grant IR 90243 but from then onwards, started registering leases on the surrendered Grant No.I.R. 70118.
9. That when the Plaintiff carried out a historical search on the suit land and K.A.A’s land, the records at the Ministry of Lands indicated they owned the adjacent land through Grant IR.90243. The Plaintiff contended that relying on the representations by the Ministry of Lands and K.A.A, it purchased, improved and developed the suit land without notice of any defect of Grant No. I.R 89497 or Grant I.R 90243 which improvements and developments as of 22nd July 2014 were valued by Rank Global Management Ltd at Kshs.798,000,000. The Plaintiff further contended that it leased out the twenty-two (22) godowns each at Kshs.310,000/= per month and the office block at Kshs.300,000 per month; therefore, it avers loss of future income for the remainder of the leasehold term (84 years) is Kshs.7,176,960,000/=.
10. The Plaintiff stated that it purchased and developed the suit land as a bona fide purchaser for value without notice of any defect of Grant IR 89497 because it conducted an official and thorough historical search of the suit land and that of K.A.A Grant IR 90243 which is adjacent, paid full consideration, paid assessed stamp duty to K.R.A, all processes inter alia; surrender, planning, subdivision, registration and issuance of Grant IR.90243 were confidential bilateral acts of K.A.A and Ministry of Lands, regardless of any irregularities therein. It impleads that all the processes that culminated into the issuance of Grant I.R 89497 were carried out by the Ministry of Lands, without knowledge of the Plaintiff who after purchase of the suit land took quiet possession until the year 2011 when K.A.A threatened to demolish the developments on the same.
11. The Plaintiff contended that Grant I.R 90243 was accepted, recognized and applied by K.A.A regardless of the unknown procedural anomalies undertaken by K.A.A and the Ministry of Lands in its processing. The Plaintiff stated that it was during the proceedings in the Petition, that it discovered the existence of Grant IR 70118 which K.A.A is now using to dispossess the Plaintiff of its land. That when Grant IR.90243 originated and K.A.A accepted it, the prior unknown Grant IR 70118 was in law extinguished.
12. The Plaintiff further pleaded that K.A.A has collected 10 years rent from World Duty Free and continues to collect rent from Greenlands and African Cargo accruing from leasehold rights it created through the leases it prompted the Chief Land Registrar to register on Grant IR 90243. It contended that up to date K.A.A has not petitioned the High Court to revoke Grant IR.90243 or reinstate Grant IR 70118 but continues to enjoy long term leasehold tenures it created for third parties on Grant IR 90243 which through an official search conducted on 22nd July 2014 disclosed that it still subsists. That



also through an official search of Grant IR 89497 on the same date, disclosed that the Plaintiff is the current owner of LR 9095.

13. The Plaintiff further asserted that K.A.A and the Ministry of Lands are the duplicitous indivisible authors of the Plaintiff's predicament thus ought to be prohibited from claiming the suit land or in the alternative, jointly compensate it for dishonest misrepresentation and breach of warranty. It added that the Defendants are Statutory bodies and State officers of the Government of Kenya which under legislated Torrens System of Registration guaranteed to the Plaintiff, the correctness of all the entries in the register with regard to Grant IR 89497 and Grant IR 90243.
14. That also, the Plaintiff had served the Defendants with demand and notice of intention to sue but they ignored to uphold its title to the suit land or compensate it for value of its investment and loss of income.

3rd Defendant's Defence and Counter claim

15. The 3rd Defendant, K.A.A filed a defence and counter claim dated 19th March 2015 and, in the counter-claim it seeks for the following orders;
 - a. A declaration that the suit property LR 9095 forms part of the property of the 3rd Defendant as contained in Land Reference Number 21919 registered as Grant Number I.R 70118.
 - b. The registration of VEKARIYA INVESTMENTS LIMITED as proprietor of the Land Reference Number 9095 or any other title derived from the said Land Reference Number 9095 being a portion of L.R No. 21919 be cancelled forthwith and the 7th Defendant do delete that register entry.
 - c. An order for eviction and removing the Plaintiff its servants and/or agents together with the structures illegally erected therein from the suit property LR 9095.
 - d. A permanent injunction restraining the Plaintiff either by themselves, their agents or servants from trespassing, demolishing or in any way interfering with the 3rd Defendant's quiet enjoyment, user and occupation of its property LR 9095.
 - e. A permanent injunction restraining the 1st, 2nd, 4th, 5th, 6th and 7th Defendants jointly and severally either by themselves its servants, agents, assignees or nay persons claiming title through the Plaintiff or nay of them from advertising for sale, alienating, transferring, selling, disposing, using, charging, mortgaging, developing on or constructing on, trespassing on, entering upon, or in any manner whatsoever dealing or interfering with the 3rd defendant's possession of the suit property.
 - f. General damages for loss of user of the land.
 - g. Costs of this suit
 - h. Such further or other reliefs as this Honourable Court may deem fit and just to grant.
16. The 3rd Defendant stated that the suit land forms part of their property Land Reference number 21919 as contained in Grant IR 70118 and registered in its name on 13th August 1996 for a term of 99 years with effect from 1st August 1996. It further stated that it is a stranger to the official searches undertaken by the Plaintiff, denies every particular of breaches enumerated and the allegation by the Plaintiff that it made any material representation to it in regard to LR 9095 which forms part of L.R 21919.



17. The 3rd Defendant averred that if indeed a historical search was conducted by the Plaintiff, it would have established that the surrender of LR 21919 in the year 2000 for the removal of Mombasa Road was never registered. Thus Grant IR 24937 purportedly issued pursuant to the surrender of the Grant for LR 21919 and any other leases created over L.R. 24937 were null. The 3rd Defendant denied the alleged sale of the suit land by the 5th Defendant and stated that the 5th Defendant has no legal proprietorship over the same and lacked a valid title capable of conferring a valid interest to the Plaintiff.
18. It added that the 6th Defendant did not have power to register any instruments of transfer over the suit land and that the second title over the same is illegal and void. The 3rd Defendant particularized the illegality stating that LR 21919 had already been alienated in its favour under Grant IR.70118 for term of 99 years with effect from 1st August 1996. That the suit land LR 9095 Grant IR 89497 measuring 2 hectares falls inside the 3rd Defendant's land but the Plaintiff allege to have been registered as proprietor on 25th February 2009, thirteen years after their registration.
19. That the 5th Defendant who allegedly sold the suit land to the Plaintiff was registered as proprietor on 12th August 2002, six years after the registration of the entire land to the 3rd Defendant. The 3rd Defendant posits that it did not dispose off or subdivide and transfer any portion of LR 21919 Grant IR 70118 to any person other than in the year 2000 when it was surrendered for the curving out of Mombasa Road which surrender was not registered. That the 3rd Defendant's title being first in time, the suit land was no longer available for alienation to any other person.
20. The 3rd Defendant contended that the Plaintiff encroached onto the suit land and illegally developed it in complete disregard of court orders that had been issued in Petition Number 263 of 2011, Nairobi, Vekariya Investments Ltd v Kenya Airports Authority & 2 others that parties maintain the status quo obtaining at that time.
21. It pleaded that the above said Petition was instituted against it and 2 others by the Plaintiffs but the same was dismissed with the court holding that ...

“the issue in this case is whether the Petitioners’ Constitutional rights appurtenant to LR 9095 should be protected and enforced against the 1st Respondent as owner of LR 21919. I have found a fact that the Petitioner’s right cannot be enforced against the 1st Respondent as its title was irregularly issued over the 1st Respondent’s property. I am unable to grant the orders sought in the petition as to do so would amount to disregarding the title issued to KAA issued earlier in time.”
22. It denied the Plaintiff's bona fide acquisition particularized therein and puts the Plaintiff to strict proof thereof stating that it had notice of the defect in Grant No.89497 thus was not a purchaser for value without notice. It further denied that it was involved in any procedural anomalies in processing of title and stated that it does not issue titles neither guarantees the correctness of entries in the land register, thus is not liable to compensate the Plaintiff.
23. The 3rd Defendant contended that the Plaintiff's claim is based on fraud particularizing the fraud as the Commissioner of Lands having allocated LR 21919 to it no subsequent allotment could be done without revocation of the previous and as per special condition No.5 of the Plaintiff's title, the user of the property was for residential purposes yet the Plaintiff developed it as for commercial purposes.
24. Further, that there was no development approval in favour of the Plaintiff from the Commissioner of lands. That also, the Plaintiff without any colour of right proceeded to lease out the go-downs illegally constructed on the 3rd Defendant's land to other third parties denying it the use of the property. The



3rd Defendant admitted that the 6th Defendant is mandated with the responsibility of guarantying the correctness of all entries in the Register of Titles but any entry in the register with regard to Grant IR 89497 and IR 90243 was wrong. The 3rd Defendant denied being served with notice of intention to sue.

4th Defendant's Defence

25. The 4th Defendant filed a defence dated 20th March 2015 denying the Plaintiff's allegations. The 4th Defendant contended that the Plaintiff through its directors vide an affidavit filed on 24th November 2011 in support of the chamber summons filed in court in Petition 263 of 2011 stated that he was in the process of erecting 22 godowns and two office blocks on the suit property having completed foundation for 15 go downs and erected a perimeter wall. That it had also completed 75% of the hardcore and also excavated a road leading to the property.
26. The Defendant stated in the said Petition, the court issued orders on 16th December 2011 to the effect that pending the hearing and determination of the Petition, the Plaintiff was ordered not to carry out any further construction on the suit land.
27. That the judgement in the Petition was delivered on 5th May 2014 and this suit filed on 18th June 2014 making it inconceivable that the Plaintiff in less than three weeks after judgement had improved the suit land as it alleges in the amended Plaint and leased the completed 22 godowns.
28. The 4th Defendant denied the alleged demolition by the Plaintiff in the existence of a court order barring the same. It stated that the sums claimed as representation of the valuation of the improvements by the Plaintiff are phantom figures noting that in the earlier Petition, the Plaintiff had quoted a figure of Kshs.124,500,000 which still is overly excessive and unjustified.
29. The 4th Defendant contended that the alleged improvements on the suit land were undertaken in blatant contravention of a court order issued on 16th December 2011 which barred any construction on the suit land pending determination of the suit. It denies the allegations of fraud, illegality and misrepresentation in respect to registration of LR 9095 or interference with the records and also denies any liability alleged by the Plaintiff.

Evidence

30. In support of its case, the Plaintiff called two witnesses and the Defendant called five witnesses. PW1, a registered and practicing valuer testified that he carried out a valuation on LR 9095, the suit land and produced the valuation report dated 23/7/2014 on page 119 in the Plaintiff's bundle of documents as PExh1. He stated that there were 5 to 10 godowns occupied by tenants and that they had been constructed about a year or two earlier. He also stated that he was not aware that there was a case concerning the suit land and that he had also visited the land in the year 2011 and there were buildings thereon.
31. On cross examination, PW1 stated that he received instructions for valuation of suit land via phone call for court purposes and visited 22/7/2014 the same for inspection purposes. That in his report he did not mention occupation of the godowns and the instructions were to get the open market value and estimated investor value.
32. He also stated that when he was preparing the report, he was told that the same would be used in court and confirmed that as seen in the Plaintiff's bundle of documents at page 137, the Plaintiffs herein had filed a Petition whose judgement was delivered on 5/5/2014 and the valuation report was prepared about 2 months after.



33. That he conducted a search on the title of the suit land which is at pages 125 to 126 of the bundle and the user according to the report is commercial cum industrial having been told by the Plaintiff that it had obtained change of user from that on Grant IR 89497 at pages 30 to 33 of the Plaintiff's bundle, condition No.5 of the grant providing that the user was residential.
34. He stated that he was not aware that another valuation had been done and had not seen the report dated 17/1/2020 by With Consult Valuers Ltd. The valuer stated that in preparing a valuation report, they normally use comparable sales, income, actual loss etc but testified that he does not have the details of the comparable sales, income and the cost he used and that the same are not part of the report. That he used maps and the current market of value of the suit property according to paragraph (a) is Kshs.789,000,000 but confirmed that he did not have any material before the court to show the basis on how he arrived at the said figure.
35. The witness testified that he had also done investment return which he put at Kshs.7,176,960 on the basis that at any time 10% of the godowns would be unoccupied but did not present to court details on how the figure was arrived nor were the workings mentioned in the report. He added that he had visited the suit property in the year 2012 and his work involved also looking for tenants to use the godowns
36. That under Item (c), he had assessed the rent earned at Kshs.81,840,000 and on Item (d) of the report given the figure Kshs.85,440,000 but did not produce the documents which he relied on stating that his valuation was based on gross value with full occupancy of the godowns and office blocks.
37. PW1 testified that using maps from survey of Kenya, he confirmed that the suit land existed and that it is not a practice to attach working details to a valuation report unless it is called for. He pointed out that the valuation report dated 20/5/2016 by the Ministry of Lands in the defendants' bundle of documents giving a value of Ksh.645,000,000 has no working details attached to it and the Ministry has not indicated what was used to arrive at that figure.
38. PW2, Manji Rauji Vekariya who is a director of the Plaintiff testified adopting a recorded statement dated and filed on 28/10/2014 as evidence in chief. He also produced a bundle of documents filed on 28/10/2014 listed as numbers 1 to 39 in evidence as a bundle save for items 17, 27 and 29 marked as PExh2.
39. He explained that he came to Kenya from India in 1988 where he had attended school thus he cannot read English but communicates in Kiswahili and that he had communicated to his lawyer that he wanted land to put up godowns. That after he got the suit land he carried out a search and purchased the land with the seller issuing him with the original documents among them a change of user obtained by the seller issued on 3/7/2009 as at page 193 of PExh 2.
40. The witness stated that when he was buying the suit land he did not know the 5th Defendant and that he got into problems in 2010 when he started carrying out construction with the 3rd Defendant claiming that the suit land had an issue putting a notice in Kenya Gazette claiming that they would use a new title. That he had filed an earlier case which he did not give evidence thereof.
41. He continued in evidence that the dispute was taken to the 1st Defendant who asked him to carry out valuation for purposes of compensation since they had a valid document of title and had been paying land rates. He asserted that when the 5th Defendant sold to them the suit land, they had approved plans and that Nairobi City Council used to visit the property from time to time to inspect the construction.
42. PW2 testified that the title to the suit land was issued in 2002 but was not involved in its acquisition and that he purchased the same land in 2009 during which he carried a search and there was no encumbrance. That at the time of purchase the title referred to had not been cancelled and there was no



- case pending against the 5th Defendant. That also he started construction in 2010 but the 3rd Defendant came to demolish the wall that had been completed but stated that the tenants started occupying the property in 2014 after the case had been determined and by December 2014, the godowns had been fully let.
43. He explained that he was charging Ksh.30 per sq feet plus VAT and service charge with one godown being charged Kshs.270,000 per month exclusive of VAT and service charge. He avers that he only had two tenants at the moment others having left after the 3rd Defendant issued a notice to vacate in 2018. The witness testified that before they commenced this suit, they had finished construction of the godowns and that the 3rd Defendant did not demolish the same but issued a notice stating that they would demolish the buildings making the tenants leave.
 44. On cross examination, PW2 stated that it was his advocates Macharia & Macharia Advocates who conducted the search for the suit land as shown at pages 30 to 33 of PExh 2 and that the same was registered under the 5th Defendant. That a search was also done on the 5th Defendant at the companies' registry and the particulars of the directors are set out at pages 50 to 52 of PExh 2. He admitted that he met said directors at the office of his advocates.
 45. He confirmed that he paid a cheque of Kshs.25,000,000 for the property through his advocates and that he can see the allotment at page 34 of PExh 2 though was not aware if the 5th Defendant had paid for the stand premiums. PW2 said that he took possession of the suit land and posted guards in 2009 but did not prepare building plans as in conditions in Page 31 of Grant No.IR 89497. That the same had been prepared by the 5th Defendant and he only undertook small amendments though did not know that the same had been approved by commissioner of lands.
 46. The witness stated that the 3rd Defendant has two titles with the second title registered on 18/1/2002 produce at page 42 of PExh 2. He confirmed that entry 10 on his title is surrender of the lease and Grant IR 70118 at page 72 of AG's bundle of documents was the 3rd Defendant's old title. He told this Court that he started construction in 2010 and finished in 2011 so that by the time the court was issuing orders in the Ag's bundle of documents he had finished construction.
 47. PW2 also stated that the Kshs.25,000,000 cheques given for the suit property are as page 381 to 384 of PExh2 and the approvals dated 25/4/2015 for the building are at page 194 of PExh2. He added that he came to know that the suit land had issues when he filed the case determined by J.Majanja on 5/5/2014.
 48. He stated that they were sent a letter at Page 372 of PExh 2 by the 5th Defendant but was not aware of the letter dated 17/6/2003 at page 89 of the Ag's bundle of documents and also is not aware if the suit land is 2KM within the airport. That from the Gazette Notice at page 91 of the AG's bundle on restriction of buildings in the declared areas, among them plots to have been excised from the 3rd Defendant's land with the suit land being at Pg 121.
 49. He stated that he can see from the Kenya Gazette notice of 15/2/2010 at page 209 of the AG'S bundle of documents the suit land is listed as among those inside the airport. He conceded that he did not personally undertake any search but his Advocate did. That as seen in Pages 57 to 60 of PEXh2, entry No.2 at page 60, the property was registered in the Plaintiff's name on 25/2/2009 and the dispute arose in 2012. He added that they have never contacted the 5th Defendant over the issue.
 50. As per the signed the transfer, PW2 admitted that they were the second owners as the 5th Defendant had a title at page 30 of PExh 2 and the grant was for 99 years with effect from 1/3/1999. He stated that the title was issued by Sammy Silas Mwaita on 2/8/2002 and that he did know the directors of the 5th Defendant though the names on the transfer are Sammy Mwaita Komen and Mwaita Dinah



Jelimo. He also did not know that it was the same Sammy Mwaita Komen who had issued the grant at Page 46 of PEXh 2. Further, PW2 said that he was unaware that at the time the suit property was being registered in the name of the Plaintiff on 25/2/2009, the 3rd Defendant had a Grant produced at Page 53 of PEXh 2 and which grant was also issued by Sammy Silas Mwaita on 16/1/2005.

51. He stated that he was not aware of the history of the suit land and that from entry No.10 of the title they registered on 18/1/2002 he can see on entry No.10 at page 56 of PEXh 2 there is a surrender on 1/2/2007. He was shown a Grant I.R. 70118 in the 3rd Defendant's bundle that was for a period of 99 years effect from 1/8/1996. PW2 confirmed that in his recorded witness statement, he stated that he had started construction of godowns and the 3rd Defendant came to demolish the same. That he had not finished building the godowns when he filed Petition No. 263/2011 and the court order dated 16/12/2011 stopped further construction. His evidence is that he resumed after the judgement was delivered and his advocate told him that his title was in order.
52. The witness testified admitted that the change of user approval produced at Page 193 of the Plaintiff's bundle was given to the 5th Defendant on 3/7/2009 after the land was transferred to them. The witness also stated when they did a valuation of the suit land as per the report dated 23/7/2014, they had completed the construction and had between 5 to 6 tenants. The report assessed the investment return at Kshs.7,176,960,000.
53. He stated that as per the tenancy agreements at page 268, 296 and 325 of their documents and dated 1/10/2015, 1/3/2018 and 13/6/2018 respectively are not registered as initially alleged. That the monthly rent was Kshs.225,000 exclusive of VAT and service charge, revisable every two years. He insisted that the Plaintiff was receiving rent and could show proof if required.
54. He stated that he was not aware of the letter dated 10/2/2011 at page 54(2a) of the 3rd Defendant's bundle which was written by Satish Liantama and who was not his advocate. That further, he was not aware that he required permission for his development from the 3rd Defendant which according to him was outside the airport. This was in response to the Kenya Gazette produced at page 62 (72) of the 3rd Defendant's consolidated bundle, Legal Notice No.60 of 1998 on Restriction of Buildings in declared areas insisting that the suit land was only near the airport but not in the airport.
55. He concluded his testimony by stating that he entered into a sale agreement with the 5th Defendant for the suit land at Kshs. 25M, paid the entire purchase price and a transfer was effected. He also asserted that Grant No.9024/3 is for the 3rd Defendant's land, LR 24937 issued by the government and he was not aware that the same had been cancelled as there was no notice cancelling his title.
56. The Defendants called 5 (five witnesses) in support of their cases. DW1, an assistant Deputy Director Department of valuation in the Ministry of Lands and Physical Planning who has worked as a valuer since 14/5/1996. She stated that on instructions from AG, she made the valuation report dated 20/5/2016 at valuation of Kshs.645,000,000 which she produced as DExh1. That this was after she visited LR No.9095 and looked at the copy of title Grant at page 46 of PEXh 2 which indicates the user to be residential.
57. DW1 explained that a commercial user land is of higher value than a residential user land at the same location and that in valuation they have three approaches namely; the cost approach, which entails coming up with comparable sales of the neighboring plots plus the cost of the buildings, the investment approach which entails valuing the lettable area of the space being valued and the rate per square foot gives the annual rent which is used to calculate with the remainder of a given lease to get a market value. That the third approach is the comparable sales approach which works with identical premises where



you compare the sale prices of the neighboring premises and you use the same to value the subject of your valuation.

58. DW1 stated that in her adduced report she used the cost approach where she referred to the improvements on the property as listed in the report noting that in as much as godowns and block offices are not used for residential purposes, the valuation included the same.
59. The witness contested the valuation by Rank Global Management Ltd dated 23/7/2014 PEXh 1 that valued the suit land at Kshs.7,176,960 as investment returns. She explained that the valuation indicated the suit land to be of commercial use and there was no evidence to show change of user. That also that you cannot value a property using interest approach when the user of the property does not comply with the approved user in the title. Further, that you cannot load one approach on another by having open market value and investment value in the same report.
60. On cross examination, DW1 testified that the three methods of valuation are contained in International Valuation Standards that valuers subscribe to and also the Blue book which is a valuation book in Kenya. The valuer confirmed that she had not provided the breakdown of the valuation she had carried out and that she valued the land itself at Ksh.247,100,000 while Rank Global gave the value of the land at Kshs.250,000,000 showing a small difference. She said that she did her own calculation regarding the value of the buildings by getting construction rates of the godowns and offices from the Ministry of infrastructure and Quantity Survey Department.
61. She further stated that she did not ask the Plaintiff the cost it incurred in construction since they have standard costs for all the items like water tanks, boreholes etc. She did not value the items 12 and 14 in paragraph (a) of the Rank Global report clarifying that she did not find the crane on site and does not understand what is referred to as damages for restoration. It is her evidence that the valuation was not undertaken for purposes of compulsory acquisition and that the suit property has no comparable developments in the neighborhood.
62. DW2, was the deputy director of physical planning in the Ministry of lands who proceeded to adopt his recorded witness statement dated 18/3/2015 as evidence in chief. He produced a survey plan at page 119 of the AG's bundle of documents and a letter dated 17/4/2013 addressed to the AG at Page 276 as DExh 2 and DExh 3 respectively. DW2 testified that DExh 2 is a plan for JKIA prepared in 1991 by the Aerodrones Department which indicates runways, taxing, future run ways, station sites, buildings and the airport boundary.
63. He stated that a part development plan is prepared for the purposes of alienating land or immediate implementation of a project and that the said plan must be prepared by the Director of Physical Planning, with a certificate to a name and signature of the planner. That the plan must also have the name of the Ministry of Lands, the name of the town and nature of the part development plan. Further, it should indicate the scale, use of the plot, the date of preparation and the number issued by the Director and the certificate. It must also have the approved conditions, the date of certification, approved development plan number which is inserted by the director upon approval.
64. He continued that a PDP for an area would have a departmental referral number stating with 42 but has not come across a PDP in respect of the land belonging to JKIA. DW2 stated that replanning of land entails complying with the provisions of sections 22 of the Physical Planning Act and it happens when a difficulty arises in the implementation of an existing plan or when the circumstances have changed necessitating replanning. Further, it must be authorized by the Minister or the Cabinet secretary.
65. He continued that after authorization, a plan is prepared and published in the newspaper, Kenya Gazette and Chiefs offices, giving the public 60 days to object the plan and if there is no object raised,



- the director forwards the plan to the Minister or cabinet secretary for approval. That it is then returned to the director of Physical planning who inserts another approved departmental reference number and forwards it to the Minister and other counterparts that allocates land.
66. That from the records, there is no evidence of documents showing that there has been a replanning on JKIA land and that if there were documents to that effect they would have them in their records. The witness stated that he stands with the evidence of Christopher David Gitonga who was his junior in the Ministry of Lands and Planning.
 67. On cross examination DW2 stated that they adopted DEXh2 as a framework for land use in JKIA and the same cannot be used for land alienation. That he cannot see LR No.21919 in DEXh2 and that the drawing includes land that belongs to other entities covering an area of approximately 5098 hectares. In response to a question regarding the letter dated 24/12/2010 by KIA managing Director and the documents in the bundle filed on 9/3/2016 attaching several land parcels whose titles were to be revoked, DW2 said the documents were not prepared by them. DW2 contended that he cannot comment on titles without PDP and that as provided in the Physical Planning Act, land alienated for private use must have a PDP which they prepare on request. That they also prepare PDP for land for public use but normally not in compulsory acquisition, unless there is need for a title.
 68. He confirmed that from DEXh2, he could see Grant No. 70118 for LR 21919 which was registered on 13/8/1996 but the DEXh 2 is for 1991. That the property in dispute is LR 9095 and was referred to a letter from the 3rd Defendant to the Ministry of Lands calling for revocation of titles LR No 9091 to 9099 with the suit land being among them. The witness emphasized that he was not testifying in support of the 3rd Defendant's case but was giving evidence concerning the documents they hold.
 69. DW3, a senior deputy director of Land Administration in the Ministry of Lands and Planning testified and adopted his recorded statement dated 14/10/2019 which is at page 7 of the 1st, 2nd, 4th, 6th and 7th defendants bundle as evidence in chief. He further produced documents No.11 to 18, 20 and 22 to 25 in the 1st, 2nd, 4th, 6th and 7th defendants supplementary list of documents dated 14/10/2019 as DEXh3 to DEXh15 respectively.
 70. He testified that in his line of duty with the Commissioner of lands since 1989 he did not come across any application for allocation of suit land by Senator Services Limited. That Grant IR 70118 in favour of the 3rd Defendant was issued on 26/7/1996 and it was registered on 13/8/1996 with the allotment to be accepted and payment made within 30 days.
 71. He testified that before Grant IR 70118 was issued with the 3rd Defendant, the land belonged to the same party as what took place was just issuance of a formal title. He added that the entire process that gave rise to the suit land in favor of the Plaintiffs was irregular as it was not available for alienation.
 72. Further, that the alleged Grant issued was never accepted or payment done taking note that the same was hurriedly processed in one day. That the same was signed by one Sammy Silas Mwaita, who also signed the transfer to the Plaintiffs and received the Kshs.25 M purchase price showing a clear conflict of interest. Also pointed out that one of the directors of the 5th Defendant is Sammy Komen Mwuita. The Witness stated that there was no evidence to show that the special conditions of the Grant were met and that it is an application for change of user in the Plaintiff's bundle directed at Commissioner of Lands which mandate is for the City Council of Nairobi.
 73. He testified that there was no replanning of the suit property done and that the government is not liable for any compensation and if there is damages to be paid, the same should be paid by one Sammy Mwaita, the former Commissioner of Lands.



74. On cross examination, DW3 confirmed that the Commissioner of Lands at the time the Plaintiff was purchasing the suit property was the direct beneficiary of the grant as he was a director of the 5th Defendant and sold the same for profit being in breach of his duty as a public officer. He admitted that Grant IR 90243 for LR 24937 whose preamble talks of a surrender of title IR 70118 for LR 21919 and the allotment issued by the Commissioner of Lands to the 5th Defendant was signed by Kilimo J.L who still works at the Ministry of Lands. That the surrender of title No.70118 was cancelled on 7/11/2002 while the title in favour of the 5th Defendant registered on 12/8/2002.
75. DW4 testified and adopted his witness statement recorded on 23/2/2016 on behalf of the 3rd Defendant. He also produced the list of documents dated 15/9/2015 as DEXh 1-3 as per the list, document No. 4-7 as MF1 D4-D7 while No.8 as DEXh 8. Documents in the further list were produced as DEX 9-26 as per the list (running from Nos.1-18).
76. The witness testified that he was involved in the Petition filed by the Plaintiff where the judgement delivered declaring the 3rd Defendant's title valid because it was the first in time. He referred to Paragraph 36 of the judgement in the Petition where the court held the Petitioner's title was issued without due regard to the 3rd Defendant's title.
77. DW4 continued in his evidence that he took the photographs produced as DEXh 8 which showed the godowns construction was incomplete when they stopped the Plaintiff for failing to seek approval from KAA. That DEXh 9 is the legal notice no.60 of 8.5.1998 which is used to avoid mushrooming of buildings along the flight path which the Plaintiff did not comply with. He also stated that they issued the Plaintiff with letters; DEXh 22 (No.14 in further list) signed by Eng. Gichuki which contained several schedules @ 32 is L.R Nos 9091-9099. That the 3rd Defendant's security also visited the suit premises.
78. He added that the Plaintiff's title falls under the parcels illegally hived off the 3rd Defendant's land and that there is a determination by NLC which found the said titles void in 2019. On cross examination, the witness confirmed that the Plaintiff undertook construction of the godowns when there was a pending court case Pet 263/2011 evidenced by the photographs he took dated 29/7/2012. He admitted that he did not have photos showing different stages of construction.
79. DW5, a licensed land surveyor testified and adopted his witness statement dated 23/2/2016 and filed on 9/3/2016 as evidence in chief. He testified that L.R No. 9095 I.R. No. 89497 is within L.R. No.21919 which constitutes the airport and denied the 3rd Defendant did surrender its title for excision. He stated that the developments were done during the pendency of Pet 263 of 2011 and that the 3rd Defendant had not granted any approvals as required under the Act.
80. On cross examination, DW5 confirmed that at pages 53-55 of the 3rd Defendant's bundle dated 22.9.2020 is a letter by the Plaintiff requesting for construction approval. That they had not produced any letter prohibiting the said construction. Further, that he was not aware if the Registrar or Commissioner of Lands revoked title L.R 9095 and whether, the 3rd Defendant sued the Plaintiff for cancellation of the said title but insisted the National Land Commission did. He posited that LR 21919 was not properly surrendered hence title for L.R. number 24937 was illegally created.

Submissions

81. The Plaintiff and the 3rd Defendant filed submissions dated 2nd April 2024 and 15th May 2024 respectively. The Plaintiff submitted that the issues for determination were whether the defendants warranted title to the suit property and if the plaintiff carried out due diligence, whether, and to



its detriment, the plaintiff relied on such warranty and the defendants' material representations and whether the plaintiff suffered any compensable losses.

82. The Plaintiff stated that it purchased the suit property in the year 2009, when the Registration of Titles Act (now repealed) was in force and Section 24 of the Registration of Titles Act (Cap. 280), as read together with section 23 of Cap.280 (repealed), empowered it to bring the present action for recovery of damages from the defendants because of their misrepresentations and errors which caused origination of title to the suit property, and subsequent registration of an instrument of transfer of the originated title in its favor.
83. That the then Commissioner for Lands and the Registrar of Titles represented that they had conveyed to the plaintiff with an indefeasible title to suit property and doing so, they exercised their statutory powers as legislated under the Government Lands Act and the Registration of Titles Act. Further, that the Commissioner of Lands and Registrar of Titles also exercised their statutory powers when that originated and registered title/grant to the suit property, and later enabled the 5th defendant to eventually transfer to the plaintiff the originated title for a paid up consideration of Kshs.25M to the 5th defendant. Also the process, the plaintiff paid land rent and stamp duty to the Ministry of Lands meaning that the government ministry financially benefited from its public officer's wrong doing.
84. The Plaintiff contended that if defendants, who are public officers, had carried out their statutory responsibilities in a manner that is faithful to the public trust that had been reposed in them the plaintiff would not have suffered the immense losses it incurred, therefore seeks compensation for breach of warranty to title to the suit land which is provided under sections 23 and 24 of the RTA.
85. The Plaintiff submitted that it undertook due diligence that went to the root of title of the suit property and that of JKIA and that the defendants did not controvert the origin and representation-capacity of the land documents which it came across when conducting due diligence before purchasing of the suit property, including an official search of the suit land issued by the 6th Defendant.
86. That from the evidence adduced by the plaintiff which has not been controverted by the defendant, the suit property was allotted and granted by the Commissioner of Lands, its deed plan was authenticated, sealed, and signed by the Director of Surveys, and its Grant registered by the Registrar of Titles as IR. 89497. In addition, the Commissioner of Lands received stand premium of Kshs.320,000 so as to process letter of allotment dated 1st March 1999 leading to issuance of a registered title over the suit property.
87. The Plaintiff submits that despite knowing that title to the suit property was invalid or overlaid JKIA, the 1st, 2nd, 6th, and 7th defendants accepted and registered the instrument of transfer of the suit property into the names of the plaintiff, which statutory conduct made it believe that its title to the suit property was indefeasible and lawfully acquired.
88. The Plaintiff submitted that it was an innocent purchaser for value of the suit property, and that it carried out extensive and far reaching due diligence on the suit property and JKIA's land. In support of the argument cited the Supreme Court of Kenya in Petition No. 8 of 2021, Dina Management Limited vs. County Government of Mombasa & 5 others in which the Court delved into the issue of who is a bona fide purchaser for value of an immovable property.
89. It stated that Land Registrar did not testify on the contradictory allegations that the land registrar allegedly refused to register the old Grant and that no evidence was adduced to prove the alleged refusal to register the surrender. That according to the 3rd defendant's testimony, Mombasa road was excised from the land survey plan of the old Grant and therefore, the then Registrar of Titles must have successfully registered the instrument of surrender for the old Grant.



90. It is also submitted that the 3rd defendant not only accepted the new Grant but it unreservedly embraced it when it registered several leases against the new Grant and also publicly reiterated the new Grant by way of a publication in the Kenya Gazette to the effect that JKIA's title was as indicated in the new Grant. In support it relied in the case of *Gitwany Investment Limited v Tajmal Limited & 3 Others* (2006) eKLR which held in part thus;

“... It is I am sure now patently clear where this court must throw the 1st Defendant's predicament. By its actions, the Commissioner of Lands together with the Registrar of Titles who is also named in the 3rd Party Notice led the 2nd and 3rd Defendants to believe that the suit land was vacant and available for them to take over. The 3rd Party proceeded to issue title six years after a valid title had already been issued to the Plaintiff. The 1st Defendant innocently, intending to develop the land and for a fair amount in consideration purchased the Land without notice of a prior title and obtained a Loan to develop it. It became its waterloo when the Plaintiff surfaced and enforced its claim to the Land”

91. The Plaintiff submitted that it welcomes the proposal made by the Honourable Attorney General that the Plaintiff be issued with a long-term lease so as to lessen the losses incurred by invalidation of its title on the grounds that this is a Country governed by the rule of law and *the Constitution* protects the right to own property, in particular, titled property akin to title to the suit property which is statutorily registered under Torrens System of Registration of Title.

92. That neither KAA nor its co-defendants are innocent in that their collaborative wrong doing played a pivotal and decisive role in prejudicially misleading the plaintiff into believing that title to the suit property was lawful, indefeasible, transferable, and acquirable and for which reasons, it invested millions of shillings on the suit property.

93. The 3rd Defendant explained that all Kenya Airports Authority land was previously owned by the Government of Kenya through the Department of Aerodromes and pursuant to Section 4(1) of the *Kenya Airports Authority Act* the Minister issued a vesting order transferring all Government property owned by the Department of Aerodromes to the 3rd Defendant effective 1st July, 1996.

94. That subsequently, on 26th July, 1996 a title was issued to the 3rd Defendant for L.R. 21919 (Grant Number I.R 70118) for a term of 99 years commencing 1st August, 1996. On 27th August, 1999 the then Commissioner of Lands requested the 3rd Defendant to re-survey its land to exclude Mombasa Road from its Deed Plan which should have been excluded from Deed Plan of L.R. 21919 (Grant Number I.R 70118).

95. That the 3rd Defendant re-surveyed its land and a new title L.R 24937 (Grant Number I.R 90243/1) was issued on 16th November, 2001 but due to various discrepancies in the new title Number L.R 24937 another grant was prepared and registered as I.R. 90243/1 on 18th January, 2002 while retaining L.R. No 24937. Due to the re-survey, the grant in respect of L.R NO. 21919 was lodged for surrender at the Lands Registry on 25th October, 2000 to facilitate the issuance of the new grant L.R 24937.

96. They continued that upon the issuance of the grant L.R 24937, they started registering leases against it, and requested tenants who had been issued leases in respect of Grant L.R NO. 21919 to surrender the same for issuance of new ones against the grant for L. R. NO. 24937. It is their argument that the surrender of L.R NO. 21919 was never registered for five years due to the manner in which it was drawn and eventually on 1st March, 2005 it was rejected by the Land Registrar who also declined to register the Leases which had been surrendered for registration on Grant L.R NO. 24937.



97. That anomalies were noted on Grant L. R NO. 24937 which included the non-registration of the surrender of L.R NO. 21919, lost acreage and illegal allocations. Thus, on 26th July, 2006 the Grant for L.R NO. 24937 together with all the Leases registered under it were surrendered for cancellation which was subsequently registered in September, 2006. Consequently, the 3rd Defendant sought to recover the lost acreage by issuing a general notice to the public for titles issued within airport land to be cancelled and the occupants thereof to vacate the land. Among the occupants served with the notice was the Plaintiff.
98. The 3rd Defendant outlined the issues for determination inter alia; whether the Plaintiff was a bonafide purchaser for value without notice of defect in title of all that parcel known as L.R NO. 9095; whether the Plaintiff is entitled to compensation for all that parcel of land known as L.R NO. 9095; whether the Plaintiff is entitled to the orders sought; and whether the 3rd Defendant is entitled to the orders sought in the Counterclaim.
99. The 3rd Defendant contended that the Plaintiff did not produce proof of payment of the purchase price nor payment of the stamp duty required before transfer to its name. It supported its argument by citing the Court of Appeal of Uganda in *Katende v Haridar & Company Ltd* [2008] 2 E A 173 which discussed who a bona fide purchaser for value is.
100. It added that the Plaintiff after taking possession over the suit property did not obtain the requisite approvals for the developments erected thereon, despite the title for L.R NO. 9095 clearly indicating that the land and buildings shall be used for residential purposes only. Also, that the Plaintiff acknowledged that no Part Development Plan (PDP) was done for the creation of the suit property neither did it not obtain approval from the 3rd Defendant since the developments were located on the flight path.
101. The 3rd Defendant submits that the Plaintiff failed to provide evidence that its title was procedurally acquired upon payment of the consideration and thus calls into question whether the same was paid to the ministry of lands or the Vendor (the 5th Defendant) of the property transferred the same to it with an attempt of disguising themselves as bonafide purchaser's for value without notice of defect in title. In support they cited the court of appeal in the case of *Munyu Maina Vs Hiram Gathiha Maina* Civil Appeal No.239 of 2009.
102. It contended that the Plaintiff having failed to establish that it was a bonafide purchaser for value of the suit property, is not entitled to compensation. That the root of the title having been fraudulently acquired by the 5th Defendant, It could not pass good title to the Plaintiff who now seek compensation from the state nor can it be protected under Article 40 of *the Constitution*.

Analysis and Determination:

103. Flowing from the summaries of the evidence adduced and submissions rendered, I frame the following questions for determination:
- i. Whether or not the legality of the Plaintiff's title was determined in HCC Petition 263 of 2011; or
 - ii. Whether or not the Plaintiff holds a valid title to the suit property; or
 - iii. Whether the Plaintiff is a bonafide purchaser for value without notice; or
 - iv. Whether or not the Plaintiff is entitled to compensation as pleaded.



150. Before this suit was filed, the Plaintiff had taken out a petition against the 1st and 3rd Defendants herein. That Petition no. 263 of 2011 was determined on and both parties produced the copy of judgment rendered by Majanja J. They have also referred to certain paragraphs of the judgment. The 3rd Defendant submitted that in Petition 263 of 2011, the judgment made a finding that the title held by the Plaintiff was irregularly issued over the 3rd Defendant's land. The Plaintiff made no submissions on the finding of the court in Petition 263 of 2011 and at par 61 of the admissions conceded that the validity of their title had been determined so they will not re-litigate.
151. At paragraph 33 of the judgment, Majanja J held thus;
- “Although broad allegations of fraud were made by the respondents, the current proceedings were not intended for the purpose of establishing the fact of unlawful acquisition. The respondents did not present any cross-petition to establish fraud, illegality or corruption. I am therefore circumspect in making any findings that would prejudice any other legal process.”
152. The judge although observing at paragraph 33 stated that the current proceedings were not intended for the purpose of establishing the fact of unlawful acquisition went ahead to hold at paragraph 38 thus;
- “The issue in this case is whether petitioner's constitutional rights appurtenant to LR No. 9095 should be protected and enforced against the 1st Respondent as owner of LR no. 21919. I have found as fact that the petitioner's rights cannot be enforced against the 1st Respondent as its title was irregularly issued over the 1st Respondent's property. I unable to grant the orders sought in petition as to do so would amount to disregarding the title issued to KAA issued earlier in time.”
153. In my view, Majanja J. determined that the Plaintiff's title was irregularly acquired and the Plaintiff has not appealed this decision. I do not know what facts changed that made the Plaintiff to file this suit seeking for declarations in prayer (a) of the amended plaint. On the face of the judgment in Petition 263 of 2011, it is not open to the Plaintiff to be declared as the lawful owner of the L.R. No. 9095 within the meaning of Article 40(6) of *the Constitution*.
154. Despite my observation above, I will proceed to consider the evidence presented by the Plaintiff in support of its title. PW1's evidence was in support of the claim for compensation. It is the evidence of Manji Ravji Vekariya (PW2) that dealt with the proof of ownership. The witness produced several documents leading to the acquisition of the suit land. PW2 stated that their advocate then acting on their behalf conducted the due diligence. The Plaintiff produced inter alia copies of cheque payment for the purchase price; copy of the title for L.R 9095; copies of title for LR 21919 and 24937.
155. The Plaintiff averred that on the basis of the existence of title LR 24937 which was issued after the resurvey of tile LR21919 held by the 3rd Defendant, their title LR 9095 was valid. The 3rd Defendant admits that a request for surrender of their title was made for purposes of curving out land belonging to Mombasa Road vide the Commissioner of Land's letter dated 27th August, 1999. The 3rd Defendant denies that this surrender was registered hence title no. L.R. 23947 was null and void.
156. Thus the fact of the Plaintiff's title being curved out of LR 21919 already owned by the 3rd Defendant is not in dispute (see page 13 of 1st, 4th & 5th Defendants bundle which showed that survey plan 205580 deposited at the Survey of Kenya has L.R 9095 inside the plan.) What is in dispute is the legality or otherwise of the alleged re-survey to create LR 23947 and the other plots whose numbers are given



as 9091 – 9096. The Plaintiff has in their submissions referred to the case of *Dina Management vs. County Government of Mombasa and 5 Others, Supreme Court of Kenya Petition No. 8 of 2021* while supporting its argument for bonafide purchaser for value without notice.

157. The pertinent question is whether the land having been allocated to the 3rd Defendant was still available to be re-surveyed and be allocated to private bodies. Section 3(a) of the Government Lands Act Cap 280 (repealed) provides thus; in regard to allocation;

“Subject to any other written law, the President may make grants or disposition of any estates, interests of rights in or over unalienated government land”

“3(b), with the consent of the purchaser, lessee or licensee, vary or remit, either wholly or partially, all or any of the covenants, agreements or conditions contained in any agreement, lease or licence, as he may think fit, or, with the like consent, vary any rent reserved thereby;”

158. The Court of Appeal in *Denis Noel Mukhulo & Another v Elizabeth Murungari Njoroge & Another*, CA No. 298 of 2013, stated as regard to sanctity of title as follows:

“While we agree with the appellants that title registered under the Registered *Land Act* was sacrosanct, we are not able to agree that the Act protected title registered under it in all and sundry cases, irrespective of how the title was acquired. By section 27 of the Act, the registration of a person as a proprietor of land vested in him the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto, while section 28 of the Act insulated the rights of a proprietor from challenge except in the manner set out in the Act, which really does not afford the blanket protection that the appellants claim it did. Section 143 of the Act, which granted the court power to order rectification of the register provided as follows...The effect of the above provision is that the court had power to order rectification, save in the case of a first registration, where the registration was obtained by fraud or mistake to which the registered person was party.”

159. Thus, it is now settled law that holding a title deed perse does not guarantee rights that the law protects. The law puts an obligation on the registered owner whose title is under challenge as in this case to demonstrate that the title passed on was good (the root of the title). Guided by this requirement of the law vis a vi the evidence adduced which proved that L.R. number 21919 was already allocated to the 3rd Defendant, any part of it was not available for alienation. Consequently, the actions of the 1st Defendant’s predecessor (Commissioner of Lands) and or the 6th Defendant could not validate an illegal process. As stated by DW1, there were no PDP plans prepared and produced for the allocation to the 5th Defendant who later sold the suit property to the Plaintiff. The 5th Defendant no good title to pass and so, my answer to question (ii) is in the negative.

160. The next question is whether the Plaintiff has established that it is a bonafide purchaser for value. It began by defining the term warranty as given in Black’s Law Dictionary as follows:

“...A covenant by which the grantor in a deed promises to secure the grantee the estate conveyed in the deed and pledges to compensate the grantee if the grantee is evicted by someone having a better title.”

161. The Plaintiff submitted that the Commissioner of Lands and Registrar of Titles represented that they had conveyed to the Plaintiff an indefeasible title to the suit property under the *Government Proceedings Act*. Further that when he paid stamp duty, the government benefitted from its Public Officer’s wrong



doing. The Plaintiff averred that while investigating the land of JKIA, they came across the new grant LR 24937 and never came across the old grant LR no. 21919.

162. This line of argument on warranty is interesting because the Plaintiff was not the original allottee. The first process of allotment involves an application being made by the person seeking to be allotted land. Thus, the person the Commissioner of Land may have given representation to was the 5th Defendant. The Plaintiff had to lay a basis in law how the Commissioner of Land acting on behalf of the President warranties when it allocates public land to an applicant. The Plaintiff also ought to have pointed the clause in their sale agreement that passed such warranty rights. Otherwise, it beats the law how a 3rd party (read Commissioner of Lands and the Registrar) would give warranty in a transaction/covenant between two private parties.
163. The leases exhibited in pages 61 – 82 of the Plaintiff's original bundle showing the 3rd Defendant was acknowledged existence of the impugned grant L.R. 24937 as their title did not take away the obligation on the Plaintiff to demonstrate that the portion taken from L.R. 21919 pursuant to the alleged re-survey became public land available for alienation. The duty was always on the Plaintiff to discharge since it was the one alleging that its title was good. Unfortunately, there is no evidence of any gazette notice declaring the portion after the alleged re-survey as unalienated land. In the case of *Dina Management vs. County Government of Mombasa Supra*, the Supreme Court of Kenya stated thus at paragraph 93 and 94 of the judgment;
- “93. As held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina Civil Appeal No. 239 of 2009 [2013] eKLR*, where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.
94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.
164. The Supreme Court went further and cited *ELC in Nelson Kazungu Chai & 9 others vs. Pwani University (2014) eKLR* on the procedure of allocation of unalienated government land. These include letter of application to the Commissioner of Lands and PDP showing location of suit property in relation to the neighbouring parcels. The Plaintiff did not produce these two crucial documents. Probably if they found the PDP they would have as shown by the maps produced by the AG show, they would have learnt that the suit plot was inside another. The Plaintiff does not indicate carrying out any searches at the Survey of Kenya or producing evidence of such.
165. The Plaintiff's evidence was that the due diligence was conducted on its behalf by its then advocate acting for them in the said transaction of purchase and transfer of the suit property. The said advocate must have known from the documents presented to them that one of the directors of the Vendor (the 5th Defendant) was also the Commissioner of Lands. This should have raised their eye brows whether it was regular that the public officer would allocate the land to a company that it had direct interest in. To affirm that the Plaintiff's advocate saw the anomaly but let it pass was again having the 5th Defendant to be the one applying for notice of change of user even after it had passed its interest in the suit property.
166. It is my considered view that the facts of this case deny the Plaintiff the protection of a bonafide purchaser for value without notice. My holding is hinged on the Court of Appeal in the case of *Chemey*



Investments Ltd vs Attorney General and 2 Others (2018)Eklr while condemning irregularities in acquisition of public land held thus;

“...The appellant claims that we should applaud rather than condemn that level of efficiency, but with respect, what we see is not efficient delivery of public service, but rather, deliberate and shameless fast-tracking of a flawed process to facilitate quick theft of public property. Such hurried and manipulated exercises must never be confused with efficient service to the public. As is evidently clear, the persons in whose favour the exercise was speeded up were not your ordinary Kenya citizens, but well-heeled and connected individuals, bureaucratically and politically.

We ask ourselves, which innocent purchaser, without notice, would accept to purchase a property that is being used for public purposes, just next to the provincial headquarters and the law courts, without any form of inquiry” As this Court stated in Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others (supra), only a foolhardy, and we may add, a careless or fraudulent investor We ask ourselves, which innocent purchaser, without notice, would accept to purchase a property that is being used for public purposes, just next to the provincial headquarters and the law courts, without any form of inquiry” As this Court stated in Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others (supra), only a foolhardy, and we may add, a careless or fraudulent investor would purchase land such as the suit property “with the alacrity of a potato dealer in Wakulima market.” And further in Flemish Investments Ltd v. Town Council of Mariakani, CA No. 30 of 2015, in an appeal where the appellant, who had fraudulently obtained registration of public property in his name, but claimed to be an innocent purchaser for value without notice, this Court stated:

“A bona fide purchaser exercising due diligence would be expected to inspect the property he is buying, to ascertain its physicallocation, persons, if any, in occupation, developments, buildings and fixtures thereon, among others. If indeed the appellant honestly believed that Plot No. 34 and the cattle dip on it were part of the suit property, he would have rehabilitated the cattle dip as his property, or simply demolished it, not to pester the respondent for its relocation. For a party who was buying a commercial property rather than a ranch, the presence of a cattle dip on the property should have rang alarm bells.”

167. The last question is whether or not the Plaintiff is entitled to compensation. The Plaintiff wants to be compensated under the heading of (i) the value of the land and (ii) loss of revenue for the duration of the lease. The 1st Defendant present a valuation of Kshs.645,000,000 which the Plaintiff submitted ignored the value of the commercial developments on the land. It is my considered view and I so hold that the title of the Plaintiff having been rendered invalid, it is not entitled to compensation for the value of the land. To do so amounts to legitimising the said title.
167. Is the Plaintiff entitled to compensation for the commercial development put up and who should compensate it? PW2 stated in his evidence in chief that after obtaining title for the suit property, he got into problems when they started carrying out construction in the year 2010. That the 3rd Defendant had left a letter with the guard claiming that the suit property had an issue. This points out that the 3rd Defendant put the Plaintiff on notice of their interest in the suit property.
168. It is on the basis of the claims by the 3rd Defendant that the Plaintiff filed HCC Petition 263 of 2011 where they sued the 3rd Defendant and National Land Commission seeking orders inter alia of permanent injunction. The Plaintiff argues they are entitled to compensation because they were issued



- with title documents by the 1st, 2nd and 6th Defendants. They also had approved development plans from the Nairobi City Council and change of user license from residential to industrial use.
169. Premised on the objection raised by the 3rd Defendant from the inception of the developments being undertaken on the suit land, I conclude that they are not liable to pay any compensation to the Plaintiff as the Plaintiff opted to take the risk of completing the impugned buildings despite being aware of the compelling interests. The 3rd Defendant also referred this court to the order issued on 16th December, 2011 in Petition 263 of 2011 which ordered for maintenance of a status quo. The Plaintiff averred that when the order was issued they had completed building.
170. However, during cross-examination by counsel for the 3rd Defendant, PW2 stated that they had not finished building the go-downs when they filed the Petition no. 263 of 2011. That he had finished one side. PW2 further stated that he stopped construction after the order was issued and only continued after judgment was delivered. He was referred to paragraph 38 of the judgment which dismissed its case and in answer, the witness said he was advised by their counsel that their title was in order and that he could continue with the construction of the go-downs.
171. Thus the Plaintiff in completing the go-downs after a judgment in Petition 263 of 2011 rendered their title was irregularly acquired was indeed exposing itself to consequential risks that they cannot blame the 1st and 3rd Defendants for. If the Plaintiff was advised by their counsel to continue with completing the building of the go-downs such claim for compensation of loss likely to occur for demolition of their go-downs does not lie against the 1st, 2nd, 3rd, 4th, 6th and 7th Defendants.
172. Although the Plaintiff claims that they had approved development plans, the ones produced were issued to the 5th Defendant. Even after acquiring the title to the suit property, the Plaintiff still had the change of user application done by the 5th Defendant on 3rd March 2009 with the change of user license issued to the 5th Defendant on 3rd July, 2009. That it was their agreement that all the approvals be obtained by the 5th defendant and no explanation is rendered why such agreement when ownership conferred all rights over the land.
173. The inference drawn from this arrangement is that there was something the Plaintiff was fearing/hiding for not taking full control over property they had spent huge sums of money to purchase. Alternatively, the agreement to have the 5th Defendant acquire all the development approvals put the 5th Defendant to be the one who warrantied to the Plaintiff that all due process was done and so any loss the Plaintiff suffers, it is the 5th Defendant to compensate the Plaintiff. The 5th Defendant did not defend this suit and thus the claim as against it remains non-contested.
174. In conclusion under the heading of compensation, I find that any compensation due to the Plaintiff is payable to it by the 5th Defendant. However, the plaintiff takes part of the blame at 50% for continuing with construction on the suit plot despite being put on notice by the 3rd Defendant. Consequently, the Plaintiff is awarded 50% of the sum claimed Kshs. 7,974,960,000 as damages as the 5th Defendant Senator Services Limited.
175. The 3rd Defendant had filed a counter-claim itemized at paragraph 15 of this judgment. Premised on the judgment in Petition 263 of 2011 and my own analysis of the documents presented in evidence in this matter, I do grant the prayers (a) – (e) of the counter-claim. Prayer (f) seeking general damages was not proved and so none is awarded. The Plaintiff in the original suit is granted a period of one year from the date of this judgement to remove their developments on the suit property. In default, 3rd Defendant is at liberty to evict them and demolish any structures standing at the Plaintiff's cost.



176. Due to the unique circumstances of this case, I make an order that each party shall bear their respective costs of the suit.

Judgment dated, signed and delivered at Nairobi on this 6th day of June 2024.

A. OMOLLO

JUDGE

NAIROBI MILIMANI ELC NO. 796 OF 2014 – JUDGMENT Page **10** of **10**

