



REPUBLIC OF KENYA



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**Sitiency v Mutai; Rotich & 3 others (Third party) (Environment & Land
Case 64 of 2015) [2024] KEELC 7278 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7278 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 64 OF 2015
LA OMOLLO, J
OCTOBER 31, 2024**

BETWEEN

ALEXANDER KIPNGETICH SITIENEY PLAINTIFF

AND

JAPHETH KIPLANGAT MUTAI DEFENDANT

AND

ANDREW CHERUIYOT ROTICH THIRD PARTY

EQUITY BANK LTD THIRD PARTY

ALFRED KISANG MARITIM THIRD PARTY

REBMAN KIPKURUI THIRD PARTY

JUDGMENT

Introduction

1. The Plaintiff commenced the present proceedings vide the Plaintiff dated 2nd December, 2015 which plaintiff was amended on 3rd August, 2018.
2. The Plaintiff avers that he is the lessee of LR No. 631/2354 for a period of 99 years from 1st April, 1997. The said parcel of land measures 1.511 Ha.
3. The Plaintiff also avers that the Defendant unlawfully trespassed onto the suit property and erected a temporary structure with the intention of denying him the use and occupation of the land.
4. The Plaintiff further avers that he obtained information that the Defendant had obtained a title deed of a portion of the suit property which was registered as LR No. Kericho/Municipality Block 1/356.



5. The Plaintiff then sets out particulars of fraud and prays that the Court issues an order of eviction against the Defendant and/or his agents and servants.
6. The Plaintiff prays for judgement against the Defendant for;
 - a. That an order of eviction do issue against the Defendants by himself, agents, servants employees or otherwise to forthwith vacate LR No. 631/2354 Kericho Municipality and do direct that any subsequent title fraudulently issued to the Defendant be cancelled.
 - b. General Damages.
 - c. Cost of the suit and interest.
 - d. Any other relief this Honourable Court may deem fit and just to grant.
7. The Defendant filed his Statement of Defence dated 22nd December, 2015 which was later amended on 7th October, 2019.
8. The Defendant states that he is the registered owner of land parcel No. Kericho Municipality Block 1/356. He also states that he purchased the said property from the 3rd and 4th Third Parties.
9. The Defendant further states that he is lawfully in possession of the said land and has carried out extensive rehabilitation of it.
10. The Defendant states that the 1st Third Party was the first registered owner of the land and that he used the land as security for a loan from the 2nd Third Party.
11. The Defendant also states that the 2nd Third Party sold the land at an auction where the 3rd Third Party purchased it.
12. The 3rd Third Party later sold half of the land to the 4th Third Party. The 3rd and 4th Third Parties then jointly sold it to the Defendant.
13. The Defendant prays that the Plaintiff's suit be dismissed with costs.
14. The 2nd Third Party filed its statement of Defence on 31st January, 2022. It states that it registered a charge on 17th June, 2019 for Kshs. 840,000/= over LR No. Kericho Municipality Block 1/356 in favour of Andrew Cheruiyot Rotich the 1st Third Party herein.
15. The 2nd Third Party also states that the 1st Third Party defaulted in the repayment of the loan and so it exercised its statutory power of sale and sold the suit property at a public auction.
16. The 2nd Third Party further states that the 3rd Third Party herein purchased the property and later jointly with the 4th Third Party sold the suit property to the Defendant who is the current registered owner.
17. The 2nd Third Party states that its role with regard to the suit property was to charge and discharge it after sale through a public auction.
18. The 2nd Third Party also states that it is not privy to the particulars of fraud pleaded by the Plaintiff as it charged and discharged its rights as a chargee on 21st November, 2011.
19. The 2nd Third Party further states that any encumbrance noted in its favour does not transfer ownership to it hence the Plaintiff's claims of fraud lie elsewhere and it ought not to be a party in the matter.



Plaintiff's Evidence.

20. Alexander Kipngetich Sitienny testified as PW1. He introduced himself as a retired brigadier and farmer.
21. He stated that he had filed a witness statement dated 2nd December, 2015. He prayed that the Court adopts the said statement as part of his evidence in chief, which prayer the Court acceded to.
22. He testified that his claim is with regard to land known as LR No. 631/2354 and stated that he acquired the said plot on 9th November, 1999.
23. He further testified that he had the certificate of title and a copy of the allotment letter in Court. He produced the Certificate of Title for LR No. 631/2354 issued on 9th November, 1991 as Exhibit P1.
24. It was his evidence that the allotment was done in April, 1997. He produced a copy of the allotment letter as Exhibit P2.
25. It was also his evidence that after he was given the land, he went to the site to know where it was located but he did not develop it.
26. It was further his evidence that sometime later as he was passing by the plot, he found a temporary structure built on it.
He could not remember the year.
27. He testified that he found two men on the land and upon asking them what they were doing, they told him that they were working for the owner Hon. Japhet Mutai who was the speaker of the Country Assembly at that time.
28. He also testified that the said Mutai was not on site and when he looked for him he could not find him. He sought legal advice and his advocate told him that he would take up the case and try and find the said Japhet.
29. He further testified that he got to know that Japhet was a son of one of his friends known as Mr. Josiah Sang who had been a Permanent Secretary at one time.
30. It was his evidence that Mr. Josiah arranged for a meeting and they met at Tea Hotel where over a cup of tea he showed him his title.
31. It was also his evidence that Japhet in return showed him his copy of title which shows that his land was within his parcel and it measures 2½ acres.
32. It was further his evidence that he conducted a search which confirmed that indeed Japhet's land was within his parcel and added that the staff at the Land Registry informed him that Japhet's plot was almost at the center of his parcel.
33. He also testified that Japhet insisted that the said parcel belonged to him and they, therefore, failed to resolve the issue as a result of which he went to the police in Kericho.
34. He further testified that he also reported the matter to the Kericho Land Registrar who was also not very helpful and the police advised him to go and see the Governor.
35. It was his evidence that he was unable to get audience with the governor and so he instructed his Advocates to file the case.



36. It was also his evidence that after he instructed his Advocates, his Advocates got in touch with the land registry and they informed him that they knew Japhet Mutai.
37. It was further his evidence that the said advocates promised to talk to Japhet.
38. He testified that the Ministry of Lands wrote the letter dated 6th October, 2015 to the Land Registrar, Kericho seeking that the Defendant's records be expunged. The letter was marked as MFIP3.
39. He also testified that another letter dated 19th November, 2015 was written addressed to the Land Registrar with regard to land parcel No. Kericho/Block 1/356. The letter was marked as MFIP4.
40. He further testified that as the owner of LR No. 631/2354 he was paying the rates and the rent and that the payments were up to date and added that he had filed some of the receipts in Court and that he also had a clearance certificate.
41. It was also his evidence that he had a copy of receipt No. 16319 dated 11th December, 1997 for Kshs. 199,340/= which payment he had made in respect of the said plot in order to obtain title. He explained that he did not have the original but only had the copy. It was produced as Exhibit P5.
42. He testified that the government demanded that he pays Kshs. 31,360/= as rent vide the letter dated 1st July, 2000. He could not remember if he paid and confirmed that he did not have a receipt. The said letter was produced as Exhibit P6.
43. He also testified that the second demand for land rates was dated 22nd December, 2003 and he produced it as Exhibit P7.
44. He went on to testify that after he got the title, he did not need any land survey.
45. He testified that his claim against the Defendant is that although he alleges that he owns the land that surrounds his property, he has never surrendered his title and therefore the plot belongs to him.
46. It was also his evidence that the structures on the land have now been removed and no developments have been made because of the pending Court case.
47. He sought prayers as set out in the Complaint.
48. In his witness statement dated 2nd December, 2015 the Plaintiff states that on 28th November, 2015 he erected a barbed wire fence on the land which was destroyed occasioning him loss and damage.
49. He also states that he has on several occasions requested the Defendant to vacate the suit property but he has always refused.
50. Upon cross examination, he reiterated that he acquired the suit property in the year 1997. He admitted that initially he had a plot near a church in the mid-west.
51. He also admitted that he used to work for President Moi and that the church leadership asked President Moi to persuade him to surrender his plot so that the church could use it.
52. He further admitted that he surrendered the plot and the leadership of the County gave him the suit parcel in exchange. He added he was also issued with an allotment letter.
53. PW1 confirmed that that he could not see the number on the allotment letter.
54. When he was referred to Exhibit P2 (letter of allotment), he confirmed that it showed the acreage as 1.8 Ha. He admitted that he produced a copy of the Certificate of Lease which was issued on 9th November, 1999.



55. He also admitted that he was aware of the conditions of the said lease and stated that he was paying rates. When he was referred to special condition No. 2 he admitted that it stated that if the conditions were not fulfilled, then the land would be taken back.
56. He stated that he was not issued with any notice that the allocation of land was revoked.
57. He went on to state that the lease showed that the land was 1.511 Ha. He attributed the difference in the acreage to the survey.
58. PW1 confirmed that the Defendant did not show him his title deed but only said that he had a title deed and further stated that the matter should be settled in Court.
59. He admitted that he was surprised that the Defendant's land was in the middle of his land. He confirmed that he was informed that Kericho Block 1/356 should not be in the middle of his land.
60. He also confirmed that from the maps, he found that his piece of land and the Defendant's land were on the same plot. He further confirmed that someone had constructed on his plot.
61. He admitted that he was trained as a soldier and was in court to assert his rights. He reiterated that he only came to know of the position of his land and the Defendant's land from the maps.
62. He also admitted that the surveyor told him that the Defendant's land was elsewhere but he did not have a report to that effect.
63. He further admitted that since he acquired the suit property, he has never developed it. He stated that he could not remember the year he discovered that the Defendant had trespassed but added that it could be the year he filed the suit which was in 2015.
64. He further confirmed that from the year 1999 to the year 2015 he had not developed the land.
65. He confirmed that he put up a fence after noticing that someone had constructed on his land and that the fence was later destroyed.
66. He also confirmed that he did not know who destroyed the fence and added that he reported the matter to the police but did not produce any evidence of the OB number in Court. He admitted that apart from the structure he found on the land, there were no other developments.
67. He also admitted that there was no landscaping done on the land and added that when he went to the District Land Registrar's office he was informed that the Defendant had a title deed.
68. He confirmed that he asked the Defendant on the phone severally to vacate the suit property. He denied having written any demand letter to the Defendant and stated that he only instructed his lawyer.
69. He admitted that he was not aware if the Defendant acquired the suit property fraudulently but since the Defendant's property was in the middle of his property, he would have expected to be notified that his property was to be affected.
70. He also admitted that he approached the Land Registrar and found that he had issued the Defendant with a title. He further admitted that the said records were with the Land Registrar.
71. He confirmed that he discussed the matter with his lawyer who was supposed to join the Land Registrar and the Chief Land Registrar to the suit.
72. He also confirmed that he was not aware of the acreage that was occupied by the Defendant but could confirm that he did not occupy the entire land.



73. He admitted that no one else was in occupation of the suit property and that he had neither sold on developed the land.
74. He reiterated that he produced the demands for rent that he had earlier filed and that he currently had a Clearance Certificate which was up to date.
75. PW1 reiterated that when he approached the police, they referred him to the Governor.
76. When referred to Exhibit P5 he explained that he did not know why he received the letter earlier than it was issued and denied making the said document.
77. He stated that if his title had been cancelled then he would not have been issued with a clearance certificate.
78. Upon re-examination PW1 stated that he did not get any notification of cancellation of his title and neither was he notified of the possibility of cancellation of his title for failure to pay rent.
79. When referred to Exhibit P2, he stated that it mentioned his name and he was confirming that it is his document. He also stated that once he got a certificate of title he had to show the letter of allotment.
80. He reiterated that the Defendant had encroached on his land and he therefore could not develop it adding that this would be a big risk as there was another person claiming it.
81. He stated that he was not aware of how the Defendant acquired title to the suit property and reiterated that he was not shown the said title.
82. He stated that his land parcel number and that of the Defendant are different and that his letter of allotment showed that the suit property was 1.8 Ha.
83. Gilding Gatweru Karani testified as PW2. He introduced himself as working at a section of the Chief Land Registrar's Office at Ardhi House Headquarters Nairobi.
84. He stated that he was in Court on account of witness summons dated 23rd January, 2023 which required their office to attend Court and produce documents with respect to LR No. 631/2354 Kericho Municipality.
85. It was his evidence that the current registered owner of LR No. 631/2354/IR 82010 is Alexander Kipngetich Sitiency of P.O Box 3090 Nakuru and added that the land measures 1.511 Ha.
86. It was also his evidence that Alexander was registered as the owner on 9th November, 1999 and the title endorsed and/or registered by the Land Registrar.
87. It was further his evidence that the endorsement ought to be on the title and that there has been no conversion as the title is still intact.
88. He produced the said title as well as a certified copy of a search which had earlier been produced as Exhibit P1.
89. He testified that before a person is issued with a title, the land has to go through the allocation process which involves the Chief Land Registrar's department in conjunction with the Survey Department.
90. He also testified that upon finalization of the entire process, as in this case, a new grant is issued and it is forwarded to the Registrar for registration.



91. He further testified that before the grant is registered, the Survey Department sets out the boundaries and he confirmed that the entire process was followed.
92. It was his evidence that on the face of the record, there seems to be no other registration on the particular parcel of land.
93. He stated that he had received correspondences with respect to the suit property. He referred to MFIP3 (letter dated 6th October, 2015) and testified that it was correspondence between the Chief Land Registrar and the Land Registrar, Kericho. He confirmed that the said letter was from their office and that the maker of the said document is now deceased.
94. When referred to MFIP 4 he testified that it emanated from the District Land Registrar Kericho and it was talking about expunging the records of Kericho/Municipality Block 1/356.
95. When referred to MFIP5 he testified that the receipt emanated from their office and he produced it as Exhibit P5. He explained that the said receipt makes reference to a letter dated 7th July, 2015 which had emanated from their office. The letter was addressed to the Director of Survey with regard to Kericho/Municipality Block 1/356.
96. He read through the letter and testified that the author sought to find out if the property existed and he produced the said letter as Exhibit P8.
97. PW2 referred to a letter dated 9th July, 2015 and testified that it was written by the office of the Chief Land Registrar to the Director of Survey. Upon reading the letter he testified that it was a confirmation that land parcel No. Kericho/Municipality Block 1/356 did not have a correspondence file.
98. It was his evidence that a correspondence file carries all the documentation with regard to allocation that included survey records for preparation of a lease for onward transmission to the registration department for registration of a lease.
99. It was also his evidence that without such a file, there cannot be any registration of a lease. He produced the letter dated 9th July, 2015 as Exhibit P9.
100. He referred to the letter dated 6th October, 2015 and confirmed that it emanated from their office. The said letter referred to Deed Plan No. 224238 Kericho and it went on to instruct the County Surveyor Kericho to go and identify the beacons so that they could be demarcated. The said letter was produced as Exhibit P10.
101. He reiterated that the registered owner of the said plot was Alexander Sitiency and that he is conferred with rights in respect of the land by virtue of registration.
102. Upon cross examination by counsel for the Defendant, he confirmed that he was a Land Registrar in the Chief Land Registrar's Office; Court Section. He explained that the Court Section gives instructions to the Attorney General on all matters when he is sued.
103. He confirmed that he attends Court on behalf of the Chief Land Registrar in instances where he is summoned. He also confirmed that he is the interlink between the Chief Land Registrar's Office and other officers in so far as Court matters are concerned.
104. He admitted that before he went to Court he confirmed that the documents were in the office and that he carried the documents that were listed in the summons.



105. He also admitted that the correspondences that he produced emanated from the office of the Chief Land Registrar. He further admitted that he did not have replies to the said letters from the Survey Office but they were in a correspondence file.
106. He reiterated that the documents were from their office and that the land measures 1.511 Ha. He stated that an allotment letter has to be issued before a title is given.
107. When referred to Exhibit P2 (allotment letter) he admitted that the acreage stated thereon was 1.8 Ha. He explained that he had not produced the allotment letter and that he needed to refer to their file in order to answer the question on the disparity on the acreage.
108. He confirmed that the title he had was a grant issued under the Registration of Titles Act and that it was not a Certificate of Lease.
109. He also confirmed that he had a search from their record which did not show any sub-division or conversion. He further confirmed that the records of the land are at the headquarters.
110. He admitted that the records that were in Kericho were those registered under the Registered Land Act. He explained that if there was a conversion, the file ought to have been forwarded to the Land Registrar in Kericho.
111. He also admitted that they do not keep the correspondence file and that the Land Registrar's department keeps the deed file which has the title deed.
112. He disclosed that the correspondence file is kept by the Administration Department.
113. Upon further cross examination by counsel for the 2nd Third Party, PW2 confirmed that they had requested that Block 1/316 be expunged.
114. He also confirmed that from the correspondence produced in Court, the land existed in Kericho before they asked that it be expunged.
115. He further confirmed that if at all the land existed, there would have been a transaction for example charging and a transfer. He stated that the Land Registrar Kericho would confirm if the said parcel was expunged.
116. He acknowledged that his evidence was limited to the title issued under the Registration of Titles Act and would not know if there was correspondence from Kericho.
117. He admitted that he did not get any correspondence from Kericho.
118. Upon re-examination, he reiterated that an allotment letter is issued to start the process of preparing a lease. He stated that the allotment letter was like a letter of offer.
119. He also stated that before a Certificate of Lease is issued, there has to be a process of conversion and that with regard to the suit property, there was no conversion.
120. He reiterated that the title documents issued under the Registration of Titles Act are at the central registry in Nairobi while the titles issued under the Registered Land Act are in the field.
121. He stated that the directions with regard to block 1/356 were issued to the District Land Registrar, Kericho.
122. Wilson Kibichy testified as PW3. He stated that he works at the Head of Survey Records Office in Nairobi and added that he has worked in the Department of Survey for twenty-six years.



123. He testified that he was in Court to give evidence because there was an issue with LR 631/2354 Kericho Municipality.
124. He also testified that in their records at the Department of Survey, they do not have the registered proprietor's title but from the deed plan, the owner of the land is Alexander Sitiency.
125. He further testified that the deed plan supports the registration of the proprietor. When he was referred to Exhibit P1 (certificate of title), he confirmed that the deed plan was attached to the title.
126. It was his evidence that the process begins with the issuance of a letter of allotment which is copied to the Director of Surveys.
127. It was also his evidence that upon receipt of a copy of the letter of allotment, the Director of Survey instructs the surveyor in that locality to conduct a survey. Upon completion of the survey, the surveyor forwards the documents and measurements to the Director of Surveys for quality control.
128. It was further his evidence that if the survey meets the required standard, it is approved and a survey plan prepared. He went on to state that thereafter, the deed plan is prepared based on the survey plan and forwarded to the Land Registrar for preparation of the title. He added that this happens in instances where a title is to be issued under the Registration of Titles Act.
129. He testified that if the title is to be issued under the Registered *Land Act*, the process is the same as the first one and the only difference is that instead of forwarding the deed plan to the Land Registrar, they usually forward a sealed Registry Index Map.
130. He also testified that they were issued with a copy of a letter of allotment and when he was referred to Exhibit P2, he confirmed that that was the letter of allotment that was forwarded to them.
131. He further testified that they prepared deed plan No. 224238 and added that they later received the letter that had been produced as Exhibit P3.
132. It was his evidence that a complaint had been raised regarding land parcel No. Kericho Municipality Block 1/356 which was alleged to be in the same location as LR No. 631/2354.
133. It was also his evidence that they responded to the said complaint and confirmed that the deed plan for LR 631/2354 existed in their records but they could not confirm the existence of land parcel No. 356.
134. It was further his evidence that they gave the Land Registrar a copy of the deed plan and the Registry Index Map for Kericho Municipality Block 1 vide the forwarding letter Ref CT 46/vol 80/94 dated 30th September, 2015. He produced the said letter as Exhibit P11.
135. He testified that another complaint was raised and they wrote the letter dated 3rd November, 2015 Ref. CT 46/Vol 80/107 to the Regional Surveyor where they sought more time to confirm the boundary of LR No. 631/2354. The boundary was confirmed and a beacon certificate was signed upon visiting the ground.
136. He also testified that the beacon certificate stated that the owner of the suit property was Alexander Sitiency. He produced the beacon certificate dated 30th October, 2015 as Exhibit P12.
137. He further testified that according to the documents in their possession, LR No. 631/2354 had not been converted to the regime under the Registered *Land Act* or under the *Land Registration Act* because the original title would have been surrendered to the Chief Land Registrar. Upon surrender, the department of surveys would then issue a new number under the block number and the parcel reflected in the Registry Index Map.



138. It was his evidence that he had a copy of the original Registry Index Map. He testified that they usually use co-ordinates of the survey plan to give the general location of the property. During conversion, they mark, with precision, the extent of the property to scale. He produced the Registry Index Map dated 21st November, 2023 as Exhibit P13.
139. It was also his evidence that according to the Registry Index Map, land parcel No. Kericho/ Municipality Block 1/356 is not reflected and under the amendment notes, there is no mention of the said parcel of land.
140. It was further his evidence that a parcel registered under the Registration of Titles Act cannot be subdivided and a new title issued in the new registration system without conversion.
141. He testified that there was no parcel of land existing within LR No. 631/2354 and he produced the letter dated 3rd November, 2016 as Exhibit P14.
142. He also testified that there was no document in his possession that show Japheth Kiplangat Mutai as the proprietor of LR No. 631/2354.
143. He further testified that he did not conduct any survey or issue instructions with regard to land parcel No. Kericho/Municipality Block 1/356.
144. Upon cross examination by counsel for the Defendant, PW3 reiterated that land parcel No. Kericho Municipality Block 1/356 did not exist in their records.
145. When he was referred to Exhibit P11 he confirmed that they forwarded deed plan No. 224238 and a Registry Index Map for Kericho Municipality Block 1.
146. He also admitted that they did not mention land parcel No. 356 because the Land Registrar would identify the said parcel as he said that there was an existing lease.
147. He reiterated that the said parcel of land does not exist at all and denied knowing if rates can be paid for land that is non-existent. He explained that they do not co-ordinate with the people who are in charge of payment of rates. He confirmed that they usually ask for a search and a copy of lease and they do not ask for the Registry Index Map or Survey Plan unless they are interested to know the precise location of the property.
148. He confirmed that he worked with the Survey Department and that the people who worked in the Rates Department had their own working method.
149. He also confirmed that he was a representative of the Director of Survey as he heads the Survey Records Office. He explained that they co-ordinate with surveyors in the whole country who after conducting their survey, submit the said surveys to the Survey Department in Nairobi for quality control. He added that this is specifically done for cadastral service which is fixed service or fixing boundaries.
150. He further confirmed that all surveyors in Kenya are under the Director of Survey and once they submit their surveys, they became public documents. If they are not submitted, they do not become public documents.
151. PW3 explained that they cannot defend surveys that are done and not submitted to the Director of Surveys. It becomes the fault of the owner and the surveyor on the ground who ought to know the procedure.
152. He stated that individuals who buy land have to know the procedure and that there is a portal containing all the procedures in the Ministry of Lands.



153. He also stated that a person who owns property should do due diligence to confirm if the documents they hold are supported by the records in the ministry.
154. He further stated that a Certificate of Lease can be issued without a survey being conducted if it is done fraudulently. The person with the lease has to conduct due diligence to confirm if the entire process was followed.
155. He explained that any registered document in the form of a title should be supported by a survey plan clearly showing the location of the land.
156. He reiterated that if the surveyor does not forward the survey done, the responsibility falls on the person doing the survey on the ground.
157. He admitted that a complaint was brought to their desk through the Chief Land Registrar that the two properties were clashing. The Chief Land Registrar wanted to know if the parcel was registered as per the Registry Index Map which precedes the registration of property.
158. He also admitted that they wrote a letter to the District Surveyor to confirm the boundary of the said parcel and if he had found another property, he would have responded, but there was no response.
159. When referred to Exhibit P14 he admitted that the instructions were that he confirms the boundary. He also admitted that it was not necessary for him to confirm and that is why he issued a beacon certificate to the owner of the property. The beacon certificate had been produced as Exhibit P12.
160. He confirmed that he did not conduct the survey and neither did he know if it was conducted. He also confirmed that he did not know what was on the ground.
161. He further confirmed that the District Surveyor did not hold any documents as the survey plans are held at the Survey Office in Nairobi.
162. He explained that the lease is prepared by the Chief Land Registrar in Nairobi and registered in the County. He confirmed that the Chief Land Registrar keeps the records.
163. Upon re-examination PW3 stated that the survey plan bears the co-ordinates and defines the geographical location of the property.
164. He also stated that a property cannot be registered without a deed plan and a survey plan.
165. The Plaintiff's case was then closed.

Defendant's Evidence.

166. Japheth Kiplangat Mutai testified as DW1. He introduced himself as an Advocate of the High Court who worked in the Office of the President in Nairobi.
167. He stated that he knew the Plaintiff before the institution of the suit.
168. It was his evidence that he was the registered owner of land parcel No. Kericho Municipality Block 1/356.
169. It was his evidence that he had purchased the said property on 16th October, 2013 vide an agreement for sale. He went onto state that the consideration was Kshs. 6.7 million which he duly paid.
170. It was also his evidence that the vendor was Alfred Kipsang Maritim and Rebman Kipkirui Tanui who are the 3rd and 4th Third Parties.



171. It was further his evidence that at the time of purchase, the suit property was registered in the name of Alfred Kipsang. He produced a copy of the agreement for sale dated 16th October, 2013 as Exhibit D1.
172. He testified that he was issued with a Certificate of Lease on 13th January, 2014. He produced it as Exhibit D2.
173. He also testified that before he purchased the suit property he undertook due diligence by conducting an official search. He went on to testify that he was issued with a Certificate of Official search on 15th October, 2013 and added that it shows that the land was registered in Alfred Kipsang's name. He produced a copy of the official search as Exhibit D3.
174. He further testified that he got a copy of the green card for the suit property. He went on to state that it is dated 8th May, 2015 and shows that the Certificate of Lease was first issued on 31st March, 2008 to one Andrew Cheruiyot Rotich who charged the property to Equity Bank and a charge entry was made on the encumbrance section on 17th June, 2009. He explained that the loan was for Kshs. 840,000/=.
175. It was his evidence that on 21st November, 2011 a discharge entry was made after the land had been sold at an auction to Alfred Kipsang Maritim who was issued with a Certificate of Lease on 21st November, 2011. He added that the entry in favour of his registration was made on 13th November, 2014. He produced the green card as Exhibit D4.
176. It was also his evidence that the name of the Plaintiff does not appear on the green card and that at the time he was purchasing the property he did not know the Plaintiff.
177. It was further his evidence that he had been informed that the suit property was sold at a public auction and therefore the bank must have conducted its due diligence before advancing the loan. He explained that on account of the involvement of the bank, he was satisfied and assured of legality of the title of the suit parcel.
178. DW1 reiterated that he purchased the suit property from Alfred Kipsang who had purchased the suit property at a public auction and was issued with a certificate of sale. He produced an undated certificate of sale as Exhibit D5.
179. He testified that the certificate of sale was signed by one Mr. Mugenda of Keysian Auctioneers.
180. He went on to testify that since he was the registered owner, he pays rates to Kericho Municipality and that he has the rates clearance certificate to confirm the same. He produced the certificate dated 6th November, 2013 as Exhibit D6.
181. He also testified that the initial registered owner Andrew Cheruiyot Rotich used to pay rates to the County Government.
182. He further testified that he had in his possession a bill of kshs. 56,300/= and another bill of Kshs. 2,000/= both dated 6th November, 2013.
183. It was his evidence that he paid a transfer fee of kshs. 5,000/= and that the demand for rates on his account was for Kshs. 623,265/= which he duly paid and was issued with a rate clearance certificate. He produced the demand notice as Exhibit D7.
184. It was also his evidence that he confirmed from the Registrar of Lands in Nairobi that he was the registered owner of the suit property and was issued with a rent clearance certificate on 10th September, 2015. It was marked and produced as Exhibit D8.



185. It was further his evidence that after he purchased the suit property, he took possession and undertook extensive developments on it. He explained that the suit land had a steep gradient and he therefore brought in loose soil and levelled it to its current state. He went on to testify that he also erected a small guard house and fenced the suit land.
186. He testified that in the year 2015, he was called by a security guard who informed him that there were people claiming ownership of the suit land and that they wanted to destroy the fence. He also testified that he went to the site and found the Plaintiff.
187. It was his testimony that at the time of rehabilitating the land, no one laid claim to it. He further testified that when he took possession of the land it looked like a mini forest and had no fence.
188. It was his evidence that the land is on the main road and one cannot fail to see any person encroaching on it. He went on to state that since the Plaintiff claimed the land after he had finished rehabilitating it, the court should decide their fate since they both hold title documents.
189. It was also his evidence that he was still in possession of the suit property and had not received any demand notice that he was trespassing on the land.
190. It was further his evidence that he had not received any notice from the authorities to vacate. He further stated that the land he is in occupation of measured 0.4151 Ha which is equivalent to 1 acre.
191. He testified that he does not know his neighbours at the suit parcel and stated that someone else had leveled a portion of it. He also testified that there were other people on the land including Siloam Hospital and wondered why he is the only one who had been sued by the Plaintiff.
192. He further testified that from the documents produced by the Plaintiff, his land measured 3.73 acres and yet he only sued him and that he is not in possession of the rest of the suit land.
193. Upon cross examination by counsel for the Plaintiff, DW1 stated that he is an Advocate of the High Court of Kenya and gave his number as P.105 No. 6923/08.
194. He also stated that he knows the process of acquisition of land and added that he is first supposed to conduct due diligence. He explained that part of the due diligence was a visit to the land office to ascertain the history of the land and also visiting the land.
195. He confirmed that his due diligence revealed that the first entry on Block 1/356 was made in the year 2008.
196. He then stated that there was no mother title and that the first entry on the green card was made on 31st March, 2008 under the Registration of Titles Act.
197. He confirmed that the title was not a subdivision and that was its first entry. He admitted that the lease he had in his possession had been issued by the government and therefore the suit property was government land.
198. He acknowledged that a title deed is superior to an allotment letter and denied having any knowledge as to when the letter of allotment was issued.
199. He also denied having any knowledge as to when the boundaries were marked and admitted that he had not produced any survey or deed plan.
200. He also admitted that he did not produce a beacon certificate and neither did he have a Registry Index Map.



201. He stated that he got confirmation from the Chief Land Registrar after he was issued with a rate clearance certificate dated 10th September, 2015.
202. When he was referred to Exhibit P3, he admitted that as per the said letter, there were no documents that supported the existence of the land and that it was only the Court that would expunge the records.
203. He stated that he did not raise any issues with the Land Registrar because he had no issues to raise. He also stated that he was not given the letter and upon looking at the letter confirmed that it did not mention LR No. 631/2354.
204. When referred to Exhibit P1, he admitted that the title was issued on 9th November, 1999 and when he was referred to Exhibit D2 he confirmed that the certificate of lease was issued on 13th January, 2014.
205. DW1 was also referred to the Registry Index Map and he confirmed that that land parcel No. Kericho Municipality Block 1/356 could not be found on the map.
206. He admitted that even though he testified that he had undertaken extensive rehabilitation of the suit property, he did not produce any photographs showing the rehabilitation.
207. He confirmed that there was a small house on the suit property but admitted that he did not produce any photographs of the said house.
208. He reiterated that he was not served with any demand notice or claim over the land. He admitted that the Plaintiff visited his father and that they later met at a hotel.
209. He also admitted that the Plaintiff had never raised any issue until the day they met. He further admitted that his title was not a conversion from a title issued under the Registration of Titles Act to the Registered Land Act.
210. Upon re-examination he stated that the Plaintiff admitted that he had done some construction on the land and that his claims that he had re-habilitated the land were not disputed.
211. When he was referred to Exhibit P3 he stated that the said letter was addressed to the Kericho County Surveyor and it was not addressed to him.
212. He also stated that he was never served with the letter raising the alleged issues and that he only saw the letter when he was served with the Court documents.
213. He further stated that the said letter emanated from the Chief Land Registrar and that the Land Registrar never questioned him nor were any issues of fraud reported to the police.
214. The Defendant's case was then closed.

2Nd Third Party's Evidence.

215. The 2nd Third Party called one witness to testify in support its case.
216. Sydney Were testified as TP2. He stated that he had filed the witness statement dated 24th April, 2014. He prayed that the Court adopts his witness statement as part of his evidence, which prayer the Court acceded to.
217. It was his evidence that he knew the 1st Third Party; Andrew Cheruiyot Rotich. He explained that the 1st Third Party approached them in the year 2009 for a loan.



218. It was also his evidence that after they conducted due diligence, they advanced Kshs. 840,000/= to him. He explained that as part of their due diligence, they conducted a search to confirm ownership, engaged valuers who visited the suit property to confirm the size and the location before registering the charge.
219. It was further his evidence that after they advanced the money to him, he failed to service the loan and they commenced the process of selling the suit parcel. It was his evidence that this was done by issuing the necessary notices and making advertisements and the suit property was then auctioned.
220. He testified that he had a copy of the green card of the suit property which confirmed ownership of the 1st Third Party who was registered as the owner on 31st March, 2008.
221. He also testified that the charge was registered on 17th June, 2009 and that there were no entries on the title until November, 2011.
222. He further testified that at the auction Alfred Kipsang, the 3rd Third Party was the highest bidder and he was issued with a certificate of sale which enabled him to pursue registration.
223. He produced a copy of the green card as Exhibit TP2 (1) and a copy of the Certificate of Sale as Exhibit TP2 (2).
224. Upon cross examination by counsel for the Plaintiff, he confirmed that they undertook due diligence by conducting a search.
225. He also confirmed that after conducting the search, they went by the land records. He admitted that they did not look at the history and also admitted that he did not produce any loan agreement.
226. He further admitted that he had not produced any transfer document to Alfred Kipsang Maritim or any consent of the Land Control Board to transfer the suit property from the 1st Third Party to the 3rd Third Party.
227. When he was referred to Exhibit P3 which was the letter from the Chief Land Registrar, he admitted that the Chief Land Registrar was saying that the land they had charged did not exist.
228. He admitted that he had not produced any beacon certificate and neither did they check the Registry Index Map to confirm if the land existed.
229. He also admitted that the land was on the Kericho-Nakuru highway but when he was referred to the Registry Index map which had been produced as Exhibit P13, he confirmed that he could not see land parcel No. Kericho Municipality Block 1/356.
230. He further admitted that he had not produced a survey plan and neither did he produce a deed plan.
231. He confirmed that he had not produced any document for the advertisement to sell and neither did he produce evidence of payment by the 3rd Third Party.
232. He also confirmed that he did not produce any evidence of stamp duty payment.
233. Upon further cross examination by counsel for the Defendant, he admitted that there was no complaint with regard to the sale by auction and neither were they sued as it was the Defendant who had been sued.
234. He explained that due diligence is conducted at the Lands Registry and that they had proved that a charge had been registered.



235. He stated that the Land Registrar should have been present to answer some of the questions. He also stated that the valuers do their search, visit the parcel of land and then do a report containing the size and value of the land.
236. He confirmed that the suit property is past the Kisumu Road junction towards town from Court on the left. He also confirmed that if there were any issues, the report would have captured them.
237. He admitted that the advertisement for the auction was in the newspaper and that the auction was conducted in November, 2011.
238. He also admitted that he had never seen the letter from the Land Registrar that had been produced as Exhibit P3 and that they believed that the land exists since a green card had been issued.
239. In his witness statement dated 24th April, 2024, TP2 reiterates the averments in the 2nd Third Party's Statement of Defence.
240. Upon re-examination he admitted that he had not produced the documents he had been asked about.
241. He stated that since the property was within the township, it did not need the consent of the Land Control Board. He reiterated that the valuer had to go to the ground before they could charge the property.
242. He stated that the property was next to Siloam Hospital.
243. The 2nd Third Party's case was then closed.
244. The 1st Third Party's case was closed.
245. The 3rd Third Party's case was closed.
246. The 4th Third Party's case was also closed.

Issues For Determination.

247. The Plaintiff filed his submissions on 21st May, 2024, the 2nd Third Party filed its submissions on 12th July, 2024, the Defendant filed its submissions dated 5th June, 2024. Subsequently, the Plaintiff filed supplementary submissions on 1st July, 2024.
248. The Plaintiff identifies the following issues for determination;
 - a. Whether the Plaintiff is the legally registered proprietor of LR No. 631/2354 Kericho Municipality.
 - b. Whether the Defendant has trespassed into LR No. 631/2354
 - c. Whether the Defendant has any legally justified claim over LR No. 631/2354.
 - d. Whether the Plaintiff is entitled to the orders sought herein.
 - e. Who should pay the costs and interest of the suit.
249. With regard to the first issue, the Plaintiff while reiterating the evidence adduced during the hearing and the documents produced in support of his case, submits that he tendered evidence to demonstrate that there is no parcel of land that exists within LR No. 631/2354 and therefore he is properly registered as the owner of the suit property.



250. On the second issue, the Plaintiff submits that the Defendant did not deny that he had trespassed into the Plaintiff's parcel of land and erected a temporary structure thereon with the intention of taking permanent occupation.
251. The Plaintiff also submits that the Defendant alleges that he owns land parcel No. Kericho Municipality Block 1/356 which as per the testimony of the surveyor is within his parcel of land.
252. The Plaintiff further submits that the surveyor also testified that he did not have any documents that support the registration of land parcel No. Kericho Municipality Block 1/356 and therefore the Defendant used a fraudulently obtained title to trespass into his land.
253. With regard to the third issue, the Plaintiff while reiterating the evidence of the Chief Land Registrar and the surveyor submits that since the Defendant's parcel of land does not exist, the Defendant does not have any claim over his parcel of land.
254. On the fourth issue, the Plaintiff relies on Sections 26(1) of the *Land Registration Act* and submits that the Defendant failed to prove the root of his title while he was able to demonstrate that the Defendant acquired the suit property fraudulently.
255. The Plaintiff relies on Section 80 of the *Land Registration Act*, the judicial decision of *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR and submits that the Court can order for the rectification of a register and any registration be cancelled if it is convinced that the registration is obtained by fraud.
256. The Plaintiff submits that since the Defendant acquired title to land parcel No. Kericho/Municipality Block 1/356 fraudulently, his title should be cancelled and he be evicted from the suit property.
257. The Plaintiff relies on the judicial decisions of *Park Towers Limited vs. John Mithamo Njika & 7 others* [2014]eKLR, *Philip Aluchio vs Crispinus Ngayo* [2014]eKLR, *Willeden Investments Limited vs Kenya Hotel Properties Limited* NBI HCC No. 367 of 2007, *Rhoda S. Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited* [2019]eKLR and submits that the Defendant admits to taking machines to his land and ploughing it thereby occasioning extensive damage.
258. The Plaintiff therefore submits that the Defendant should be ordered to pay a sum of Kshs. 20,000,000/= as general damages for trespass.
259. The Plaintiff also seeks that the Defendant be ordered to pay costs of the suit.
260. The Defendant in his submissions identifies the following issues for determination;
- a. Whether the Defendant fraudulently obtained title of the suit property. (sic)
 - b. Whether the suit land LR No. 631/2354 Kericho Municipality exists.
 - c. Whether the Defendant trespassed on LR No. 631/2354 Kericho Municipality.
 - d. Whether the Defendant is the legitimate owner of the suit property.
 - e. Who should pay costs.
261. With regard to the first issue, the Defendant relies on the judicial decisions of *Vijay Morjaria v Nansingh Madhu Darbar & another* [2000] eKLR, *Central Bank of Kenya Limited vs Trust Bank Limited & 4 Others* [1996] eKLR and submits that he did not obtain title to his property fraudulently and that the Plaintiff failed to prove that he acquired the suit property fraudulently.



262. The Defendant relies on the judicial decision of *Taraban Company Limited v Harchan Singh Sebmi CA Civil Appeal No. 463 of 2019* where the Court held that even though fraud had been proved, the purchaser was not involved.
263. The Defendant submits that an innocent buyer should not be deprived off his property and relies on Article 40 of *the Constitution* of Kenya and Section 26 (1) of the *Land Registration Act*.
264. The Defendant also submits that the Plaintiff did not enumerate any specific actions amounting to fraud on his part and he therefore legally acquired land parcel No. Kericho Municipality Block 1/356.
265. With regard to the second issue, the Defendant submits that the Plaintiff alleges that land parcel No. Kericho/Municipality Block 1/356 was hived from LR No. 631/2354 which allegations he is a stranger to because as far as he is concerned, he lawfully purchased his parcel of land.
266. The Defendant submits that Special Condition No. 2 on the Certificate of Lease that was produced as Exhibit P1 required the Plaintiff to develop the suit property within twenty-four months failure to which the land would be repossessed.
267. The Defendant also submits that the Plaintiff denied being aware of the said special condition.
268. The Defendant further submits that the Land Registrar representing the Chief Land Registrar admitted that their letters were never responded to and neither could he explain the disparity in the acreages of the suit property.
269. It is the Defendant's submissions that the allotment letter produced by the Plaintiff showed that he had been allocated 1.8 Ha and yet his certificate of Lease showed that his parcel of land measured 1.511 Ha.
270. It is also the Defendant's submissions that even though PW3 testified that land parcel No. Kericho Municipality Block 1/356 could not be traced on the Registry Index Map, the Registry Index Map is not a definite and final authority to be relied on.
271. It is further the Defendant's submissions that it would be absurd for the Court to cancel his title deed based on a reference that is not authoritative. The Defendant relies on the judicial decisions of *Azzuri Limited v Pink Properties Limited* [2018] eKLR, *Leonard Otiso versus Airtel Kenya Limited* [2018] eKLR and submits that the Plaintiff ought to have joined the Land Registrar as a party to the present proceedings as the Certificate of Official Search and green card were obtained from his office.
272. With regard to the third issue, the Defendant relies on Section 3 (1) of the *Trespass Act*, the judicial decision of *Samuel Ramere v Land Registrar* [2015] eKLR and submits that he adduced evidence to demonstrate that he conducted due diligence before he purchased land parcel No. Kericho Municipality Block 1/356.
273. On the fourth issue, the Defendant relies on Section 26 of the *Land Registration Act* and submits that a title is conclusive evidence as to the legitimacy of ownership of land.
274. The Defendant reiterates that he has demonstrated how he acquired his parcel of land and submits that the Plaintiff has no interest in the suit property as he has never taken possession or used the land while on the other hand he has substantially rehabilitated, developed and improved it.
275. The Defendant relies on the judicial decision of Dr. *Joseph Arap Ngok vs Justice Moiwo Ole Keiwua & 5 Others Civil Application No. 60 of 1997* in support of his submissions.
276. The Defendant seeks that the Plaintiff's suit be dismissed with costs.



277. The 2nd Third Party submitted on whether it carried out due diligence before charging land parcel No. Kericho Municipality Block 1/356.
278. The 2nd Third Party while reiterating the evidence of its witness submits that the chargor gave to it the Certificate of Lease and it obtained a copy of the green card from the Ministry of Lands which showed that Andrew Cheruiyot Rotich was the registered owner of the land.
279. The 2nd Third Party relies on Section 26 (1) of the Land Registration Act and submits that a certificate issued by the Registrar is evidence that the person named thereon is the proprietor of the said land.
280. The 2nd Third Party therefore seeks that it ought to be struck out from the suit herein and the Defendant be ordered to pay its costs.
281. The Plaintiff in his supplementary submissions reiterates his earlier submissions that the Defendant acquired land parcel No. Kericho Municipality Block 1/356 fraudulently.
282. The Plaintiff relies on the judicial decision of Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others [2015] eKLR as was cited in Elijah Makeri Nyangwara v Stephen Mungai Njuguna & another ELC Case No. 609 B of 2012 and submits that a title acquired by an innocent purchaser can be impeached on grounds that it was obtained illegally, un procedurally or through a corrupt scheme and that the title holder need not have contributed to the aforementioned vitiating factors.
283. The Plaintiff submits that indefeasibility of title was never intended to be a guise of perpetuating fraudulent activities and relies on the judicial decision of Marteve Guest House Limited v Njenga & 3 Others (Civil Appeal 400 of 2018) [2022] KECA 539 (KLR) (28 April 2022) (Judgement) (with dissent – W Karanja, JA) in support of his submissions.
284. The Plaintiff also relies on the judicial decision of Dina Management Limited vs County Government of Mombasa & 5 Others (Petition No. 8 (E010) of 2021) and submits that the documents that support the registration of the Defendant as the owner of land parcel No. Kericho Municipality Block 1/356 were obtained fraudulently and therefore the title with respect to the said property should be cancelled.
285. The Plaintiff relies on Funzi Development Ltd & Others v County Council of Kwale, Mombasa Civil Appeal No. 252 of 2005 [2014]eKLR and submits that the Defendant should not be allowed to hide under the guise of bonafide purchaser when the title he holds was obtained as a result of an illegality.
286. The Plaintiff submits that the Court has to interrogate a title and relies on the judicial decision of Alberta Mae Gacci vs Attorney General & 4 Others [2006] eKLR in support of his submissions.
287. The Plaintiff also submits that there can never be any issuance of a certificate of lease without a survey being conducted and he relies on Nelson Kazungu Chai & 9 Others vs Pwani University [2014] eKLR in support of his submissions.
288. The Plaintiff reiterates the evidence of the surveyor and seeks that judgement be granted in his favour.

Analysis And Determination.

289. After considering the pleadings, submissions and testimonies of the Plaintiff, Defendant, 2nd Third Party and their witnesses, the issues that arise for determination are as follows;
- a. Whether land parcel No. Kericho Municipality Block 1/356 was acquired procedurally.
 - b. Whether the prayers sought in the Plaint should be granted.



- c. Whether the Defendant has established any claim against the Third Parties.
- d. Whether the defence of innocent purchaser for value is available to the Defendant.
- e. Who should bear costs of the suit.

A. Whether land parcel No. Kericho Municipality Block 1/356 was acquired procedurally.

- 290. It is the Plaintiff's case that he acquired LR No. 631/2354 Kericho Municipality in the year 1999, having been issued with a letter of allotment on 9th April, 1997 and a Certificate of Title on 9th November, 1999.
- 291. It is also the Plaintiff's case that after he was given the land he did not develop it and sometime later he noticed some activity on it.
- 292. It is further the Plaintiff's case that he found a temporary structure constructed on the suit property and there were two people on it. It was his further evidence that upon inquiry the two men informed him that they were working for the Defendant.
- 293. It is the Plaintiff's case that he approached the Defendant who informed him that he was the registered owner of land parcel No. Kericho Municipality Block 1/356 and upon seeking further information from the Chief Land Registrar and the Director of Survey, he was informed that the said parcel of land was non-existent.
- 294. The Plaintiff submits that the Defendant acquired the title to land parcel No. Kericho Municipality Block 1/356 fraudulently and he seeks that his title be cancelled and he be evicted from the suit property.
- 295. In support of his case, the Plaintiff produced a Copy of a Certificate of Title for LR No. 631/2354. (Exhibit P1). The Grant Number on the Certificate of Title is IR 82010 and the land measures 1.511 Ha. The Certificate of Title was issued on 4th November, 1999 to Alexander Kipngetch Siteney (The Plaintiff) and the lease is for a period of ninety-nine years.
- 296. The Plaintiff also produced a copy of the letter of allotment dated 9th April, 1997 (Exhibit P2). The Letter of allotment is issued to Alexander K. Siteney for UNS. Residential Plot – Kericho Municipality. The area of the land is 1.8 Ha and it is for a term of 99 years from 1st April, 1997.
- 297. The said Letter of Allotment required the payment of Kshs. 199, 340/= within a period of thirty days. Attached to the said Letter of Allotment is Plan No. R.22/96/78.
- 298. A copy of the letter dated 6th October, 2015 was produced (Exhibit P3). The letter is written by Machora Mogare for the Chief Land Registrar and addressed to the District Land Registrar, Kericho. The subject of the said letter is Kericho Municipality Block 1/356 and it is written in response to the District Land Registrar, Kericho's letter dated 23rd June, 2015 Ref No. KER/IR/14/Vol.11/57.
- 299. This letter informs the Land Registrar Kericho that land parcel No. Kericho Municipality Block 1/356 does not exist in their records and it instructs him to expunge the records for the said property. It further instructs the Land Registrar Kericho to inform the purported proprietor of the said parcel of land of the said directive and if there are any issues, they be directed to the office of the Chief Land Registrar.
- 300. A copy of a receipt dated 11th December, 1997 was produced (Exhibit P5). The receipt No. is 196319 and it is issued to A.K Siteney (The Plaintiff) for payment of Kshs. 199,340/=.



301. A copy of a demand letter for payment of rent dated 1st July, 2000 was produced as Exhibit P6. The said letter requires the payment of Kshs. 31,360/= on 1st January and if the payment was not made by 31st January, the said amount would attract a penalty of 1% per month. It is issued over LR No. 631/2354.
302. A copy of a demand letter for payment of land rates dated 22nd December, 2003 was also produced. (Exhibit P7) It is issued to Alexander k. Sitiency over LR No. 631/2354 and seeks payment of Kshs. 182,692/=. The said letter requires that the said payment be made by 1st January and if any payment is not made by 31st January, a penalty of 2% would be charged.
303. A copy of the letter dated 7th July, 2015 was produced. (Exhibit P8). It is written by Machora Mogare on behalf of the Chief Land Registrar and is addressed to The Director of Survey. The subject of the letter is Kericho Mun. Block 1/356. The said letter requests the Director of Survey to confirm whether the said parcel of land exists because the Chief Land Registrar had received conflicting information about it. It also informs the Director of Survey that the Chief Land Registrar had a copy of the lease purportedly issued by their office but they could not trace the deed plan.
304. A copy of the Letter dated 9th July, 2015 was also produced. (Exhibit P9). It is written by Machora Mogare on behalf of the Chief Land Registrar and is addressed to The Director of Survey. The subject of the letter is Kericho Mun. Block 1/356. The letter requests the Director of Survey to supply the Chief Land Registrar with a certified Registry Index Map for Block 1 Kericho Municipality and a copy of Deed Plan No. 224238. The letter also informs the Director of Survey that the Chief Land Registrar did not have a correspondence file for Kericho Block 1/356 and neither did it have the corresponding documents in support of the registration of the said parcel of land.
305. A copy of the letter dated 6th October, 2015 was produced as Exhibit P10. It is written by Machora Mogare on behalf of the Chief Land Registrar and is addressed to The Director of Survey. The subject of the letter is Deed Plan No. 224238- Kericho and it requests the Director of Survey to instruct the County Surveyor Kericho to move to site and identify the beacons for the registered proprietor to fence his land.
306. A copy of the letter dated 30th September, 2015 was produced as Exhibit P11. The letter is written by W. Kibichii for the Director of Surveys and it is addressed to the Chief Land Registrar. The subject of the letter is Kericho Municipality Block 1/356 and it forwards certified copies of deed plan No. 224238 and the Kericho Municipality Block 1 Registry Index Map.
307. A copy of the beacon certificate dated 30th October, 2015 was produced. (Exhibit P12). It is issued by Geoffrey Komen Kibowen and it defines the boundaries of LR No. 631/2354 Kericho Municipality and it shows the registered owner to be Alexander Sitiency (The Plaintiff).
308. A copy of the Registry Index Map for Kericho Municipality Block 1 was produced as Exhibit P13. The Registry Index Map is certified as a true copy on 21st January, 2023 by Wilson Kibichii the Principal Cartographer.
309. The Defendant's case on the other hand is that he purchased land parcel No. Kericho Municipality Block 1/356 on 16th October, 2013 from Alfred Kipsang Maritim and Rebman Kipkirui Tanui the 3rd and 4th Third Parties herein.
310. It is also the Defendant's case that he purchased the said property at a consideration of Kshs. 6,500,000/=. It is further the Defendant's case that he conducted due diligence before he purchased the property.
311. It is the Defendant's case that the said property was initially owned by one Andrew Cheruiyot Rotich who had charged it to Equity Bank for a loan of Kshs. 840,000/=. He explains that the said Andrew



- Cheruiyot Rotich was unable to repay the loan and the suit property was auctioned to recover the loan. At the auction, Alfred Kipsang Maritim purchased it before later selling it to him.
312. It is also the Defendant's case that he took possession of the land, extensively levelled it and erected a small guard house. It is also his case that in the year 2015 the Plaintiff began to claim the land which he is still in possession of.
313. In support of his case, the Defendant produced a copy of the agreement for sale dated 16th October, 2013 entered into by Andrew Kipsang Maritim and Rebman Kipkurui Tanui as the vendors and Japhet Kiplangat Mutai (The Defendant) as the purchaser. (Exhibit D1).
314. The sale agreement is for land parcel No. Kericho Municipality Block 1/356 and it was sold for kshs. 6,700,000/=.
315. A copy of the Certificate of Lease dated 13th January, 2014 was produced. (Exhibit D2). It is for land parcel No. Kericho Municipality Block 1/356 measuring 0.4151 Ha.
316. The lease is for a term of 99 years commencing from 1st April, 1999 and it is issued to Japhet Kiplangat Mutai (The Defendant).
317. A copy of the green card for land parcel No. Kericho Municipality Block 1/356 was produced as Exhibit D4. The entries on the said green card were extensively set out by the Defendant in his evidence.
318. A copy of the Certificate of Sale issued under Order 21 Rule 83 was produce as Exhibit D5. It states that Alfred Kipsang Maritim (The 3rd Third Party) had been declared the purchaser of land parcel No. Kericho Municipality Block 1/356 upon purchase at a public auction on 16th September, 2010.
319. A copy of a rate clearance certificate was produced as Exhibit D6. It is issued by the Municipal Council of Kericho for LR 1/356 to Japheth Kiplangat Mutai (The Defendant) on 6th November, 2013.
320. A copy of a Demand for rates was produced as Exhibit D7. It is issued by the County Government of Kericho to Japheth Kiplangat Mutai (The Defendant) for block No. 1/356 seeking payment of Kshs. 62,465/=.
321. A copy of a rent clearance certificate was produced. (Exhibit D8). The said certificate is No. 343180 issued under the Government Lands Act to Japhet Kiplangat Mutai (The defendant) on 31st December, 2015 in respect of Kericho/Blk/356.
322. The 2nd Third Party's case is that it advanced a loan of kshs. 840,000/= to Andrew Cheruiyot Rotich (The 1st Third Party) and it registered a charge over land parcel No. Kericho Municipality Block 1/356. Its case is that when the 1st Third Party failed to service the loan, it exercised its statutory power of sale and sold the suit property through a public auction to Alfred Kipsang (The 3rd Third party.)
323. The 2nd Third Party produced a copy of the green card for land parcel No. Kericho Municipality Block 1/356 (Exhibit TP2 (1) and a copy of the Certificate of Sale as Exhibit TP2(2). The details of the said documents have been set out in the preceding paragraphs.
324. It is not disputed that the Plaintiff is the registered owner of LR No. 631/2354 Kericho Municipality. It is also not disputed that the Defendant is the registered owner of land parcel No. Kericho Municipality Block 1/356. It is further not disputed that the Defendant is in occupation of a portion of land that the Plaintiff alleges forms part of LR No. 631/2354.
325. What is disputed is whether land parcel No. Kericho Municipality Block 1/356 exists and whether it is physically situated within LR No. 631/2354 Kericho Municipality.



326. In the judicial decision of *Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 others* [2021] eKLR the Court set out the procedure for issuance of a Certificate of Lease arising from a letter of allotment. The Court stated thus;

“The question of acquisition behoves the Court to trace the legal prescriptions for the issuance of an allotment letter and to adjudge the Plaintiff’s acquisition from the light of the law.

This Court in the case of *Mako Abdi Dolal v Ali Duane & 2 others* [2019] eKLR noted that prior to the promulgation of the 2010 Constitution and the 2012 amendments to the body of Land Laws in Kenya, disposition of government land was governed by the Government Lands Act (Repealed). Section 4 of the Act provided as follows:

“All conveyances, leases and licenses of or for the occupation of Government Lands, and all proceedings, notices and documents neither this Act, made, taken, issued or drawn, shall serve as

otherwise provided, be deemed to be made, taken, issued or drawn under and subject to the provisions of this Act.”

Power to dispose of public land was vested in two entities: The President and the Commissioner of Lands, under Sections 3 and 9 respectively. The process of the disposition of government land followed the following procedure:

First, the respective municipal council in which the land to be disposed was situate had the mandate of advising the Commissioner of Lands on which portions of land could be disposed. This step would have required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all government land and second that it was indeed available for disposition. See *Harison Mwangi Nyota v Naivasha Municipal Council & 20 others* [2019] eKLR

“...The question that the plaintiff seemed to raise is what role the Municipal Council of Naivasha had in the issuance of allotment letters to the defendants in 1992. According to DW1, an employee of the 1st defendant, the local authority (1st defendant) has to recommend that the land is available for allocation before an allotment letter can issue. DW13 also told the Court that the Council oversees all developments in its jurisdiction and allocates land on advisory basis for the Commissioner. It seems that even if the 1st defendant issued the letters dated 1/12/1992, it was mere advisory to the Commissioner of Lands. The allotment of the land had to be ratified by the Commissioner for Lands. It is obvious even from the communication between the Municipal Council and the Office of the Commissioner of Lands that the Council played an important role in identifying what land was available for purposes of alienation.”

The second step would be for the part development plan to be drawn up and approved by the Commissioner of Lands. See *Nelson Kazungu Chai & 9 Others vs. Pwani University College* (2014) eKLR

“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 of Lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved Part Development Plan is then issued to the allottee.”



The third step involved the determination of certain matters by the Commissioner of lands which matters are listed under Section 11 of the Government Lands Act (Repealed).

The matters to be determined include the upset price at which the lease of the plot would be sold, the conditions to be inserted into the lease; the determination of any attaching special covenants and the period into which the term is to be divided and the annual rent payable in respect of each period.

The fourth step would be for the gazettelement of the plots to be sold, at least four weeks prior to the sale of the plots by auction under Section 13 of the Government Lands Act (Repealed). The notice was required to indicate the number of plots situate in an area; the upset price in respect of every plot; the term of the lease and rent payable, building conditions and any attaching special covenants.

The fifth step would be for the sale of the plots by public auction to the highest bidder. Section 15 of the Government Lands Act (Repealed).

The sixth step would be for the issuance of an allotment letter to the allottee. An allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. See the decisions in: *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* 182/1992 (Nyeri); and in *Dr. Joseph N.K. Arap Ng'ok v Justice Mojjo Ole Keiyua & 4 others* C.A.60/1997 where the Court of Appeal held as follows:

“It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land.”

In order for an allotment letter to become operative, the allottee was required to comply with the conditions set out therein including the payment of stand

premium and ground rent within the prescribed period. See the decision in: *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others* [2014] eKLR

“I have considered the evidence on record and the submission of the parties and do find that a letter of allotment was issued to Mr. Joseph K. Mugambi on 21/10/1971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr. J.K. Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the plaintiff. This Court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. In the letter

dated 17th June, 1988 which was written about 17 years after the allotment letter was issued, the Commissioner of Lands confirmed that the plot was allocated to Joseph M. Mugambi in 1971 for lorry depot. However, the plot had neither been paid for nor an acceptance of the offer in the allotment letter made. The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the plaintiff and therefore all transactions between the allottee and the plaintiff were a nullity in law.”



The allotment letter also must have attached to it a part development plan (PDP). See the decision in *African Line Transport Co. Ltd Vs The Hon .AG, 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.”

And again, in *Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR*

“Worth noting as well is that no Part Development Plan was produced to back the Appellants’ claim that due process had been followed as alleged.”

The seventh step, which comes after the allottee has complied with the conditions set out in the allotment letter is the cadastral survey, its authentication and approval by the Director of Surveys and the issuance of a beacon certificate. The survey process precipitates the issuance of land reference numbers and finally the issuance of a certificate of lease. *Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR* the Court held as follows:

‘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 survey was confirmed by the Surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co. Ltd Vs The Hon .AG, 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.”

327. As was held in the above cited judicial decision, before a Certificate of Lease is issued, a letter of allotment has to be issued by the Commissioner of Lands and a part development plan attached to it.
328. After the allottee has complied with the conditions set out in the allotment letter, the Director of Surveys undertakes a cadastral survey and issues a beacon certificate. The survey process leads to the issuance of the land reference number and the Certificate of Lease.
329. As stated in the preceding paragraphs, it is the Plaintiff’s case that he was allotted LR No. 631/2354 Kericho Municipality and was issued with a certificate of Lease before the Defendant trespassed onto his land.
330. In addition to the various documents that he produced, the Plaintiff called the evidence of Gilding Gatweru Karani from the Office of the Chief Land Registrar who testified as PW2 and Wilson Kibichy from the Office of the Director of Survey who testified as PW3.
331. The evidence of PW2 and PW3 is pivotal in this case.
332. PW2’s evidence was that the Plaintiff is the registered owner of LR No. 631/2354 Kericho Municipality. It was his evidence that the process of preparing a lease commenced by issuance of a letter of allotment. It was also his evidence that with regard to LR No. 631/2354 Kericho Municipality the procedure was followed before the Plaintiff was issued with a Certificate of Lease.
333. With regard to land parcel No. Kericho Municipality Block 1/356, it was his evidence that the Chief Land Registrar’s office wrote to them to state that they did not have the correspondence file with regard to the said land.



334. He testified that the correspondence file contains all the documentation with regard to allocation. He produced various correspondences which were to the effect that the said property did not exist and therefore any records held by the Land Registrar Kericho ought to have been expunged.
335. It was PW2's evidence that the documents registered in the Chief Land Registrar's office were registered under the Registration of Titles Act while those registered by the District Land Registrar were registered under the Registered *Land Act*.
336. It was his evidence that the suit property had to be converted from the registration under the Registration of Titles Act to registration under the Registered *Land Act* before a Certificate of Lease could be issued to the Defendant. It was his evidence that the said procedure was not followed.
337. PW3's evidence on the other hand was that after a letter of allotment has been issued, a copy of the said letter of allotment is forwarded to the Director of Survey who instructs the surveyor in the locality of the property to conduct a survey.
338. Once a survey has been done, it is forwarded to the Director of Survey for approval. After it has been approved, a deed plan is prepared and forwarded to the Land Registrar for preparation of the title.
339. It was his evidence that they were given a copy of the Plaintiff's letter of allotment and later prepared Deed Plan No. 224238. When a complaint was raised that land parcel No. Kericho Municipality Block 1/356 was in the same location as LR No. 631/2354, they were able to confirm the existence of the Plaintiff's parcel of land but they had no records of the Defendant's parcel of land.
340. It was further PW3's evidence that land parcel No. Kericho Municipality Block 1/356 did not exist on the Registry Index Map of Kericho Municipality Block 1.
341. Both PW2 and PW3's evidence was not controverted.
342. From the evidence adduced, it is my view that the Plaintiff has demonstrated how he acquired LR 631/2354 Kericho Municipality. He has an allotment letter, a receipt showing payment of a sum of Kshs. 199,340/= which amount was required to be paid as set out in the allotment letter, deed plan and beacon certificate and finally the certificate of lease. Essentially, all the steps necessary for acquisition of Land under the Registration of Titles Act as enumerated in the decision of Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 others (Supra) have been complied with.
343. It was also necessary for the Defendant to demonstrate the root of his title. In the judicial decision of Munyu Maina v Hiram Gathiha Maina [2013] eKLR the Court of Appeal held as follows;

“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.”

(Emphasis mine.)



344. In *Catholic Diocese of Nakuru v Abdi Fatah Ali Hassan & another* [2021] eKLR the Court dealt with a matter whose facts and issues for determination are similar to the present case. The Court stated thus;

“The Land Registrar and the Ministry of Lands official from Nairobi were categorical there were no documents in their offices that could support the 1st defendant’s ownership of the property. How did Lesonet acquire the title he transferred to the 1st defendant? Who was Reuben Wahome shown as Lessee in the property section of the certificate of Lease issued to both Lesonet and the 1st defendant? Did he have an allotment letter issued to him and if so was a Lease issued to him? These are the pertinent questions the records and documents from the Land Registry and Ministry of Lands offices would have provided answers to if they were availed. The problem was even more compounded when no records were available in the Department of Survey to explain how land parcel 306 got to be created...

35. Be it as it may be, and particularly paying particular regard to the evidence of PW3 who testified respecting (sic) the lack of records at the Ministry Headquarters and absence of any appropriate survey records at the Director of Surveys Department, it is doubtful how the title transferred to the defendant came into being. A title cannot drop from nowhere. A title has to have a source. In the case of government land, ownership is initiated from a letter of allotment which carries terms, which terms have to be accepted and survey of the land carried out and thereafter a lease processed and signed by the Commissioner of Lands before it is registered. In the instant case, it is not clear where the title transferred to the 1st defendant originated from. The 1st defendant was duty bound to verify the root of the title considering it was government land that was alienated. If he had, he would have probably discovered there were no appropriate survey records and that the plaintiff was holding a letter of allotment for the same Land that had yet to be processed. The letter of allotment issued to the plaintiff had not been cancelled and/or annulled.

36. The 1st defendants ought to have extended his due diligence to the Department of Survey particularly when he discovered the location of the plot was surrounded by institutions. A duly authenticated PDP and RIM were essential documents in the identification of the property.” (Emphasis Mine)

345. The Defendant submits that he is a bonafide purchaser for value and that he carried out due diligence before he acquired land parcel No. Kericho Municipality Block 1/356. In *Catholic Diocese of Nakuru v Abdi Fatah Ali Hassan & another* (supra) the Court further held as follows;

“The 1st Defendant has argued no fraud was pleaded and/or proved against him and that he was a bonafide purchaser for value. Section 26 (1) (b) of the *Land Registration Act* 2012 provides that a title that is shown to have been acquired illegally or unprocedurally can be challenged. I have made a finding that the title to land parcel Nakuru Municipality Block5/306 could not have been regularly and/or procedurally registered. The 1st defendant in my view could have discovered that if he had carried out appropriate due diligence. He did not and for that reason he will suffer the consequences.”

346. It is my view that in the present case it was necessary for the Defendant to conduct due diligence from the office of the Director of Survey to confirm the existence of his parcel of land.



347. The Defendant has in his possession the Certificate of Lease for land parcel No. Kericho Municipality Block 1/356, he has failed to demonstrate the root of his title i.e. the process leading to the acquisition of the said parcel of land.

348. From the evidence adduced, it is evident that land parcel No. Kericho Municipality Block 1/356 was acquired unprocedurally.

B. Whether the prayers sought in the Complaint should be granted.

349. Section 26 (1) of the Land Registration Act provides as follows;

“26.

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

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

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

350. The Plaintiff seeks an order of cancellation of the Defendant’s title. Section 80(1) of the Land Registration Act provides as follows;

“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.”

351. From the above provision, the Court has the power to order for rectification of a register by directing that any registration be cancelled if it was obtained by fraud or mistake.

352. The circumstances of this case are such that an order of cancellation of any records at the Kericho Land Registry in respect of land parcel No. Kericho Municipality Block 1/356 are merited.

353. The Plaintiff also seeks for general damages for trespass. The Plaintiff submits that a sum of Kshs. 20,000,000/= be granted as general damages for trespass.

354. The Defendant did not address this issue in his submissions.

355. In Philip Ayaya Aluchio v Crispinus Ngayo [2014]eKLR the Court held as follows;

“The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less



See Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).

356. In *Nakuru Industries Limited v S S Mehta & Sons* [2016] eKLR the Court stated as follows;

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the Defendants did trespass onto the Plaintiff’s land and conduct some excavation. For this reason, I award the Defendant damages in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”

357. In *Willesden Investments Limited Vs. Kenya Hotel properties limited NBI H.C.C. NO. 367 of 2000* the Court held as follows;

“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that Kshs. 10 000 000 is a reasonable award for general damages”.

358. Use and occupation of land belonging to another without consent is trespass. In this case, the fact of use and occupation by the Defendant is not in dispute. Although the exact value of the land before and after the trespass is not proved and the difference in the value of the Plaintiff’s property immediately after the trespass or the costs of restoration is not known, I find that the Defendant did trespass onto the Plaintiff’s land and the Plaintiff is therefore entitled to general damages. In my view an amount of Kshs. 500,000/= is sufficient.

359. In view of the foregoing, I have no reason not to order that the Defendant and/or his agents vacates LR No. 631/2354 Kericho Municipality forthwith and further that if they fail to do so, an order of eviction shall issue against them.

C. Whether the Defendant has established any claim against the Third Parties.

360. With regard to the third parties, the Defendant filed an application dated 22nd August, 2017 seeking to join four other parties to the suit. The said parties included the 2nd Third Party. The application was, by consent, allowed on 6th November, 2019.

361. Subsequent to grant of orders of joinder as Third Parties, the Defendant filed his Amended Defence on 7th October, 2019 wherein Andrew Cheruiyot Rotich, Equity Bank Ltd, Alfred Kipsang Maritim and Rebman Kipkurui were joined as the 1st, 2nd, 3rd and 4th Third Parties respectively.

362. Upon being joined, the 2nd Third Party filed the Notice of Motion application dated 24th December, 2019 seeking to be struck out from the proceedings for the reason that it was not a necessary party to the suit.

363. This Court in its ruling delivered on 20th May, 2020 held that the 2nd Third Party was a necessary party to the suit because its presence was crucial in demonstrating how the ownership of the Defendant’s parcel of land moved from the 1st Third Party to the 3rd and 4th Third Parties.

364. Paragraph 18 of the ruling held as follows;

“If the 2nd third party expects its liability to come out clearly, then it should wait until all evidence is in. At this stage, it is clear that the 2nd third party is enjoined because the first sale transaction is



traced to it...For the whole picture to emerge concerning the fraud or illegality alleged by the Plaintiff, it appears to me clear (sic) that one would have to start with the first presumed owner, the 1st third party, and it is not possible to go to the other subsequent owners without first considering the role played by the 2nd third party. To me it is clear why the 2nd third party was enjoined...in my view, the 2nd third party is a necessary party to the proceedings.”

365. It is important to note that even though the Court held that the 2nd Third Party was a necessary party to the proceedings, a perusal of the Defendant’s Statement of Defence shows that the Defendant did not seek any orders against it.
366. Upon hearing evidence in this matter, it is my view that the joining of third parties to the suit and the 2nd third party in particular served no purpose other than demonstrating the previous registered owners of the Defendant’s parcel of land. The Defendant has not made any claim against them.

D. Whether the Defence of innocent purchaser for value is available to the Defendant.

367. The Defendant submits that he is a bonafide purchaser for value and that he carried out due diligence before he acquired
land parcel No. Kericho Municipality Block 1/356.
368. In the judicial decision of *Katende V Haridar & Company Limited* [2008] 2 E.A.173 the Court of Appeal of Uganda held as follows;

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

- (a) he holds a certificate of title;
- (b) he purchased the property in good faith;
- (c) he had no knowledge of the fraud;
- (d) he purchased for valuable consideration;
- (e) the vendors had apparent valid title;
- (f) he purchased without notice of any fraud;
- (g) he was not party to any fraud.”

369. In *Catholic Diocese of Nakuru vs Abdi Fatah Ali Hassan & another* [2021] eKLR the Court further held as follows;

“The 1st defendant has argued no fraud was pleaded and/or proved against him and that he was a bonafide purchaser for value. Section 26 (1) (b) of the *Land Registration Act* 2012 provides that a title that is shown to have been acquired illegally or unprocedurally can be challenged. I have made a finding that the title to land parcel Nakuru Municipality Block5/306 could not have been regularly



and/or procedurally registered. The 1st defendant in my view could have discovered that if he had carried out appropriate due diligence. He did not and for that reason he will suffer the consequences.”

370. As afore stated, the Defendant submits that he is an innocent purchaser for value. It is therefore incumbent upon him to demonstrate that he conducted due diligence before buying the suit property.
371. The Defendant in his evidence-in-chief states that he conducted due diligence by conducting an official search. He went on to testify that he was issued with a Certificate of Official search on 15th October, 2013 and added that it shows that the land was registered in Alfred Kipsang’s name. The search certificate was produced as Exhibit D3.
372. It was further his evidence that he had been informed that the suit property was sold at a public auction and therefore the bank must have conducted its due diligence before advancing the loan. He explained that on account of the involvement of the bank, he was satisfied and assured of legality of the title to the suit parcel.
373. My view is that if this is the extent of due diligence conducted by the Defendant, it obviously fell short. For example, the Defendant did not inspect the survey records to ascertain the ground position and/or existence of the property. Regrettably, the Defendant bought air.
374. While this Court sympathizes with the Defendant’s predicament, the defence of an innocent purchaser for value is not available to him. As was held in *Catholic Diocese of Nakuru v Abdi Fatah Ali Hassan & another* (Supra) the Defendant could have discovered, had he carried out appropriate due diligence, that Kericho Municipality Block 1/356 was non-existent and unprocedurally registered.
375. I find that the Defendant cannot claim to benefit from the doctrine of a bona fide purchaser for value when he purchased land that had not been procedurally acquired.

E. Who should bear costs of the suit.

376. The general rule is that costs shall follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

377. In the result, the Plaintiff’s suit succeeds and I order as follows:
- a. The Defendant shall deliver vacant possession of all that portion of land occupied by him and comprised in LR No. 631/2354 Kericho Municipality to the Plaintiff within 90 days of the date hereof.
 - b. In the event of failure to comply with (a) above, an order of eviction shall issue against the Defendant by himself, agents, servants and/or employees to vacate all that portion of land occupied by him and comprised in LR No. 631/2354 Kericho Municipality.
 - c. The Land Registrar Kericho County shall forthwith cancel the title for Kericho Municipality Block 1/356.
 - d. The Plaintiff is hereby awarded Kshs. 500,000 as general damages.
 - e. The Plaintiff shall have costs of this suit and interest on costs from the date of Judgment until payment in full.



378. For purposes of the present suit, the Defendant did not establish any claim against the Third Parties. Consequently, the 2nd Third Party who participated in the present proceedings is awarded costs of the suit from the date of judgement until payment in full.

379. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 31TH DAY OF OCTOBER, 2024.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Okok for the Plaintiff

The firm of Ms Kipkemoi for Defendant – Absent

1st Third Party - Absent

2nd Third Party – Mr. Migiro. Absent

3rd Third Party – Absent

4th Third Party - Absent

Court Assistant; Mr. Joseph Makori.

