

THE REPUBLIC OF KENYA
ENVIROMENT AND LAND COURT AT BUNGOMA
ELC CASE NO: 12 OF 2020

JUDITH NEKOYE.....PLAINTIFF

VERSUS

ETHICS AND ANTI CORRUPTION COMMISSION..... DEFENDANT

JUDGMENT.

1. By way of a plaint dated 07/04/2020, the Plaintiff seeks Judgment against the Defendant for the following orders;

- a) **A declaration that the Defendants actions, decisions and demand as hereinabove complained of defied reason, logic and justification and were ill prompted.**
- b) **A declaration that the actions purported investigations, decision and demand hereinabove complained of by the defendants, its agents and or servants were in violation of provisions of Articles 27(1), 28, 40, 47 and 50, the provisions of the Administrative Actions Act and provisions of various legislative pieces relating to matters land and proprietary interest therein.**
- c) **A declaration that she procedurally, legally, validly and without fraud acquired the interest in and got registered as proprietor of, the subject property.**
- d) **Costs of the suit.**

2. The Plaintiff in her plaint averred that she is the registered leaseholder of all that portion of land measuring 0.18ha comprised in BUNGOMA TOWNSHIP/169 for a period of 99 year w.e.f 01/01/1999

having purchased it from one Charles Osioma Nyasani and Scholastica Nyakerario Osioma on 17/10/2016 for Kshs. 5,100,000/=. That she later obtained registration and embarked on the construction of a house now valued at Kshs. 30,000,000/= having passed the inspection by various government agencies. That prior to the purchase, she did her due diligence of the ownership of the land. That on or about 27/02/2020, she received a letter from the defendant inviting her for an interview and statement recording over the land which invitation she obliged. That on 11/03/2020, she received a letter demanding the surrender of the suit property and the relevant documents for rectification and cancellation. She averred that the actions by the Defendants breached various provisions of the Constitution.

3. The Defendant filed a Defence and Counterclaim against the Plaintiff dated 29/03/2021 seeking the following orders:

- a) **A Declaration that the Certificate of Lease registered on 18th October, 2002 in favour of Charles Osiomi Nyasani and Scolastica Nyakerario over parcel of land described as Bungoma Township/169 was fraudulently obtained is null and void and incapable of conferring any interest to the Plaintiff and/or any other person whatsoever.**
- b) **A Declaration that the purported lease purporting to have been registered on 24th October, 2016 in favour of the Plaintiff over the parcel of land described as Bungoma township/169 was fraudulently obtained and thus illegal null and void ab initio**
- c) **In the alternative Prayer (1) above a declaration that the purported lease purported to have been registered on 24th**

October, 2016, in favour of the Plaintiff over the parcel of Land described as Bungoma Township 169 was issued without any lawful authority obtained and is thus illegal, null and void ab initio

- d) The registration of all the entries related to the issuance of the Certificate of lease purported to have been issued on 24th October, 2016 to the Plaintiff in respect of Bungoma Township 169 be hereby cancelled.**
- e) An order directed to the Land Registrar, Bungoma Land Registry to expunge from the record and or rectify the register by cancellation of all entries relating to the issuance of the Certificate of Lease purported to have been issued on 24th October, 2016 and all subsequent entries in respect to Bungoma Township 169.**
- f) An order of permanent injunction to restrain the Plaintiff, their agents, servants, employees from and or assigns from subdividing, charging, trespassing upon, transferring, leasing and wasting and or dealing in any manner whatsoever with the parcel of land described as Bungoma Township 169 and Government House other than by way of surrender to the Government of Kenya.**
- g) An order of eviction directing the Plaintiff, Servants, agents or assigns to vacate LR Bungoma Township 169.**
- h) General Damages.**
- i) Costs and Incidental to this suit, be awarded to the Defendant.**

j) Any other relief that the Court may deem fit and just to grant.

The Plaintiff avers that the purported investigations, decision and demand.

4. It was the Defendants case that pursuant to its statutory mandate, they lodged investigations for the recovery of government houses on behalf of the Ministry of Housing in Bungoma who claim ownership of BUNGOMA TOWNSHIP/169 which they believe had been acquired by the Plaintiff illegally, irregularly and fraudulently. That the investigations showed that the Plaintiff acquired the said property with full knowledge that it belonged to the Ministry of housing. The Defendant set out particulars of fraud, illegality and fraud against the Plaintiff.

5. It was averred in the counterclaim that in 1961, the government reserved and constructed various residential houses for public officers, among them a house referenced as Bungoma HG15 within BUNGOMA MUNICIPALITY/169. In 2004, House No. KAK/HOU/HG15 was allegedly allocated to Charles Osioma Nyasani, a civil servant. That the said house was not available for allocation as it was owned by the State Department of Housing and the proper procedure for its acquisition was not followed. It was averred that the house was boarded without due consultation or approval from the Ministry of Housing.

6. Further, it was averred that a lease to the suit property was issued to Charles Osioma Nyasani and Scolastica Nyakerarion trading as Nyasco Enterprises of Bungoma. On 30/07/2008, a circular was issued authorizing the sale of non-strategic houses, but the same was later

rescinded, a fact well known to the said lessees. Nonetheless, the lessor proceeded to alienate the property in favor of the Plaintiff. The Defendant contends that this alienation was illegal, fraudulent, and unlawful.

7. The suit was agreed by consent of the parties to proceed by viva voce evidence.

Plaintiff's Evidence

8. **PW1, Judith Nekoye**, adopted her witness statement dated 07/04/2020 and produced documents marked MFI 21, 28, 29, 30, 37, 38, 25, 26 & 27. She testified that she purchased the suit land from Charles Nyasani, who had been duly allocated the same, and that the land was transferred to her upon payment of the requisite fees. She stated she paid stamp duty though lacked receipts, but insisted she obtained all approvals and her development was never stopped. She conceded the Part Development Plan (PDP) was unsigned but argued that the Ndungu Report indicated the land was awaiting validation. She relied on a letter dated 08/09/2016 which showed government had no interest in the property. She maintained that Nyasani held a certificate of lease and that any questions arising from the 1999 allotment to Nyasco Enterprises were for Nyasani to answer.

9. **PW2, Charles Osioma Nyasani**, adopted his statement dated 16/03/2020 and produced validation and correspondence letters including PExhibits 21, 29 and 38. He confirmed having validated his allocation through a letter dated 16/12/2008 and written further to

government officials regarding the property. He testified that he had paid the purchase price, and although the government cancelled the sale of non-strategic houses through a circular dated 28/07/2008, his validation came after he had already paid the relevant fees. He insisted the cancellation did not affect purchasers who had paid deposits before January 2007 and that his purchase price was never refunded. He further testified that he became a government tenant in 2004, paid rent until 2010 when payments were stopped, and that the government had no claim to the property thereafter.

10. PW3, Dorcas Emali, a retired civil servant and former Director of Housing in Bungoma, testified that validation was sought for House No. HG 15 on the suit land and produced PExhibits 26, 28 and 35. She confirmed that the transaction was completed in 2009 after full payment and the money was never refunded. She acknowledged that the proper disposal process required bonding, committee approval, and removal from the register of government houses, but in this case, due process was not followed.

Defendant's Evidence.

11. DW1, Justus Waweru Mwangi, a retired Deputy Director in the State Department of Housing, adopted his statements dated 26/08/2020 and 22/03/2021 and produced documents including DExhibits 16, 18, 21–27. He testified that the suit property was reserved for government housing and was never available for reallocation. He explained the legal procedure for disposal of government houses, including bonding, Treasury approval, valuation, and parliamentary approval and that none

of which were undertaken here. He emphasized that although some non-strategic houses were advertised for sale in 2007, the entire sale was cancelled in July 2008 and deposits were to be refunded. He testified that any subsequent validation was illegal, that the officer who purported to validate Nyasani's claim lacked authority, and disciplinary proceedings were instituted against him.

12. DW2, Timothy Waiyu Mwangi, Deputy Director of Physical Planning, testified that the PDP relied upon by the Plaintiff was incomplete and not formally approved. He explained the statutory process for PDP preparation and approval, involving various local officers and the Commissioner of Lands. He produced DExhibits 34, 35 and 36, and stated that the Plaintiff's PDP was in fact a sketch and not an authentic plan, and that the allotment letter did not bear any PDP number. On cross-examination, he conceded he did not have the approved PDP for the suit land but maintained the Plaintiff's documents lacked the hallmarks of authenticity.

13. DW3, Moses Omina Owuor, testified that the suit property was still registered in government records as BUNG/HOU/HG/15. He explained that Nyasani's acquisition was irregular as validation and bonding were never conducted, and the circular cancelling the sale directed that deposits be refunded.

14. DW4, Wilson Kibuchi, a survey officer, confirmed that there was no Registry Index Map (RIM) for the property and produced a report (D-Exhibit 38) showing its boundaries. He stated that the lease relied on by

the Plaintiff could not be verified against survey records, casting doubt on its validity.

15. DW5, Violet Lamu, Land Registrar, testified that the first lease was registered on 04/10/2002 in favour of Charles and Scholastica Nyasani before being transferred to the Plaintiff. She produced the parcel file (D-Exhibit 14) and transfer instruments (D-Exhibit 12). She stated that while the records reflected ownership, there was no sealed RIM or survey report, and therefore the registration was procedurally defective.

16. DW6, Gordon Odeka Ochieng, a Director at the Ministry, testified that the original allotment of 07/01/1999 was in the name of Nyasco Enterprises. He produced the allotment letter, acceptance letter, and lease as D-Exhibits 1, 2 & 3. He explained that the process did not disclose the existing government building on the land, as would have been required through a Board of Survey and valuation, rendering the lease irregular. He further testified that the purported PDP (P-Exhibit 7) lacked the attributes of a genuine PDP.

17. DW7, Sophia Nyabiru, an investigator with the Defendant, testified that their investigations confirmed the land was reserved for government housing and that the lease lacked an approved PDP number. She stated that the validation process relied upon was improper as the author lacked authority, and further that the Plaintiff failed to conduct due diligence before purchasing the land. She emphasized that since there was an existing government house on the land, it was not available for alienation, and that no refund of the purchase monies had been sought.

Plaintiffs' Submissions.

18. The Plaintiff filed submissions dated 21/07/2025 and addressed five issues.

19. First, she argued that the suit land was not public or government land at the time of acquisition and that She purchased it from Charles Nyasani (PW2), who held a certificate of lease and allotment letter issued to Nyasco Enterprises, a registered business name of Charles and Scholastica. She emphasized that she conducted due diligence and relied on letters from the Ministry of Housing dated 19/11/2007 and 12/02/2008, which directed validation of sales of irregularly alienated government houses. Further, by a letter dated 08/09/2016, the Ministry confirmed that the government had no claim over the suit land. This position has never been revoked, nor has the allotment or lease been cancelled. She relied on **Nakel Investments Limited v Ministry of Transport, Infrastructure, Housing and Urban Development & another [2024] KEELC 3971.**

20. Second, she submitted that a Board of Survey was unnecessary since the land had been properly validated, transferred to Nyasani, and converted into private land.

21. Third, she denied fraud, arguing that the defendants neither defined nor proved fraud to the required legal standard, citing authorities including **Koinange v Koinange [1986] KLR 23, Ratilal Gordhanbhai**

Patel v Lalji Makanji [1957] EA 314, and Ulmila Mahindra Shah v Barclays Bank International & Another [1979] KLR.

22. Fourth, she contended that the counterclaim was defective for non-joinder of necessary parties. Key government officials who authorized, validated, or facilitated the allocation and transfer namely, the Permanent Secretary Ministry of Housing, the Commissioner of Lands, the County Land Registrar, the Chief Officer Lands, the Town Planner, the County Works Officer, and the seller Nyasco Enterprises were not joined. She argued that declaring the certificate of lease fraudulent without their involvement would offend the principles of natural justice, citing Edward Mwangi Irungu v Chief Land Registrar & Others [2018] KEELC 201 and Pashito Holdings Ltd & Another v Paul Ndungu & 2 Others [1997] eKLR.

23. From the foregoing, the Plaintiff urged the court to uphold her claim, dismiss the counterclaim, and award her costs.

Defendants' Submissions.

24. The Defendants filed submissions dated 07/07/2025 addressing five issues.

25. First, they argued that investigations into the suit property were proper and compliant with the **Fair Administrative Actions Act**, since the Plaintiff was given an opportunity to record a statement and was duly issued with a demand.

26. Second, on whether the land (BUNGOMA TOWNSHIP/169) was available for alienation, the Defendants contended that it was reserved

for government housing (House BUNG/HOUS/HG/15) and therefore, unavailable for re-allocation or disposal. They submitted that any disposal had to follow the prescribed procedure under the (repealed) **Government Lands Act**, and any deviation rendered the allocation irregular. They relied on authorities including **African Line Co. Ltd v Attorney General [2007] eKLR and Kenya Anti-Corruption Commission v Lima Limited & 2 others [2019].**

27. Third, on the validity of the transfer, the Defendants maintained that the original allottees lacked good title to transfer. They argued that the allotment letter was defective since it was never gazetted, lacked an approved Part Development Plan(PDP), and was unsupported by the Survey of Kenya, which confirmed that the sealed Registration Index Map (RIM) for BUNGOMA MUNICIPALITY/169 had not been forwarded. They further noted that stand premium was paid three years after the offer had expired, without evidence of acceptance in writing, rendering the allotment invalid. They cited authorities such as **Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others, Dr. Joseph Arap Ng'ok v Justice Moiyo Ole Keiyua & 4 others, and Arthi Highway Developers Ltd v West End Butchery Ltd & others [2015] eKLR.**

28. Fourth, they submitted that the alleged validation of the property in 2016 was a nullity since the validation committee had been disbanded by the government through a circular dated 28/07/2008. They argued that any validation thereafter was fraudulent and done by unauthorized staff. Reliance was placed on **Noreen Shariff & others v Chief Land Registrar & 2 others; Amusement Garden Ltd (Interested Party)**

[2019] eKLR and other authorities emphasizing protection of public interest over private claims.

29. Fifth, they asserted that the Plaintiff could not invoke the doctrine of indefeasibility under Section 26 of the Land Registration Act or protection under Article 40 of the Constitution, since her root title was unlawfully acquired from public land that was never available for alienation. They contended that the Plaintiff was not a bona fide purchaser, as proper due diligence would have revealed the defects. They further argued that the non-joinder of certain parties such as PW2 or the Commissioner of Lands was not fatal, since what was challenged was the process leading to the Plaintiff's acquisition.

30. The Defendants also filed further submissions dated 24/09/2025, reiterating that the absence of a Part Development Plan (PDP) and sealed Registry Map Index (RIM) confirmed the illegality of the allotment. They emphasized that the property was already in use by the State Department of Housing for construction of civil servant houses and thus, could not be allocated as unalienated government land. They relied on Dina Management Ltd v County Government of Mombasa & 5 others [2023] KESC 30.

31. In conclusion, the defendant urged the Court to find that the Plaintiff's title was founded on irregular and fraudulent processes, that she was not a bona fide purchaser, and that her claim should fail.

ANALYSIS AND DETERMINATION

32. The Plaintiff's position is that she is the lawful owner of the suit property, BUNGOMA TOWNSHIP/169, having acquired it from one Charles Osioma Nyasani. According to her pleadings and testimony, Nyasani was lawfully allocated the property by the Commissioner of Lands and issued him with a lease. The Plaintiff further contends that Nyasani had purchased the house erected on the property pursuant to an advertised Government sale, and that his ownership was therefore legitimate. The Plaintiff produced in evidence the letter of allotment, duly executed transfer forms, and a certificate of lease in her name as proof of ownership.

33. She also relied on correspondence from the Ministry of Lands to demonstrate that the allocation and transfer followed due process. It is her case that she purchased the property for value and without notice of any defect in title, and therefore enjoys the protection of the law as a bona fide purchaser. She contends that her title is indefeasible under section 26 of the Land Registration Act, and that the Defendant has no legitimate claim over the property. She urges the Court to uphold her title and dismiss the Defendant's counterclaim with costs.

34. The Defendant, on the other hand, contends that the suit property was never available for allocation or sale to private individuals, as it had long been reserved for Government housing for civil servants. Their pleadings and witness testimony assert that the purported allocation to Nyasani was irregular, unlawful, and contrary to established procedure. They relied on evidence to show that the relevant approvals including a

Part Development Plan and the sanction of a Board of Survey were not obtained prior to the allocation.

35. The Defendant further pointed out that the said advertised government sale was cancelled by the Ministry of Lands, and that any subsequent validation and approval for transfer to the Plaintiff was therefore null and void. They insist that the Plaintiff cannot claim protection as a bona fide purchaser where the root of her title is defective, and argues that fraud and illegality taint the entire transaction. The Defendant accordingly seeks judgment on their counterclaim, urging the Court to order the cancellation of the Plaintiff's lease, rectification of the land register, eviction of the Plaintiff from the property, and a permanent injunction to restrain her from interfering with it.

36. The Defendant submits that the Government's offer for the sale of non-strategic houses was a decision of the Cabinet arrived at in 2004. Phase I of this offer commenced and took off with the sale of Non-Strategic Houses within Nairobi while phase II as communicated through the circular Ref. No. CHSF/EST/01/2/Vol.11/41 dated 24th January 2007 and the addendum CHSF/EST/10/2/Vol.11/51 dated 2nd March 2007 was meant to extend to the Districts. By a circular Ref No. CSHSF/EST/01/2/VOL. III(123) dated 28th July 2008 and notice appearing in the Standard daily issued on 30th July 2008 rescinded the whole process.

37. After considering the pleadings and the evidence on record, it is my view that the following issues arise for determination;

- a) **Whether Bungoma/Township/169 was procedurally alienated.**
- b) **Whether the Plaintiff is entitled to the prayers sought in the plaint.**
- c) **Whether the Defendant is entitled to the prayers sought in the counterclaim.**
- d) **Who should bear the costs of the suit.**

Whether Bungoma/Township/169 was procedurally alienated.

38. It is not in contention that the Plaintiff holds a certificate of lease for BUNGOMA TOWNSHIP/169 issued on 24/10/2016 for an area measuring approximately 0.18ha (hereinafter referred to as '**the suit land**') and registered for a term of 99 years from 01/01/1999(P-Exhibit 5). It is also not in dispute that the said certificate of lease was previously registered in the names of Charles Osioma Nyasani and Scolastica Nyakerario issued on 04/10/2002(P-Exhibit 14 &15). That the said initial lessees sold the suit land to the Plaintiff vide an agreement dated 17/10/2016(P-Exhibit 1). It was the Plaintiffs case that the lease was issued by the County Government of Bungoma through the Commissioner for lands to Charles Osioma Nyasani and Scolastica Nyakerario, the proprietors of Nyasco Enterprises vide a letter of Allotment dated 07/01/1999(P-Exhibit 11) wherein all the required fees was paid on 13/02/2002(P-Exhibit 12) and a letter dated 30/09/2002 further written by the Commissioner of Lands to the Bungoma, District

Land Registrar forwarding lease documents for purposes of registration of a lease in the name of the said lessees.

39. The Defendant contends that the initial leasees obtained the said lease without following due procedure. It is their contention that the suit property was not available for alienation as it hosted a government house (BUNG/HOU/HG/15) and therefore, the allotment was issued unprocedurally. They contended that the registration of the lease was done without a sealed Registry Index Map (RIM) and an approved Part Development Plan (PDP) as the one attached was irregular as the correct PDP for the suit property was referenced BUN 120/95/6 and marked as approved Development Plan No. 57. That the said leasees accepted the allotment of the subject property in the year 2002 yet the offer was made in the year 1999 and that registration of the lease which required due diligence was registered in a record period of 7 days raising concerns to the authenticity of the lease.

40. The Plaintiff further contends that the said initial lessees further upon the advertisement for sale of non-strategic government owned houses vide Circular referenced CSHSF/EST/01/2/Voll.II(41) dated 24/01/2007(D-Exhibit 21) and another dated CSHSF/EST/01/2/II/51 02/03/2007(D-Exhibit 22) purchased the house hosted in the suit property and produced receipts No.7757900 for Kshs.100,000/= (P-Exhibit 22) and receipt No. A3240540 (P-Exhibit 23) and thus, the purchase was validated by the letters dated 19/11/2007(P-Exhibit 19) by SM Kamanja and 12/02/2008 (P-Exhibit 20) approved vide letter dated 16/12/2008(P-Exhibit 21) by the same SM Kamaja. It was therefore their

contention that the demolition of the house was lawful. The Defendants on the other hand contend that the said sale was cancelled vide a circular reference no. CSHSF/EST/01/2/Voll.III (123) issued in the year 28/07/2008(D-Exhibit 23) and a newspaper advertisement dated 30/07/2008(P-Exhibit 21 & D-Exhibit 24).

41. In my analysis of this issue, I will also seek to address the question whether the suit land was available for allocation which to me will also answer to the legality of the Plaintiff registration. The Court of Appeal in **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** emphasized the duty of the holder of an impugned title thus;-

We state that when a registered proprietors' 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"

42. Justice Sila Munyao in **Daudi Kiptugen Vs. Commissioner of Lands & 4 Others (2015) eKLR** and which was also referred to by both parties persuasively further elaborated the above; -

"In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease

or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. 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 the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or 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. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.'

43. Section 26 of the Land Registration Act provides that:-

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.

44. Further it is trite that under section 23 of the Registration of Titles Act cap 281 (repealed) a title is revered and indefeasible and can only be challenged on grounds of fraud and misrepresentation

45. Section 107 (1) of the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Sub-Section (2) of the said provision provides that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. In terms of Section 108 of the Evidence Act, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

46. From the evidence before this Court, it is not in dispute that the initial lessees were issued with an allotment letter dated 07/01/1999, which they accepted and complied with on 13/02/2002, culminating in the issuance of a certificate of lease on 18/10/2002. However, a careful evaluation of the record, and in particular D-Exhibit 36, which are certified copies of Part Development Plans (PDPs) for the area/region, discloses that the suit land had already been alienated, surveyed, and registered as Bungoma Township/169 as early as 1995 in an approved development plan no.57. The importance of a PDP in the land allocation process cannot be gainsaid. A PDP is a statutory planning instrument prepared under **Section 16** of the repealed ***Physical Planning Act, Cap***

286, which provided for the preparation and approval of Part Development Plans to guide the use and alienation of land. It is the PDP that demonstrates whether land is available, planned, and earmarked for a particular purpose, and without such an approved plan, no valid allotment can lawfully issue.

47. The courts have consistently underscored this requirement. In African Line Transport Co. Ltd vs. The Hon. Attorney General, Mombasa HCCC No. 276 of 2013 [2014] eKLR, where it was held;

“planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot.” Similarly, in Nelson Kazungu Chai & 9 Others v Pwani University [2014] eKLR, the Court reiterated that Part Development Plans are central to the process of alienation, and any purported allocation made without reference to an existing PDP is irregular, unlawful, and incapable of conferring valid title.

48. The manner and procedure through which the initial lessees, Charles and Scolastica Nyasani, obtained their letter of allotment and the subsequent lease raises a fundamental legal question as to the validity of the allocation and issuance of title in their favour. The principle is well settled that once land has already been alienated,

surveyed, and registered, it cannot be the subject of a fresh or parallel allocation. In **Wreck Motors Enterprises v Commissioner of Lands & 3 Others** [1997] eKLR, the Court of Appeal emphatically held that where land has already been allocated and a title issued, any subsequent allocation or issuance of title over the same parcel is nullity *ab initio*. See also the case of **James Joram Nyaga & Another v The Hon. Attorney General & Another** [2007] eKLR.

49. The above position is anchored in the provisions of **Section 3 of the (now repealed) Government Lands Act, Cap 280**, which vested the Commissioner of Lands with powers of allocation but did not permit alienation of land already lawfully set aside for a defined public purpose. **Further, Article 62(1)(a) and (d) of the Constitution of Kenya, 2010** affirms that public land includes all land lawfully set aside for public use and government institutions, and such land is held in trust for the people and is not subject to arbitrary allocation. Any purported allocation of such land, therefore, is ultra vires, null, and incapable of conferring proprietary rights.

50. This Court finds it difficult to reconcile the Plaintiff's assertions regarding the position of the first lessees, who, on the one hand, were issued with a certificate of lease over the suit parcel, yet on the other hand, the same parcel of land continued to host a government house which remained under the use and control of the government. Indeed, the Plaintiff himself conceded that he was required to make a formal application to be allocated the house in question. This oddness raises a pertinent legal question as to what proprietary interest, if any, the

certificate of lease conferred upon the said lessees when the land and the developments thereon remained firmly under government occupation and control. The essence of a leasehold interest is the assignment of exclusive possession and enjoyment of land for a defined term, subject to the terms of the lease. Where the government continued to exercise dominion over the land and its developments, it becomes evident that the certificate of lease issued could not have been intended to, nor did it in fact, vest the lessees with effective proprietary rights

51. Justice Mbogholi Msagha in the case of Paul Nderitu Ndung'u & 20 Others -V- Pashito Holdings Limited & Another (Nairobi HCCC No. 3063 of 1996 referred to in the case of Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others [2019] eKLR held that the Commissioner of Lands had no legal authority to allocate two pieces of land which had been reserved for a Police Post and a Water Reservoir as they had already been alienated. He further stated that ***“Under the Government Lands Act (Cap 280, Laws of Kenya) the Commissioner of Lands can only make grants or dispositions of any estates, interests or rights in over unalienated government land. (Section 3). In the instant case, the two parcels of land among others had been alienated and designated for particular purposes. It was not open for the Commissioner of Lands to re-alienate the same. So the alienated was void ab initio.”***

52. The evidence points to a situation where the allocation was made in disregard of the fact that the land had already been alienated and reserved for government housing. Such an allocation was not only

irregular but also contrary to established principles of land law and public policy. The Plaintiff further argued that the initial lessees, Charles and Scolastica Nyasani, were not parties to these proceedings, and that their exclusion ought to weigh in favour of his claim. On that, this Court is not persuaded. The absence of the said lessees does not alter the legal position, as the principle of '*nemo dat quod non habet*', that one cannot give what one does not have. Having already found that the certificate of lease in their favour was acquired irregularly, it follows that they could not pass any valid proprietary interest to the Plaintiff, and no rights could lawfully accrue to him under such a transaction

53. Moreover, if indeed the Plaintiff believed that the participation of the said lessees was essential to the just determination of this dispute, the obligation lay squarely upon him, as the party moving the Court, to take the necessary steps to enjoin them. The burden of ensuring that all necessary parties were properly before the Court cannot be shifted onto the Defendants, who have merely defended the suit and filed a counterclaim.

54. The Plaintiff further asserted that Charles and Scolastica Nyasani subsequently validated the allocation of the suit property pursuant to a government policy on the disposal of non-strategic government-owned houses. He relied on a ministerial circular dated 18/08/2004 which advised that the sale of such houses would commence in Nairobi before being rolled out to the districts. The Ministry thereafter issued further circulars dated 24/01/2007 and 02/03/2007 advertising the sale of

district houses. The latter circular expressly listed the subject house as one of the properties available for purchase.

55. From the evidence, however, it emerges that the Ministry, through yet another circular dated 28/07/2008, and a press statement published in the *Standard Newspaper* of 30/07/2008, cancelled the said sale. The reason given was that government sought to ensure that highly valuable public land remained in its hands for redevelopment and continued use in serving public servants. Applicants for the district houses advertised in January 2007 were expressly advised to seek refunds of the 10% deposits that had been paid. The cancellation circular was categorical that its effect did not extend to non-strategic houses that had already been sold prior to January 2007, nor to newly developed units in Nairobi that had been sold to civil servants.

56. It is on record that PW2 paid his deposit of Kshs.100,000/= on 23/02/2007, and subsequently remitted Kshs.560,000/= on 14/04/2009 as the balance of the purchase price, described as a “validation fee,” pursuant to a letter dated 16/12/2008 authored by one S. M. Kamanja on behalf of the Permanent Secretary, Ministry of Housing. That letter purported to authorize the payment of the said balance. The Plaintiff also relied on letters dated 19/11/2007 and 12/02/2008 which directed District Building Surveyors and Maintenance Officers to continue receiving validation fees, suggesting that the sale of district non-strategic houses was ongoing at the time.

57. Nevertheless, it is imperative to note that there is no evidence that the cancellation circular of 28/07/2008 or the accompanying press notice of 30/07/2008 were ever revoked, recalled, or otherwise rendered inoperative. On the contrary, those circulars remained valid and continued to direct that all deposits paid in respect of the district houses advertised in January 2007 be refunded. The Plaintiff's payment of the balance of the purchase price in April 2009 was therefore made against the backdrop of a subsisting cancellation directive.

58. Further, the circular of 28/07/2008 was authored by the Permanent Secretary, Ministry of Housing, who was the chief accounting and policy officer of the Ministry, and was duly followed by a press statement to the same effect. The later letters emanated from officers acting in a representative or administrative capacity within the Ministry. There is insufficient basis for this court to conclude that subordinate officers can, by way of administrative correspondence, override or nullify a formal ministerial directive. In my considered view, such a cancellation could only have been reversed or superseded by a subsequent circular of equal authority, emanating from the same office or from an authority of higher jurisdiction. No such countermanding circular was produced in evidence.

59. Accordingly, this Court finds that the Plaintiff's reliance on subsequent letters and acceptance of payments cannot cure the illegality created by the cancellation of the sale. The cancellation circular of 28/07/2008 remained the operative instrument, and unless and until it was expressly withdrawn or replaced by another circular of

the same or higher authority, the purported sale and validation process remained legally ineffective.

60. Ultimately, having found that the certificate of lease herein was acquired irregularly, this Court sees no basis upon which to sustain the Plaintiff's claim. The law is clear that nothing can flow from an illegality. As was stated in **Macfoy v United Africa Co. Ltd** [1961] 3 All ER 1169, one cannot place something on nothing and expect it to stand. Equally, this Court cannot legitimize a title that was irregularly issued; such a title must inevitably fail. In this regard, the Court is guided by the pronouncement of the Supreme Court of Kenya in **Dina Management Limited v County Government of Mombasa & 5 Others**; SC Petition No. 8 (E010) of 2021, where it was held:

"Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the right as not extending to any property that has been found to have been unlawfully acquired. Having found that the first registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of the Constitution."

Whether the Plaintiff is entitled to the prayers sought in the plaint.

61. Flowing from my finding as above, the Plaintiff is not entitled to the prayers sought in her claim.

Whether the Defendant is entitled to the prayers sought in the counterclaim.

62. Flowing from my finding as above, the Defendant is entitled to the prayers sought in their counterclaim which evolve around cancellation and surrender of the suit property. The Defendants also sought for general damages. However, apart from being pleaded, no evidence was led to quantify or justify the claim for damages. Consequently, the prayer for general damages fails.

Who should bear the costs of the suit.

63. On the question of costs, the guiding principle is encapsulated in **Section 27 of the Civil Procedure Act**, which provides that costs follow the event unless the Court, for good cause, orders otherwise. The Defendants herein are the successful party and are therefore entitled to costs of the suit and the counter-claim.

64. Accordingly, the following are the final disposal orders of the court;-

- a) **A Declaration be and is hereby issued that the Certificate of Lease registered on 18th October, 2002 in favour of Charles Osiomi Nyasani and Scolastica Nyakerario over parcel of land known as BUNGOMA TOWNSHIP/169 was fraudulently obtained, is null and void, and incapable of conferring any interest to the Plaintiff and/or any other person whatsoever.**
- b) **A Declaration is hereby issued that the lease registered on 24th October, 2016 in favour of the Plaintiff over the parcel of land known as BUNGOMA TOWNSHIP/169 was fraudulently obtained and is illegal, null and void ab initio.**
- c) **A declaration is hereby issued that the registration of all entries relating to the issuance of the Certificate of Lease issued on 24th**

October, 2016 to the Plaintiff in respect of BUNGOMA TOWNSHIP/169 be and are hereby cancelled.

- d) An order is hereby issued directing the Land Registrar, Bungoma Land Registry, to expunge from the records and/or rectify the register by cancellation of all entries relating to the Certificate of Lease purportedly issued to the Plaintiff on 24th October, 2016, together with all subsequent entries in respect of BUNGOMA TOWNSHIP/169.**
- e) An order of a permanent injunction be and is hereby issued restraining the Plaintiff, his agents, servants, employees, or assigns from subdividing, charging, trespassing upon, transferring, leasing, wasting, or in any other manner whatsoever dealing with the parcel of land known as BUNGOMA TOWNSHIP/169.**
- f) An order of eviction is hereby issued directing the Plaintiff, his servants, agents, or assigns to vacate Bungoma Township/169.**
- g) The costs of the Plaintiff's suit and the Counter-claim are awarded to the Defendant.**

65. It is so ordered.

DATED and SIGNED and DELIVERED at BUNGOMA this 09th day of October, 2025.



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HON.E.C CHERONO
ELC JUDGE

In the presence of;

- 1. Mr. Anwar for the plaintiff.

2. M/S Ayunga for the Defendant.

3. Bett C/A.

