



**Chebii v Sirma (Environment & Land Case 81 of 2000)  
[2024] KEELC 6229 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6229 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 81 OF 2000**

**EO OBAGA, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**PHILIP CHEBON CHEBII ..... PLAINTIFF**

**AND**

**JOSEPH K. CHESIRE SIRMA ..... DEFENDANT**

**JUDGMENT**

1. The suit herein was instituted in the High Court by way of a Plaint dated the 6<sup>th</sup> December, 2000 but was later transferred to this court. The Plaintiff prays for Judgement against the Defendant for:
  - a. A mandatory injunction compelling the Defendant his agents and/or servants to vacate and/or remove the fence he has constructed on the parcel of land known as Uasin Gishu/Kipkabus Settlement Scheme/670 forthwith, and to give possession thereof to the Plaintiff.
  - b. An injunction to restrain the Defendant, his agents and/or servants from entering, constructing on, ploughing, fencing, wasting, selling, alienating or in any other manner whatsoever dealing with land parcel known as Uasin Gishu/Kipkabus Settlement Scheme/670.
  - c. Damages for trespass and mesne profits.
  - d. Costs and interests.
2. The Plaintiff's case is that he is the registered proprietor and occupant of Uasin Gishu/Kipkabus Settlement Scheme/670 (the suit property herein). He averred that the Defendant, in the company of his servants, employees and/or agents unlawfully entered the suit property and began putting up a fence around it and commenced other projects. He alleged that the Defendant, without any claim to the land, has threatened to harm anyone who tries to stop them from carrying out their heinous acts. It is his case that he has suffered loss and damage and has been deprived of possession to the land.



- The Plaintiff averred that despite demand and notice of intention to sue, the Defendant has ignored and/ or refused to vacate the suit property. The Plaintiff therefore prayed for orders of injunction and eviction against the Defendant, as well as general and special damages for trespass.
3. The Defendant responded by a Statement of Defence and Counterclaim dated 14<sup>th</sup> February, 2001 and Amended on 28<sup>th</sup> March, 2017. In his Defence, he denied the contents of the Plaintiff's Complaint and instead averred that he has been in possession of the suit property since he purchased it for value in 1991, and the fence has been in existence since then. The Defendant denied that he had threatened harm to anyone and averred that the suit property belongs to him. That he has settled there for over 10 years hence the Plaintiff cannot suffer any loss and damage as his intention is to grab the Defendant's property. The Defendant denied the Plaintiff's entitlement to injunctive orders and averred that the Plaintiff cannot be allowed to unjustly enrich himself from the Defendant's piece of land. He also refuted the Plaintiff's contention that he had met the requirements of the law as to notice as the matter was filed under certificate of urgency.
  4. In the Counterclaim, the Defendant claimed that he purchased the suit property for value on 13<sup>th</sup> July, 1991 from Lila C. Sieley who was allocated the land as a first allotment on 2<sup>nd</sup> November, 1988. The Defendant averred that the Plaintiff fraudulently caused the suit property to be registered in his name and he set out the particulars of fraud some of which are obtaining a double allotment, obtaining a title deed on the Defendant's parcel of land, several instances of misrepresentation of facts and particulars among others. The Defendant further averred that the Plaintiff did not obtain consent to transfer from the first allottee of the suit property. The Defendant asked that any title issued to the Plaintiff be cancelled and declared null and void and that he be declared legal owner. He asked that the Plaintiff's suit be dismissed with costs and judgment be entered in his favour in the following terms:-
    - a. Declaration that parcel No. Uasin Gishu/Kipkabus Settlement Scheme/670 belongs to the Defendant and that the Plaintiff is a trespasser.
    - b. An order of permanent injunction restraining the Plaintiff either by himself or by his servants and/or agents from continuing to enter the Defendant's land known as Uasin Gishu/Kipkabus Settlement Scheme/670, disrupting operations, selling, alienating, leasing, encumbering and/ or from laying any claim at all the said parcel of land.
    - c. Costs and interest.
    - d. General damages for trespass and mesne profits.
    - e. An order revoking the Title issued to the Plaintiff herein on 2.12.1999 over that parcel of land known as Uasin Gishu/Kipkabus Settlement Scheme/670 illegally issued to the Plaintiff.
    - f. Order requiring the Land Registrar-Uasin Gishu District to issue a proper title over the parcel of land known as Uasin Gishu/Kipkabus Settlement Scheme/670 in favour of Joseph K. Chesire Sirma.
  5. The Plaintiff filed a Reply to Amended Defence and Defence to Counterclaim dated 10<sup>th</sup> April, 2017 where in response to the Defence he reiterated the contents of his Complaint. The Plaintiff averred that the Defendant has never been in possession of the suit property and the fence was illegally put up. He denied the allegation that the Defendant had settled on the suit property for 10 years or for any period at all thus the defendant's claim over the suit property is unfounded and baseless.
  6. In response to the counterclaim, the Plaintiff denied every allegation in the Defence and Counterclaim. He averred that the said Lila C. Sieley has never owned or been in possession of the suit property. That any sale of the land by the said Lila C. Sieley was done illegally as she had no good title to pass. The



Plaintiff denied fraudulently registering the suit property in his name and further denied the particulars of fraud set out in the counterclaim. The Plaintiff further denied the allegation that he did not obtain consent from the first allottee and averred that the claim for cancellation of his title and declaration that the Defendant is the owner are misplaced as the Plaintiff is the rightful owner. He averred that the Defendant is not entitled to any relief sought in his Amended Statement of Defence and Counterclaim and prayed that it be struck out with costs and judgment entered as prayed for in the Plaintiff.

### **Hearing and Evidence:**

#### **Plaintiff's Case;**

7. The Plaintiff led evidence as PW1 in support of his case. He was sworn and adopted his witness statement dated the 20<sup>th</sup> February, 2013 as his evidence in chief. In his testimony he informed the Court that he bought the suit property vide Agreement dated 10<sup>th</sup> September, 1999 from Henry Kipsuto and he produced it as PEX1. He testified that when the Seller showed him the land, nobody was living there. He then conducted a search and confirmed that it was registered in Henry Kipsuto's name, who is the first registered owner. That he obtained Land Control Board (LCB) Consent to transfer the land, which he produced as PEX2.
8. PW1 testified that the land was then transferred to him and he was issued with a title deed to the suit property, he produced the transfer as PEX3, the title deed as PEX4, and the search he conducted as PEX5. PW1 testified that the records at the Land Registry show that the land is registered in his name and he produced a copy of the green card as proof which he marked as PEX6. It is his testimony that after obtaining title, he went to the land to cultivate but was chased away by the Plaintiff with youths he had mobilised, thus he moved to court. He stated that there is nothing happening on the suit property, that no construction had been undertaken thereon. He asked that the orders in the plaint be granted as prayed together with costs to the suit.
9. In cross-examination, PW1 was adamant that he bought the land from Henry Kipsuto who showed him a title deed that showed that he was the registered owner of the land which is agricultural land. He testified that he did not know Lila C. Sieley. He informed the court that the consent to transfer was issued to him. He confirmed that he has not been ploughing the suit property, and that it is the Defendant who has been cultivating it. He testified that the Defendant did not give him a reason other than that the suit property belonged to him. When re-examined, PW1 testified that the Defendant blocked him from using the land. He testified that the Defendant has never showed him any documents indicating that he is the owner of the suit property. This marked the close of the Plaintiff's case.

#### **Defendant's Case;**

10. The Defendant testified as DW1, was sworn and adopted his witness statement dated 29<sup>th</sup> September, 2017. He then testified that he bought the suit property from Lila C. Sieley on 13<sup>th</sup> July, 1991 and produced the Agreement as DEX1. He paid the purchase price of KShs. 120,000/- in full and was shown an allotment letter dated 2<sup>nd</sup> November, 1988 issued to Lila Sieley, which he marked and DMF12. He testified that he was an athlete travelling to different countries to represent the republic whereas the Vendor went to Canada to the Ministry of Foreign Affairs but he had asked her to process the LCB Consent. PW1 testified that he went to the then District Commissioner, Ishmael Chelanga but was told the land could not be transferred in Lila's absence. DW1 testified that when they came back to the country in 1998, he found out that the land had been registered in the name of Henry Kipsuto, and he received a letter from Mr. Kipsuto to that effect.



11. It is DW1's testimony that he went to the Provincial Land Adjudication Officer-Nakuru, Mr. Chemwon, who referred him to the Commissioner of Lands, Sammy Mwaita. That there is a letter dated 7<sup>th</sup> March, 2000 addressed to the District Land Registrar-Eldoret to put a restriction on the suit property, pursuant to which a restriction was lodged. The letter was marked as DMFI3. DW1 testified that he wrote a letter dated 18<sup>th</sup> June, 2001 and he produced it along with the response from the commander as DEX 4(a) and (b). DW1 also produced a letter that he received from the Commissioner of Lands as DEX5. He prayed for dismissal of the Plaintiff's suit and that his counterclaim be allowed as he has been staying on the land ever since, as well as costs for the Counterclaim.
12. When cross-examined, DW1 testified that he bought the land from Lila Sieley who had an allotment letter. He testified that they did not go to the LCB. That he has no evidence that there was a restriction placed on the suit property. DW1 testified that he did not know the Plaintiff in this suit, and further that it is not true that he refused the Plaintiff entry into the land. That the Plaintiff has never taken possession of the suit property. That he thought the land was transferred fraudulently but that he never sued Henry Kipsuto. When shown the green card that Henry Kipsuto got in 1999, DW1 testified that he got the land through purchase. On re-examination, DW1 testified that the Commissioner of Land's letter (DEX5) indicated that the land was transferred fraudulently. He testified that the allotment was for 1988.
13. The Defendant then called Bernard Malakwen, the retired Chief of Nyaru location, to testify as DW2. He was sworn and adopted his witness statement dated 29<sup>th</sup> September, 2017 as his evidence. He testified that the Defendant is his neighbour and owner of the suit property. He recalled that the Defendant tentatively bought the suit property in the 1990's. He was cross-examined and he testified that he was not present when the Defendant bought the suit property. He testified that he does not keep records of people who own land in his area. Further, that as a chief, it was his duty to know who resides in his jurisdiction but not whether the Plaintiff has title to the suit property. On re-examination, he conceded that it is the Defendant who is staying on the land.
14. Lila Chepkemoi Sieley testified under oath as DW3 and told this court that the letter dated 2<sup>nd</sup> November, 1988 is an allotment letter that was given to her and that it is in her name, she produced it as DEX2. She testified that she sold the land to Mr. Chesire vide and Agreement dated 18<sup>th</sup> July, 1991. She was cross-examined and testified that she was issued with the allotment letter and she is not aware that the same was cancelled. She testified that she was not aware that Henry Kipsuto was issued with an allotment letter for Plot No. 670. She testified that she had not been issued with a title when she sold to the Defendant. She testified that the Allotment Letter does not indicate a plot number, and it only refers to Kipkabus farm. Upon re-examination, DW3 testified that she was abroad in Ottawa Canada that is why she did not process the title deed. She testified that the Land Registrar wrote the Plot No. 670 on the letter. She stated that she did not know Henry Kipsuto.
15. The Land Registrar, Uasin Gishu Land Registry, Emily Sitienei, was called to testify as DW4. She was sworn and testified that she was in court to produce the green card in respect of the suit property. She testified that she has an original as well as certified copy of the members' register which shows that no. 670 was in the name of Lila Sieley. She testified that this member must have been issued with allotment letter. DW4 testified that the name of Henry Kipsuto does not appear. She produced the extract of the register as DEX6. She testified that the register for Parcel No. 670 was opened on 26<sup>th</sup> March, 1990 and entry No. 1 of that date is the Government of Kenya, whereas entry No. 2 made on 21<sup>st</sup> February, 1997 is Henry Kipsuto with a title deed issued on the same day. She testified that entry No. 6 is a restriction made pursuant to a letter dated 7<sup>th</sup> March, 1999 Reference No. Gen/A/Z/VOL.VI/50 put by the Chief



Land Registrar Mr. C.W. Ngatia. She produced the letter as DEX3 and a copy of the extract of the register for parcel No. 670 as DEX7.

16. In cross-examination, she testified that she is aware that Henry Kipsuto beame registered as the owner of the suit property on 21<sup>st</sup> February, 1997 and the Plaintiff on 2<sup>nd</sup> December, 1999. DW4 testified that it is the settlement officer who can say whether an allotment letter is cancelled or not. She testified that they do not allocate land and that she is unable to trace the parcel file. That she only had the green card and the members register. DW4 testified that she does not have the correspondence file and cannot tell what transpired. She testified that it is the officials of the Kipkabus Settlement Scheme, who prepared the members list. DW4 testified that she did not know if the suit property was allocated to someone else. She told the court that the suit property was never registered in the name of Lila Sieley or the Defendant herein.
17. When re-examined, DW4 testified that the Defendant's name does not appear anywhere on the records. She testified that she did not know the reason why he was not registered but only knew the reason Lila was not registered. This marked the close of the Defence case and the court directed parties to file written submissions.

### **Submissions:**

#### **Plaintiff's Submissions;**

18. In compliance with the court's directions, the Plaintiff filed Submissions dated 8<sup>th</sup> March, 2024. Counsel Submitted that the Plaintiff had placed before the court all the relevant documents showing how he became registered as the proprietor of the land and the Title Deed that is proof of his ownership. Relying on Section 24(a) and 26(1) of the [Land Registration Act](#), he submitted that Certificate of Title issued on registration is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. He argued that as the registered proprietor, the Plaintiff is entitled to protection under Sections 24, 25 and 26 of the [Land Registration Act](#).
19. Counsel argued that despite allegations that the land was allocated to Lila Sieley, no evidence has been produced to show a title was issued or any interest registered in favour of the Defendant over the suit property. Counsel was of the opinion that a letter of allotment does not confer interest in land as was held in *Gladys Wanjiru Ngacha vs Teresa Chepsaat & 4 Others* (2008) eKLR. Counsel prayed that Court do find that the Plaintiff is the registered owner. Counsel submitted that the Defendant is in trespass by the fact that he entered into his property without any colour of right and without his permission and has refused to vacate despite being requested to do so. Counsel submitted that the Defendant had not denied entering the land, thus by his own admission he is a trespasser. Counsel urged that as a result, the Plaintiff is entitled to the reliefs sought.
20. On the alleged fraud, Counsel for the Plaintiff submitted that the same needed to not only be specifically pleaded but also proved beyond a balance of probabilities. Counsel argued that the Defendant had produced no evidence to show that the Plaintiff engaged in any act of fraud to warrant the revocation of his title. Counsel contended that since the claim for fraud was not proved, the counterclaim ought to automatically fail. He relied on the *Gladys Wanjiru Ngacha Case* (Supra). Counsel submitted that the Plaintiff is a bonafide purchaser for value without notice, whose title cannot be defeated. It was his prayer that the Plaintiff's suit be allowed while the Defendant's be dismissed with costs.



## Defendant's Submissions;

21. Likewise, the Defendant filed submissions dated 15<sup>th</sup> April, 2024 where Counsel argued that a Certificate of Title is only prima facie proof of ownership. That however, under Section 26(1) of the [Land Registration Act](#), it may be challenged on grounds of fraud or misrepresentation, or where it has been acquired illegally, un-procedurally or through a corrupt scheme. He cited the case of John Waboi Mwangi & Another vs Commissioner General of Prisons & 2 Others; Ethics & Anti-Corruption (Intended Interested Party) (2020) eKLR. Counsel submitted that since the Plaintiff's title had been challenged, the Plaintiff ought to have tendered evidence as to how he acquired it. Counsel submitted that had the Plaintiff conducted due diligence prior to the purchase as purported, he would have ascertained that the land was already occupied. In addition, Counsel took issue with the Plaintiff's failure to call Harry Kiptoo, the man who allegedly sold to him, to explain how he acquired title to the property and prove the Plaintiff's innocence in the fraudulent scheme. He relied on Falcon Global Logistics Co. Limited vs Management Committee of Eldama Ravine Boarding Primary School (2018) eKLR.
22. Counsel contended that the Agreement between the Plaintiff and the said Harry Kiptoo was used to facilitate the illegal registration of the title deed in the Plaintiff's name so he could lay claim to the land. Further, the Plaintiff did not call any witness from the Land Registry/Department to authenticate the genuineness of his title. Counsel asserted that on the flip side, the Defendant had explained how he had acquired his interest over the suit property, and that from the Agreement he took possession of the land immediately after execution thereof. Counsel argued that the said Harry Kiptoo, who was a Provincial Land Registrar used his position to mislead the Provincial Land Adjudicator that the land was vacant, which explains why the parcel and correspondence file are missing at the lands office. Further, that the Plaintiff produced no evidence to show that the allotment to Lila Sieley had been cancelled, thus it remains that Lila Sieley was rightfully allotted the suit property, which she sold to the Defendant. He asked that the Court makes a finding that the Plaintiff does not own the land (Republic vs City Council of Nairobi & 3 Others (2014) eKLR and Dina Management vs County Government of Mombasa).
23. Counsel argued that the Plaintiff had failed to explain how he acquired his title and was not deserving of the orders sought in his plaint. He pointed out that Article 40(6) of [the Constitution](#) provides that the right to property does not extend to property acquired unlawfully, thus the Plaintiff cannot claim protection under Sections 24, 25 and 26 of the [Land Registration Act](#) (LRA). He urged that the Plaintiff's claim against the Defendant should thus be dismissed with costs, and that his claim, if any, should be against Harry Kiptoo. He relied on the case of Martha Wangui Thurura & Another vs Henry Gitahi Thurura & 3 Others (2021) eKLR and Falcon Global Logistics Case (Supra). Counsel also submitted that the Defendant had proved that he purchased the suit property for value and took possession immediately, thus it is only fair that he be accorded the protection of law as per Sections 24, 25 and 26 of the LRA. That the Defendant had acquired lawful title, which should not be arbitrarily taken away (Philemon L. Wambia vs Gaitano Lusitsa Mukofu & 2 Others (2019) eKLR).
24. Responding to the Plaintiff's Submissions, Counsel disputed the contention that the Plaintiff is a purchaser for value without notice, arguing that the issue was not pleaded but only raised in submissions, which amounts to trial by ambush. Counsel relied on Chumo Arap Songok vs David Kibiego Rotich (2006) eKLR, where it was held that parties are bound by their pleadings, and the court is to pronounce judgment only on the issues arising from the pleadings. Counsel submitted that costs follow the event, and the Plaintiff having caused him the trouble of defending himself, should compensate the Defendant by way of costs.



## **Analysis and Determination:**

25. I have read the pleadings of the parties filed in this suit. I have also considered and weighed the witness testimonies and evidence adduced, as well as the rival submissions of Counsel on record and the judicial decisions cited and therein. In my view, the issues for determination at this stage are:
- i. Whether the Plaintiff acquired and holds valid title to the suit property
  - ii. What orders should the court make regarding the main suit and counter-claim.

### **i. Whether the Plaintiff acquired and holds valid title to the suit property**

26. The Plaintiff's case is that his registration as the owner of the suit property conferred on him the status of an absolute and indefeasible proprietor thereof. The Defendant herein acknowledged that the Plaintiff does indeed hold title to the suit property. However, in his Statement of Defence & Counterclaim he challenged the Plaintiff's title on grounds that it was fraudulently acquired. The Defendant has contended that the title was acquired by fraud and misrepresentation and therefore, the same was not protected under the law. The Defendant set out the particulars of the Plaintiff's fraud at Paragraph 13 of his Statement of Defence & Counterclaim.
27. Both parties made reference to Section 26 of the *Land Registration Act*, 2012. The said section provides that a registered owner's title can be challenged and impeached if it is proved that such title was acquired fraudulently or through misrepresentation to which the proprietor is proved to be party. It also provides that a title may also be successfully challenged where it is established that the title was acquired illegally, un-procedurally or through a corrupt scheme. It follows therefore that the indefeasibility of title is not absolute.
28. That being so, the starting point for this court is to determine whether the Plaintiff's title was acquired following due procedure. This is because the Defendant's claim and title to the suit property cannot be considered as a standalone issue but as result of the entire process that led to its issuance. It is now trite that a title is the end-product of a process, which in and of itself must comply with the laid down laws and procedure to be held indefeasible. The procedure for the allocation of un-alienated land was laid out by the Environment and Land Court in *Nelson Kazungu Chai & 9 Others vs Pwani University* [2014] eKLR as follows:

“130. It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co. Ltd vs. The Hon. Attorney General, Mombasa HCCC No. 276 of 2013* where Njagi J. held as follows:

“Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department



of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed...”

29. In the instant suit, the Plaintiff has produced an Agreement for Sale dated 10<sup>th</sup> September, 1999 showing that he purchased the suit property from one Harry K. Kiptoo. He produced a Letter of Consent from the Ainabkoi Land Control Board, the Transfer of Land in his favour and the Title Deed issued after registration thereof dated 2<sup>nd</sup> December, 1999. He also produced a Certificate of Official search dated 21<sup>st</sup> December, 1999 conducted after the registration and finally, he produced the extract of the Register for the suit property. While all these documents do point to the Plaintiff being the current registered owner of the land, they do not clear the air on the root of the title, which is what has been challenged by the Defendant in his counterclaim.
30. The law now demands that where the root of the title is challenged, a party needs to do more than just wave his title, one needs to show that the property and title thereto was procedurally acquired, in a process that is devoid of fraud, misrepresentation and/or illegality. In *Munyu Maina vs Hiram Gathiha Maina* (2013) eKLR, where the court held that:-
- “We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”
31. It is the Defendant’s case that the suit property was first allotted to Lila C. Sieley and he produced the Letter of Consent dated 2<sup>nd</sup> November, 1988. The said Lila C Sieley testified as DW3 and confirmed that she is the original allottee and she sold her land to the Defendant. The Defendant also called the Land Registrar, Uasin Gishu who testified that Lila Sieley was the Original Allottee of the suit property. She produced the original list of Members of Kipkabus Settlement Scheme, which shows that the land initially allotted to Lila Sieley and not Harry Kiptoo.
32. It is not clear then how the said Harry Kiptoo ended up as the registered owner of the suit property. As correctly pointed out by the Defendant, the Plaintiff did not see fit to call the said Harry Kiptoo to come and shed light on the process through which he obtained title to the suit property. I have seen no copy of a Letter of Allotment issued to the Mr. Harry Kiptoo, or in the alternative, an application by Harry Kiptoo to be allocated the suit property, since he is not on the original list of members for the Kipkabus Settlement Scheme. See *Waterfront Holdings Limited vs Kandie & 2 others (Civil Appeal 88 of 2019)* [2023] KECA 1223 (KLR), where the court of Appeal at Mombasa held that a letter of allotment is a prerequisite for allotment of un-alienated government land, and that a title acquired in its absence is not valid and is inconsequential.
33. This court has seen the letter dated 4<sup>th</sup> March, 2002 which was written about 14 years after the allotment letter was issued, where the Commissioner of Lands acknowledged that the Defendant’s complaint regarding the suit property is genuine. The letter also stated that; “the case was fraudulently handled by the District Land Registrar, Nakuru”. DEX3 is a letter dated 7<sup>th</sup> March, 2000 from the



Chief Lands Registrar addressed to the District Land Registrar. The subject of the letter is “Parcel Number Uasin Gishu/Kipkabus Settlement Scheme/670” and at the second paragraph reads:

“I am further informed that the manner in which the title was issued to Harry K. Kiptoo was through misrepresentations of facts and abuse of office. This issue is now under investigation by the office of the Commissioner of Lands.”

34. There can be no greater condemnation of the Plaintiff’s title than that coming from the then Commissioner of Lands, who was not only the custodian of land records in the country, but whose office also investigated the Defendant’s complaints over the suit property. In the letter dated 4<sup>th</sup> March, 2002 the Commissioner of Lands admitted that the case was handled fraudulently. Harry Kiptoo was not in the original List of Members of Kipkabus Settlement Scheme. I have also not seen evidence that he submitted an application to be allocated the suit property. Without a proper explanation as to how he came to be the registered proprietor of the land, all these facts lead up to only one conclusion, which is that the root of the Plaintiff’s title is defective. In *Dina Management Limited vs County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), the Supreme Court had this to say:-

“ 110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co (1993) Ltd, who in turn could pass to the appellant.

111. Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1<sup>st</sup> registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.

112. We therefore agree with the appellate court that the appellant’s title is not protected under article 40 of *the Constitution* and the land automatically vests to the 1<sup>st</sup> respondent pursuant to article 62(2) of *the Constitution*. We hasten to add that, the suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The appellant ought to have been more cautious in undertaking its due diligence.”

35. I do not see then, how one who holds a title whose root is defective can pass good title as the Plaintiff suggests. Further, the *Dina Management Case* (Supra) is clear that the principle of innocent purchaser for value without notice will not come to the aid of a buyer where the root of a title is defective as is the case herein. I find persuasive guidance in the case of *Miroro vs Nyarumi & 5 others (Environment & Land Case 23 of 2019)* [2023] KEELC 21533 (KLR), where the court held that:-

“In our case, I have demonstrated that Tom Nyagami Gai never acquired a good title to the suit property. His registration was procured by way of fraud. Having not obtained a good title to the suit land, he had no good title to pass to the plaintiff, and therefore the plaintiff does not hold a good title to the suit land. Even the doctrine of an innocent purchaser for



value without notice cannot help in such an instance. The doctrine of an innocent purchaser for value without notice, in our jurisprudence, cannot apply to one who has purchased a fraudulent title, or a title that is for one reason or another declared to be null and void. Thus, so long as a title is illegal, it is pointless to argue that one is an innocent purchaser for value, and indeed, the court need not consider the innocence, or otherwise, of the purchaser in so far as the question of nullification of title is concerned. A fraudulent title is subject to nullification irrespective of the fact that the purchaser is an innocent purchaser for value without notice. This principle was given a seal of acceptance by the Supreme Court in the case of *Dina Management vs County Government of Mombasa & 5 Others*, Supreme Court of Kenya, Petition No. 8 (E010) of 2021 [2023] KESC 30 (KLR).”

36. This court is loath to declare the Plaintiff an owner of land whose acquisition and root of title is marred by fraud and I dare say failure to adhere with procedure. In *Wambui vs Mwangi & 3 others (Civil Appeal 465 of 2019)* [2021] KECA 144 (KLR), the Court of Appeal made the following finding:-

“The jurisprudence relied upon by the appellant and which we find prudent not to replicate are as already highlighted above. We have given due consideration to them in light of the record as assessed herein by us. Our take on the same is that the jurisprudential thread running through all of them is that no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, un-procedurality or otherwise a product of a corrupt scheme.”

37. The court is not blind to the fact that the said Harry Kiptoo was himself a Provincial Land Registrar, which would in itself offer insights on how he was able to perpetuate the fraud in acquiring the suit property. Applying the legal principles espoused in the above cases to the instant case, it is clear that the Plaintiff did not demonstrate to the court that the requisite legal process was followed in obtaining the Title that was eventually sold to him. The evidence adduced in this case, shows that the applicable laws and procedures were flouted in effecting registration of the Title in favour of the said Harry Kiptoo. The Title acquired by Harry Kiptoo was therefore defective and he had no valid title that he could pass to the Plaintiff herein. Since the Plaintiff did not acquire valid title, he is not entitled to the reliefs sought in the Plaintiff.

## ii) What orders should the court make regarding the main suit and counter-claim?

38. In the case of *Chemey Investments Ltd vs Attorney General & 2 Others, CA No. 349 of 2012*, the Court of Appeal held that sanctity of title was guaranteed and could not be defeated except on the specific grounds. As the law stands currently, title to property which is obtained fraudulently or illegally in violation of the provisions of the law is not sacrosanct and does not enjoy any protection under the law. In such instances, the court has power under Section 80 of the *Land Registration Act* to order rectification of the register. Section 80 (1) of the *Land Registration Act* provides that:-

“Subject to subsection (2), the court may 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.”

39. Further, a title can be nullified under Section 26 (1)(b) where it has been acquired illegally, un-procedurally or through a corrupt scheme. The court has already found that the title issued to Harry Kiptoo and later transferred to the Plaintiff is a fraudulent one. From the above provisions, it is clear that the court has power to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, by fraud or mistake. This



court has already found that the Title issued to the Plaintiff, having emanated from the defective title, is impeachable on ground of fraud, which was sufficiently proved through evidence and it is liable for revocation/cancellation. Consequently, the court is well within its rights to revoke the Plaintiff's registration as the proprietor to the suit property and cancel his title based on the totality of the evidence adduced herein, which it hereby does.

40. As a consequence of having lost his title to revocation and/or cancellation, it goes without saying that the Plaintiff cannot be entitled to the prayers set out in the Plaint.

41. With regards to the Defendant's Counterclaim, this court is bound by the decision of the Supreme Court in the Torino Enterprises Limited Case (Supra), where it went on to find that:-

“While we agree with the general tenor of the learned Judge's foregoing pronouncement, we remain uncomfortable with his inference that the allotment letter was of no legal consequence solely because it had lapsed after 30 days. We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed.”

42. Since Lila C. Sieley could not transfer her interest before she was issued with a title over the property, the cancellation of the title means that the status of the land reverts to the status before the purported sale of the land to the Defendant. For the avoidance of doubt, the effect of this is to put the state of affairs back to the original allotment to the Lila C. Sieley, the original allottee. She is at liberty to process the title following due procedure and thereafter transfer the property to the Defendant as per their Agreement.

43. Since the Defendant has also not proved that he has acquired title to the suit property herein, the Court is not able to grant him all the prayers in his counterclaim. Notably, he has only succeeded in establishing that the root of the Plaintiff's title is defective, as a result of which, this court has found it liable for cancellation/revocation. However, not having proved that Lila C. Sieley had interest capable of being transferred, this court cannot therefore declare him the legal owner of the suit property neither can it direct the Land Registrar to issue a title in his favour.

44. With regards to trespass, Section 3 (1) of the *Trespass Act*, Cap 294 provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

45. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. The Defendant is not the registered owner of the land, but he is in possession. The Parties are in agreement that the Plaintiff was not able to gain entry into the suit property because the Defendant was able to repulse his attempt into the land. Since the Plaintiff was not able to gain entry into the land, the element of trespass was not proved. That being the case, the Defendant has not proved any loss arising out of the Plaintiff's actions. He is thus not entitled to the prayer for damages for trespass or mesne profits.



46. With regards to the order of permanent injunction, in *Nguruman Limited vs Jan Bonde Nielsen & 2 others, CA No. 77 of 2012*; [2014] eKLR, the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. Establish his case only at a prima facie level,
- b. Demonstrate irreparable injury if a temporary injunction is not granted, and
- c. Alleviate any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

47. From the testimonies of both the Plaintiff and the Defendant, this court has established that the Defendant is the one currently in possession and physical occupation of the suit property. The allegations that the Defendant went to the Plaintiff's property and put up a fence among other heinous acts is false. DW3 confirmed that she sold the land to the Defendant and he took possession immediately upon execution of the Agreement for sale. The Defendant has stated that he has been living on the land all this time. Although the Defendant is not the registered owner, he is a beneficial owner of the land, residing on it by permission of the original allottee. For that reason, he is entitled to protection of his interests from any future interference by the Plaintiff by way of the permanent injunction sought.

48. The upshot is that the Plaintiff's case is dismissed in its entirety. The Defendant's counterclaim partly succeeds in the following terms:-

- a. An order of permanent injunction be and is hereby issued restraining the Plaintiff either by himself or by his servants and/or agents from entering into the parcel of land known as Uasin Gishu/Kipkabus Settlement Scheme/670, disrupting operations, selling, alienating, leasing, encumbering and/or from laying any claim at all the said parcel of land.
- b. An order revoking the Title issued to the Plaintiff herein on 2<sup>nd</sup> December, 1999 over all that parcel of land known as Uasin Gishu/Kipkabus Settlement Scheme/670 illegally issued to the Plaintiff.
- c. An order directing the Land Registrar Uasin Gishu to issue title over parcel of Land known as Uasin Gishu/Kipkabus Settlement Scheme/670 in the name of Joseph K. Chesire Sirma.
- d. The Defendant shall have the costs of the suit and counter-claim.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**E. O. OBAGA**

**JUDGE**

**In the virtual presence of;**

Ms. Odwa for plaintiff.



Mr. Osewe for Defendant.

Court Assistant –Laban

**E. O. OBAGA**

**JUDGE**

**30<sup>th</sup> SEPTEMBER, 2024**

