



Siero v County Government of Kisumu & another (Environment & Land Case E032 of 2022) [2024] KEELC 13960 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13960 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E032 OF 2022
SO OKONG'O, J
DECEMBER 19, 2024**

BETWEEN

BERNARD OUMA SIERO PLAINTIFF

AND

COUNTY GOVERNMENT OF KISUMU 1ST DEFENDANT

PHILISTER AMOLO OCHIENG 2ND DEFENDANT

JUDGMENT

1. Sometime in 2001 or thereabouts, the defunct Municipal Council of Kisumu (hereinafter referred to only as “the Council”) allocated several parcels of land to the members of the public. Among the parcels of land that were allocated by the Council was a parcel of land that was referred to as Kisumu Municipality Block 5/357-358/73. Kisumu Municipality Block 5/357-358/73 was allocated to one Albert Obote. On 17th August 2001, Albert Obote acting through Abel Ogwang Nduga sold Kisumu Municipality Block 5/357-358/73 to the 2nd Defendant at a consideration of Kshs. 180,000/-. Upon survey, Kisumu Municipality Block 5/357-358/73 was given a land reference number, Kisumu Municipality/Block 5/685(hereinafter referred to as “the suit property”). The Council allocated the said parcels of land including the suit property to the public for development. The suit property is situated in Kisumu in an area referred to as Makasembo /Celtel /Makaburini /Polyview. Several beneficiaries of the said land allotment by the Council including the 2nd Defendant did not develop their parcels of land.
2. On 19th February 2010, the Council passed a resolution to repossess all undeveloped and partially developed plots within Migosi and Block 5 in Kisumu and to reallocate the same to other people who could develop the same. The suit property is situated within Kisumu Municipality Block 5 and was one of the plots that were repossessed. On 18th October 2010, the Council placed an advertisement in the Daily Nation Newspaper inviting offers from the public for allocation of residential plots in among other areas, Block 5. Following that advertisement, the Plaintiff on 21st October 2010, applied to be



allocated one of the plots that was on offer. The Plaintiff paid Kshs. 7500/- as an application fees and was issued with a receipt. After the application, the Plaintiff participated in balloting for the plots that took place on 18th November 2010 and was successful.

4. On 19th November 2010, the Council offered in writing to allocate to the Plaintiff, Plot No. 685, Block 5, Kisumu Municipality (the suit property) which offer the Plaintiff accepted. The Plaintiff was required to pay a sum of Kshs. 39,100/- for the allotment which he paid in full on 9th and 10th December 2010. The receipts issued to the Plaintiff indicated that the payment was for the allocation of land parcel, Kisumu/Block 5/685. The Plaintiff thereafter applied for development approval for which he paid Kshs. 12,100/- on 23rd June 2011. The Plaintiff's application for development approval was granted by the Council on 15th July 2011. In the letter granting the approval, the Council indicated that the development was to take place on Plot No. Kisumu/Block 5/685 within Kisumu Municipality. The Plaintiff thereafter commenced the construction of a 5-storey residential building on the property. From 2011, the Plaintiff had been paying land rates initially to the Council and thereafter to the 1st Defendant. The Rates Demand Notices and Payment Requests from the Council and the 1st Defendant indicated that the rates were being paid for the suit property; Kisumu Municipality Block 5/685. At the time the Plaintiff filed this suit, the construction of the said building was near completion.
5. The Plaintiff brought this suit on 14th December 2022 against the Defendants claiming that after the suit property was allocated to him by the Council as aforesaid and while he was in possession thereof, the Defendants fraudulently and corruptly caused a title for the suit property to be issued in the name of the 2nd Defendant. The Plaintiff averred that the 1st Defendant wrote to the National Land Commission (NLC) on 6th February 2015 claiming that the suit property had been allocated to the 2nd Defendant by the Council and that the 2nd Defendant had developed the same and as such should be issued with a title in respect thereof.
6. The Plaintiff averred that while writing the said letter, the 1st Defendant was aware that the suit property had been repossessed by the Council from the 2nd Defendant and re-allocated to the Plaintiff who was the one who had developed it. The Plaintiff sought judgment against the Defendants jointly and/or severally for;
 1. A declaration that the Plaintiff is the lawful owner of the suit property.
 2. An order that the registration of the 2nd Defendant as the proprietor of the suit property be cancelled.
 3. A mandatory injunction directing the Kisumu County Land Registrar to rectify the register by registering the Plaintiff as the proprietor of the suit property.
 4. A mandatory injunction directing the 1st Defendant to cancel and/or close all parallel records held by it in respect of the suit property purporting that the 2nd Defendant is the proprietor of the suit property.
 5. A permanent injunction restraining the 2nd Defendant from interfering with the Plaintiff's possession and enjoyment of the suit property.
 6. Costs of the suit.
7. In her defence and counter-claim filed on 30th January 2023, the 2nd Defendant denied all the allegations made against her in the plaint. The 2nd Defendant averred that she acquired the suit property lawfully through a letter of allotment dated 19th November 2005 after which she was issued with a Certificate of



Lease. The 2nd Defendant averred that she was the lawful owner of the suit property and was entitled to exclusive use and possession thereof. The 2nd Defendant denied that the suit property was repossessed by the Council and reallocated to the Plaintiff. The 2nd Defendant averred that any document held by the Plaintiff purporting to confer upon him ownership of the suit property was obtained by the Plaintiff fraudulently and unlawfully.

8. In her counter-claim, the 2nd Defendant reiterated that she was the lawful owner of the suit property the same having been allocated to her by the NLC on behalf of the County Government of Kisumu. The 2nd Defendant averred that she was holding a certificate of title for the suit property. The 2nd Defendant averred that the Plaintiff entered the suit property without any reasonable cause or lawful excuse and constructed permanent structures thereon. The 2nd Defendant averred that the Plaintiff had failed or refused to vacate the suit property despite having been asked to do so. The 2nd Defendant reiterated that the documents held by the Plaintiff purporting to confer title in the suit property upon him were fraudulent and illegal. The 2nd Defendant sought the following reliefs against the Plaintiff;
 1. An order of eviction from the suit property.
 2. A permanent injunction restraining the Plaintiff from entering upon, remaining on, taking possession of, carrying out any construction, or any other activity on the suit property or any part thereof, and from alienating, or interfering with the suit property.
 3. A declaration that the suit property lawfully belongs to the 2nd Defendant.
 4. In the alternative, an order that the Plaintiff compensates the 2nd Defendant by paying to the 2nd Defendant the market value of the suit property at the date of judgment subject to the property being valued by a valuer appointed by the court.
 5. Costs
 6. Interest on 4 and 5 above.
 7. Any other or further relief the court may deem fit to grant.
9. The 1st Defendant filed a defence to the Plaintiff's claim and the 2nd Defendant's counter-claim on 14th June 2023 in which it denied the Plaintiff's claim in its entirety. In its defence to the 2nd Defendant's counter-claim, the 1st Defendant admitted that the 2nd Defendant was the lawful owner of the suit property and that the Plaintiff was a trespasser on the property. The Plaintiff filed a reply to the 2nd Defendant's defence, and a defence to the 2nd Defendant's counter-claim 24th February 2023.

The Plaintiff's case:

10. At the trial, the Plaintiff adopted his witness statement dated 24th November 2022 and gave a brief oral testimony. In his oral evidence and witness statement, the Plaintiff averred that he saw an advertisement by the Municipal Council of Kisumu (the Council) inviting members of the public to apply for residential plots that it had repossessed. He made an application and paid Kshs. 7,500/- for the same. He thereafter balloted. On 19th November 2010, the Council offered him the suit property on terms and conditions that were contained in the letter. He accepted the offer and paid the requisite charges for the allotment. He thereafter submitted to the Council building plans for approval. The plans were approved on 15th July 2011. He thereafter commenced development on the property. He had consistently paid land rates to the Council since he was allocated the property.
11. In April 2022, he was notified of a suit that the 2nd Defendant had filed at the Chief Magistrate's Court at Kisumu against him in which the 2nd Defendant had claimed that she had been issued with



a Certificate of Lease in respect of the suit property on 30th November 2018 as the owner thereof. His attempt to have the lower court suit transferred to this court for want of jurisdiction failed. The purported documents of ownership held by the 2nd Defendant were fraudulent, null and void. The suit property having been repossessed and reallocated to him, neither the 1st nor the 2nd Defendant had any interest left in the same. The Plaintiff produced the documents attached to his list and bundle of documents dated 24th November 2022 as P.EXH. 1 to 13 respectively.

12. The Plaintiff filed submissions dated 18th March 2024. The Plaintiff framed five issues for determination by the court namely; whether the suit property was repossessed by the Council and reallocated to the Plaintiff, whether the parcel of land which had been referred to variously as Plot No. 685 Block 5, Kisumu Municipality, Plot No. KSM/Block 5/685-Kibuye, Plot No. KSM/Block 5/685-Makasembo, Plot No. KSM/Block 5/685-Celtel, Plot No. KSM/Block 5/685-Kaburini, and Plot No. KSM/Block 5/685-Kaburini Area Ayanga was one and the same parcel of land, whether the 2nd Defendant's title was procured by fraud, improper procedure or corruptly, whether the Certificate of Lease dated 30th November 2018 issued to the 2nd Defendant was a nullity having been issued under a repealed statute, and whether the Plaintiff was entitled to the prayers sought in the plaint.
13. The Plaintiff submitted that he discharged the burden of proving that the suit property was repossessed and reallocated to the Plaintiff by the Council. The Plaintiff submitted that the Council offered the suit property for allotment to the Plaintiff which offer was accepted by the Plaintiff. The Plaintiff submitted that he performed the terms of the offer thereby creating a contract between him and the Council which conferred rights and duties. On the second issue, the Plaintiff submitted that from the evidence adduced by both parties, it was clear that the parcel of land variously referred to as Plot No. 685 Block 5, Kisumu Municipality, Plot No. KSM/Block 5/685-Kibuye, Plot No. KSM/Block 5/685-Makasembo, Plot No. KSM/Block 5/685-Celtel, Plot No. KSM/Block 5/685-Kaburini, and Plot No. KSM/Block 5/685-Kaburini Area Ayanga was one parcel of land reference number 685 in Block 5 within Kisumu Municipality. The Plaintiff submitted that there was no practical or legal difference in the various descriptions of the parcel of land. On the third issue, the Plaintiff cited Section 26 of the *Land Registration Act*, 2012 and Article 40 of *the Constitution* and submitted that a certificate of title that has been acquired illegally, unprocedurally or through a corrupt scheme is impeachable, and the same is not protected by the law. The Plaintiff cited several authorities in support of this submission. The Plaintiff submitted that the suit property having been lawfully repossessed and reallocated to the Plaintiff, the same was not available for allocation again to the 2nd Defendant. The Plaintiff submitted that when reallocating the suit property to the Plaintiff, the Council expressly cancelled the earlier allotment to the 2nd Defendant. The Plaintiff submitted that the title held by the 2nd Defendant for the suit property was impeachable. The Plaintiff submitted that the 1st Defendant whose predecessor had reallocated the suit property to the Plaintiff and approved the Plaintiff's development plans for the property could not feign ignorance of the Plaintiff's title to the property. The Plaintiff submitted that the 2nd Defendant acted dishonestly in processing the impugned certificate of lease knowing well that she had not developed the suit property at the time of its repossession. The Plaintiff submitted that the 2nd Defendant went to the extent of lying that she was the one who had developed the property knowing well that that was not the case. The Plaintiff submitted that he had proved fraud against the Defendants to the required standard.
14. On issue number four, the Plaintiff submitted that the Certificate of Lease issued to the 2nd Defendant was issued under the Registered *Land Act*, Chapter 300 Laws of Kenya which had been repealed at the material time. The Plaintiff submitted that to that extent the same was a nullity and incapable of conferring any interest in the suit property upon the 2nd Defendant.



15. In conclusion, the Plaintiff urged the court to enter judgment in his favour as prayed in the plaint. The Plaintiff also prayed that the 2nd Defendant's counter-claim be dismissed with costs.

The 1st Defendant's case

16. The 1st Defendant called one witness, Oscar Adeded (DW1). DW1 adopted his witness statement filed on 16th October 2023 as his evidence in chief and gave a brief oral testimony. He also produced the extract of the minutes of the Town Planning Committee Meeting held on 9th November 2010 as D.EXH.1. DW1 told the court that according to the records held by the 1st Defendant, the suit property was owned by the 2nd Defendant. He stated that the Plaintiff was not indicated as the owner of the suit property in their records. DW1 stated that the suit property was not one of the parcels of land that was repossessed by the Council. In his witness statement, DW1 stated that the 2nd Defendant was allotted the suit property in 2017 by the National Land Commission and was subsequently issued with a 99 years lease with effect from 1st December 2015. DW1 stated that the 2nd Defendant was consistent in the payment of land rates for the suit property. DW1 stated that the suit property was located at Kaburini area while the documents produced by the Plaintiff in support of his case suggested that the land was situated at Kibuye area. DW1 stated that there was a possibility of the Plaintiff referring to a different parcel of land.
17. In its submissions dated 2nd April 2024, the 1st Defendant framed three issues for determination by the court namely, whether the Plaintiff and the 2nd Defendant were claiming the same parcel of land, whether the Plaintiff was entitled to the reliefs sought, and who should bear the costs of the suit? On the first issue, the 1st Defendant submitted that based on the differences in the sizes and location of the parcels of land claimed by the Plaintiff and the 2nd Defendant, it was clear that the two parcels of land were separate and distinct. On whether the Plaintiff was entitled to the orders sought in his plaint, the 1st Defendant submitted that since the suit property belonged to the 2nd Defendant and not the Plaintiff, the Plaintiff was not entitled to the orders sought. On the issue of costs, the 1st Defendant submitted that cost follow the event unless the court for good reason orders otherwise. The 1st Defendant urged the court to award it the costs of the suit.

The 2nd Defendant's case

18. In her witness statement that she adopted as her evidence in chief, the 2nd Defendant reiterated the contents of her defence and counter-claim. The 2nd Defendant averred that the suit property was allocated to her by the National Land Commission(NLC) on 18th November 2017 and she was issued with a certificate of lease in respect thereof on 30th November 2018. The 2nd Defendant averred that she was shocked when she found out that the Plaintiff had put up a building on the suit property. The 2nd Defendant averred that her request to the Plaintiff to vacate the suit property bore no fruit. The 2nd Defendant averred that the documents of title held by the Plaintiff in respect of the suit property were fraudulent and illegal.

Analysis and determination

19. I have considered the pleadings, the evidence tendered by the parties and the closing submissions by the advocates for the parties. From the pleadings, I am of the view that the issues arising for determination in this suit are the following;
1. Who is the rightful owner of the suit property between the Plaintiff and the 2nd Defendant?
 2. Whether the 2nd Defendant's title to the suit property should be cancelled.



3. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
4. Whether the 2nd Defendant is entitled to the reliefs sought in her counter-claim.
5. Who is liable for the costs of the suit and the counter-claim?

Who is the rightful owner of the suit property between the Plaintiff and the 2nd Defendant?

20. There are two competing claims of ownership of the suit property. The 2nd Defendant has claimed ownership of the suit property through; a letter of allotment dated 19th September 2005 issued to the Municipal Council of Kisumu (the Council) by the Commissioner of Lands, a letter of allotment dated 18th November 2017 issued to the 2nd Defendant by the National Land Commission(NLC) and a certificate of lease dated 30th November 2018. The 2nd Defendant claimed that she acquired the suit property from one, Abel Ogwang Nduga acting as an agent of Albert Obote on 17th August 2001. The 2nd Defendant claimed that the suit property was allocated to Albert Obote by the Council. The 2nd Defendant averred that at the request of the 1st Defendant, she was subsequently issued with the letter of allotment dated 18th November 2017 by the National Land Commission(NLC) followed with a certificate of lease on 30th November 2018. The 2nd Defendant's title is supported by the 1st Defendant which is the successor of the Council.
21. The allotment and subsequent issuance of a title to the 2nd Defendant in respect of the suit property have been challenged by the Plaintiff who has averred that the same are fraudulent as the suit property was repossessed by the Council from the 2nd Defendant and reallocated to the Plaintiff. The Plaintiff's case is that in 2010, the Council repossessed plots that it had earlier allocated and which had not been developed and offered the same for allotment to members of the public. The Plaintiff averred that the suit property was one of the said parcels of land which were repossessed as it had not been developed. The Plaintiff averred that following the Council's offer that was published in the Daily Nation of 18th October 2010, he applied to be allocated one of the repossessed plots. The Plaintiff averred that after the application, he attended a balloting exercise through which he was offered the suit property on 19th November 2010 on terms and conditions which he accepted. The Plaintiff averred that he thereafter took possession of the suit property and started developing it after obtaining development approval from the Council. The Plaintiff averred that it was while he was at an advanced stage of developing the suit property that the 1st and 2nd Defendants colluded and fraudulently caused a title for the suit property to be issued to the 2nd Defendant.
22. In *Adan Abdirahani Hassan & 2 others v. Registrar of Tiles & 2 others* [2013] eKLR, the court stated as follows:

“20. Article 40 of the current Constitution, just like section 75 of the repealed Constitution protects the right to own property. This Article should however be read together with the provisions of Article 40(6) which excludes the protection of property which has been found to have been unlawfully acquired. This requirement recognises the fact that *the Constitution* protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by *the Constitution*, he must show that he has followed the due process in acquiring that which he wants to be protected.”



23. In *Hubert L. Martin & 2 Others v. Margaret J. Kamar & 5 Others*[2016] eKLR, the court stated as follows:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain...Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”

24. In *Munyu Maina v. Hiram Gathiha Maina*[2013] eKLR, the Court of Appeal stated 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.”

25. In *Daudi Kiptugen v. Commissioner of Lands & 4 Others*[2015] eKLR, the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

26. I have considered the competing claims to the suit property by the Plaintiff and the 2nd Defendant. Both the Plaintiff and the 2nd Defendant derive their claims from the Municipal Council of Kisumu (the Council). It is common ground that the suit property was allocated to the Council by the Commissioner of Lands which in turn allocated the same to members of the public for the development of residential houses. It is also common ground that the 2nd Defendant purchased the suit property from the original allottee to whom the property was allocated by the Council. It is also common ground that when the 2nd Defendant acquired the suit property in 2001, the same was not developed and that the 2nd Defendant had also not developed the same as at the time the dispute before the court arose in 2019.

27. I am satisfied from the evidence before me that the suit property was among the undeveloped plots that were repossessed by the Council in 2010 and reallocated to new allottees. The Plaintiff has proved that he was a beneficiary of the repossession and new allotment. The Plaintiff has established that; the Council offered repossessed plots to the public through an advertisement in the Daily Nation Newspaper, he responded to the offer and made an application to be allocated one of the plots on offer, he attended the balloting exercise for the plots, following that exercise he was offered the suit property by the Council, he accepted the offer and paid the requisite charges, he took possession of the suit property, applied for development permission, the same was granted and he started developing



the property. The Plaintiff also demonstrated that he had been paying rates for the suit property since the same was allocated to him in 2010.

28. I am not persuaded by the Defendants' argument that the suit property was not repossessed and that the Plaintiff may have been allocated a different parcel of land. The evidence placed before the court leaves no doubt that the suit property was repossessed and that the same was the plot that was reallocated to the Plaintiff. It is clear from the Minutes of the Council meeting held on 19th February 2010 that was produced by the Plaintiff in evidence as P.EXH.13 that the suit property was one of the plots that was earmarked for repossession since it was not developed. It was following the resolution passed at the said meeting that the Council offered the repossessed plots to the public through an advertisement carried in the Daily Nation on 18th October 2010. If the suit property was not repossessed the Plaintiff could not have balloted for it and the Council could not have offered it to the Plaintiff. I agree with the Plaintiff that the meeting that was held by the Council on 9th November 2010 whose minutes were produced by the 1st Defendant as D.EXH.9 was meant to receive the applications that had been made for the repossessed plots. The meeting was held after the repossession had taken place, the repossessed plots advertised for reallocation and applications made by interested members of the public. I agree with the Plaintiff that a copy of the minutes produced by the 1st Defendant did not contain all the plots that were repossessed. As correctly observed by the Plaintiff in his submissions, out of the 723 plots that were repossessed, the copy of the minutes produced by the 1st Defendant had 113 plots only. The said minutes cannot therefore be relied on as showing that the suit property was not repossessed.
29. I agree with the Plaintiff that after the suit property was repossessed by the Council, offered to the Plaintiff, the offer accepted and the conditions of the offer met, the 2nd Defendant ceased to have any interest in the suit property. The offer that was made to the Plaintiff by the Council on 19th November 2010 expressly stated that the same cancelled earlier offers made in respect of the same plot. That being the case, the 1st Defendant which is the Council's successor in title to the suit property could not purport to confirm to the NLC on 6th February 2015 that the 2nd Defendant was still the owner of the suit property and that the 2nd Defendant had developed the same. The 2nd Defendant confirmed that this confirmation was made at her request. The 2nd Defendant admitted that she was not the one who developed the suit property. The 1st Defendant being the successor of the Council had records of the suit property. It must be taken to have been aware that the suit property was repossessed and reallocated to the Plaintiff. It must also be taken to have been aware that it was the Plaintiff who had developed the suit property and not the 2nd Defendant. I therefore agree with the Plaintiff that the Defendants gave to the NLC false information to fraudulently dispossess the Plaintiff of the suit property that he had lawfully acquired and developed.
30. When the NLC was purportedly allocating the suit property to the 2nd Defendant on 18th November 2017, the property was in the possession of the Plaintiff who had developed the same. It is worth noting that the NLC's letter of allotment had a disclaimer that NLC would not accept any liability in case the suit property had already been committed. This means that if it had been brought to the attention of the NLC that the suit property had been repossessed and reallocated to the Plaintiff in 2010, the NLC would not have issued the letter of allotment.
31. Having investigated the roots of the conflicting ownership claims to the suit property, I find that the Plaintiff has proved on a balance of probabilities that he is the lawful owner of the suit property. It is my finding that the 2nd Defendant obtained her title to the suit property irregularly through deceit. The title held by the 2nd Defendant is therefore not valid.



Whether the 2nd Defendant's title should be cancelled

32. The suit property is registered under the Registered [Land Act](#), Chapter 300 Laws of Kenya (RLA) (now repealed). The validity of the registration of the suit property under the repealed Act is debatable. I do not however wish to go there. Sections 27 and 28 of the Registered [Land Act](#) provides as follows:

“27. Subject to this Act -

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

33. Section 143(1) and (2) of the Registered [Land Act](#) provides as follows:

- “(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”



34. Sections 24, 25 and 26 of the [Land Registration Act](#), 2012 that repealed the Registered [Land Act](#) provides as follows:

“24. Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

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.”

33. Both under the Registered *Land Act* and the *Land Registration Act*, 2012, the registration of a person as a proprietor of land or lease confers upon that person the absolute ownership of the land and in the case of a lease, the leasehold interest in the land. Under the Registered *Land Act* which is the statute under which the suit property was registered, a register of land can be rectified by the cancellation of any entry therein where such registration has been obtained by fraud or mistake.
34. I have held that the suit property had already been repossessed and reallocated to the Plaintiff by the Council and the Plaintiff had already taken possession and developed the same when the same was purportedly allocated to the 2nd Defendant and a title in respect thereof issued to her on the recommendation of the 1st Defendant. The suit property was therefore not available for the purported further allocation by the NLC. The Plaintiff has proved fraud in the acquisition of the suit property by the 2nd Defendant. The 2nd Defendant’s title having been acquired fraudulently, the same is void. The certificate of lease issued to the 2nd Defendant on 30th November 2018 could not therefore confer any interest in the suit property upon the 2nd Defendant. In *Macfoy v. United Africa Co Ltd* [1961] 3 All ER 1169 it was stated as follows concerning an act that is void:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”

35. Due to the foregoing, it is my finding that the title held by the 2nd Defendant is liable to cancellation on account of being void having been acquired illegally and fraudulently.

Whether the Plaintiff is entitled to the reliefs sought in the plaint

36. I have set out herein earlier the reliefs sought by the Plaintiff. I am satisfied that the Plaintiff has established his claim against the Defendants on a balance of probabilities. The Plaintiff is therefore entitled to a declaration that he is the lawful owner of the suit property and an order for the cancellation of the title held by the 2nd Defendant. The Plaintiff is also entitled to an order compelling the 1st Defendant to cancel the parallel records held by it in respect of the suit property indicating that the property is owned by the 2nd Defendant. The Plaintiff is also entitled to an injunction sought to restrain the 2nd Defendant from interfering with his quiet possession and enjoyment of the suit property. The Plaintiff is however not entitled to an order for the registration of the suit property in his name. The Plaintiff who was allotted the suit property by the Council should pursue the issuance of his title to the suit property in the normal manner from the 1st Defendant and the National Land Commission now that the court has declared him as the owner of the land. The Plaintiff is also entitled to the costs of the suit.

Whether the 2nd Defendant is entitled to the reliefs sought in the counter-claim

37. I have made a finding that the 2nd Defendant acquired the suit property irregularly and fraudulently. I have also made a finding that the Plaintiff is the lawful owner of the suit property. Given the said findings, the 2nd Defendant’s counter-claim has no merit. The 2nd Defendant is therefore not entitled to any of the reliefs sought in the counter-claim.



Conclusion

38. In conclusion, I hereby make the following orders;

1. I declare that the Plaintiff is the lawful owner of all that property known as Plot No. 685 Block 5, Kisumu Municipality also known as Title No. Kisumu/ Municipality Block 5 /685.
2. The title held by the 2nd Defendant in respect of Title No. Kisumu/ Municipality Block 5 /685(the suit property) is hereby cancelled.
3. An order is issued compelling the 1st Defendant to cancel and/or close all parallel records held by it in respect of the suit property indicating that the 2nd Defendant is the proprietor of the property.
4. A permanent injunction is issued restraining the 2nd Defendant whether by herself, her agents, servants, employees or otherwise whosoever from interfering with the Plaintiff's quiet possession and enjoyment of the suit property.
5. The 2nd Defendant's counter-claim is dismissed.
6. The Plaintiff shall have the costs of the suit and the counter-claim

DELIVERED AND DATED AT KISUMU ON THIS 19TH DAY OF DECEMBER 2024.

S.OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. Mungla for the Plaintiff

Mr. Munuang'o for the 1st Defendant

Mr. Sala for the 2nd Defendant

Ms. J. Omondi-Court Assistant

