REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. E033 OF 2023

–BETWEEN–

HARCHARAN SINGH SEHMI ..... 1ST APPELLANT

JASWARANA SEHMI .....2ND APPELLANT

–AND–

TARABANA COMPANY LIMITED.....1ST RESPONDENT

ROSPATECH LIMITED.....2ND RESPONDENT

CHIEF LAND REGISTRAR, NAIROBI.....3RD RESPONDENT

NATIONAL LAND COMMISSION..... 4TH RESPONDENT

INSPECTOR GENERAL OF POLICE..... 5TH RESPONDENT

ATTORNEY GENERAL.....6TH RESPONDENT

(Being an Appeal from the Judgment of the Court of Appeal at Nairobi (Asike-Makhandia, Nyamweya & Lesiit, JJ.A.) in Civil Appeal No. 463 of 2019 delivered on 8th October 2021)

Representation:

Mr. Mansur Issa, Ms. Julian Ndirangu, and Ms. Samuel Mbatai for the appellants *(Igeria & Ngugi Advocates)*

Mr. John Khayega Chivai for the 1st respondent
(Khayega Chivai & Co. Advocates)

Mr. Allan Kamau for the 3rd , 5th and 6th respondents
(Office of the Attorney General)

No appearance for the 2nd and 4th respondents

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This is a petition of appeal dated 23rd November 2023 and filed on 27th November 2023, pursuant to its certification by the Court of Appeal *(Omondi, Laibuta & Gachoka, JJ.A*) in ***Civil Appeal (Application) No. 463 of 2019*** as one involving matters of general public importance under Article 163(4)(b) of the Constitution. The appellants are challenging the entire Judgment and orders of the Court of Appeal *(Asike-Makhandia, Nyamweya & Lesiit, JJ.A.)* **in Civil Appeal No. 463 of 2019** delivered on 8th October 2021.

B. FACTUAL BACKGROUND

[2] The appellants, alongside the late Harcharan Singh Sehmi (whose case abated at the Court of Appeal following his passing on in 2019), were the registered proprietors of L.R. No. 209/2759/9 (I.R. 6477), situated in the Ngara area of Nairobi (hereinafter referred to as the ***"suit property"***). They had acquired the

property in 1968 from Elizabeth Ann Maria Estreta Rodrigues for a consideration of Kshs. 25,000/- and were duly registered as tenants in common. The tenure of the property was a leasehold for a term of fifty-nine (59) years commencing on 1st October 1942 and was scheduled to expire or for extension on the 1st October 2001. However, in October 2014, they were forcibly evicted from the property by the 1st and 2nd respondents who laid claim on the property under a separate title bearing a new I.R. number, L.R. No. 209/2759/9 **(I.R 12263).**

C. LITIGATION HISTORY

(i) Proceedings at the Environment and Land Court (ELC)

[3] Against this backdrop, the appellants initiated ***ELC Case No. 1311 of 2014*** against the 2nd respondent seeking injunctive relief to restrain the latter or its agents from trespassing or encroaching on the suit property, as well as orders for the 2nd respondent's eviction. Subsequently, the 1st respondent sought and was granted leave to join the proceedings, asserting its claim as the registered proprietor. Upon being joined, the 1st respondent was designated as the 2nd defendant. The appellants later filed an application seeking leave to amend their plaint, which was duly allowed, culminating in the filing of an amended plaint on 15th February 2017.

[4] The appellants contended that prior to the expiration of the lease for the suit property, they had applied for its extension. While they did not produce the actual application to substantiate their claim, they presented three pivotal documents: a letter dated 13th July 2001 from the Commissioner of Lands to the Director of City Planning and the Director of Survey, seeking any objections to the proposed lease extension; and two letters indicating no objection to the extension, one from the Director of Physical Planning to the Commissioner of Lands dated 17th December 2001 and another from the Director of Survey to the Commissioner of Lands dated 15th November 2007.

[5] The appellants further submitted that in 2009, the Director of Physical Planning informed Two Ems and Associates, a firm they had engaged to facilitate the lease extension process, that the extension had been unconditionally recommended for approval. Despite these approvals, they contended that the Commissioner of Lands issued a subsequent letter to the Director of Physical Planning and the Director of Survey, once again seeking confirmation of any objections to the extension. In response, the Director of Physical Planning reaffirmed the absence of objections through a letter dated 22nd October 2009. Nevertheless and despite those unequivocal confirmations, the Commissioner of Lands issued yet another letter on 22nd March 2011 to the Director of Physical Planning and the Director of Survey, once more seeking their comments on the extension of the lease.

[6] The appellants asserted that, while pursuing the extension of their lease, they enjoyed quiet possession of the suit property until agents of the 2nd respondent approached them, claiming that the latter was the rightful registered proprietor of the said property. In response to these allegations and attempts to interfere with their possession, the appellants reported the matter to the Director of Criminal Investigations on 4th March 2011. They maintained that they continued to occupy the property peacefully until 2nd October 2014 when they were forcibly evicted by persons representing the 1st respondent. During the eviction, the 1st and 2nd respondents purported to rely on a title to the suit property as evidence of ownership. However, the appellants contended that the 2nd respondent's title had been fraudulently, unlawfully, and illegally acquired.

[7] The appellants therefore sought 12 prayers summarised as follows;

(a) *Permanent injunction restraining the 1st and 2nd respondents or their agents from interfering or dealing with the suit property;*

(b) *Order that the proprietorship section of the entry of the register of the suit property known as L.R. 209/2759/9(I.R. 12263) in favour of the*

1st and 2nd respondents was fraudulent, illegal, unlawful, null and void and the same be cancelled and the same be ordered to be registered to read L.R. No. 209/2759/9 (I.R. No. 6477) in favour of the appellants;

(c) *Eviction of the 1st and 2nd respondents;*

(d) *Orders that the appellants were the rightful owners of the suit property;*

(e) *Orders giving the appellants immediate vacant possession and occupation of the suit property under the protection and supervision of the OCS Pangani Police Station, Nairobi;*

(f) *General damages against the 1st and 2nd respondents for the loss of use, income and unlawful occupation and eviction;*

(g) *Exemplary and punitive damages against the 1st and 2nd respondents for their illegal and wrongful acts which had harmed the appellants;*

(h) *Special damages against the 1st t and 2nd respondents for loss of use of the suit property at a rate of Kshs 1,000,000.00 per month from 2nd October 2014 until payment in full;*

(i) *Special damages for the demolished house and business items lost during the unlawful eviction;*

(j) *Interest on (f), (g), (h), and (i);*

(k) *Costs of the suit; and*

(l) *Any other relief the court deems fit to grant.*

[8] In its defence, the 2nd respondent denied any unlawful acquisition of the suit property, asserting that the appellants' lease had expired on 1st October 2001, and the property had therefore reverted to the Government of Kenya. The 2nd respondent also claimed that it applied for and was lawfully allocated the property in 2010. It also denied evicting the appellants, contending that their removal was carried out lawfully by the then City Council of Nairobi in compliance with the Physical Planning Act. The 2nd respondent further stated that it had transferred the

suit property to the 1st respondent and categorically denied any involvement in fraud or collusion, as alleged by the appellants.

[9] The 1st respondent in response filed an amended defence and counterclaim. It also denied the appellants' assertions and averred that it was a purchaser for value having acquired the suit property from the 2nd respondent for value and without any notice of fraud. The 1st respondent also argued that it had conducted due diligence and ascertained that the appellants' lease had expired in 2001 while the 2nd respondent was registered as the proprietor of the suit property in 2009. The 1st respondent further averred that it had secured financing using the suit property, developed it by erecting a storied commercial and residential building, and applied the proceeds from the development to service the loan facility. Furthermore, the 1st respondent argued that the appellants had continually harassed and interfered with its quiet possession. Consequently, it sought the following prayers:

(a) *A declaration that the 2nd defendant (1st respondent) is the rightful and legal owner of the suit property;*

(b) *An order of permanent injunction restraining the plaintiffs (appellants) from interfering with the 2nd defendant's (1st respondent) quiet possession of the suit property; and*

(c) *Costs of these proceedings.*

[10] The 3rd, 5th and 6th respondents also denied the appellants' claim. Instead, they argued that there was no collusion or fraud on their part and the suit property was allocated to the 2nd respondent upon the expiry of the appellants' lease.

[11] In the Judgment delivered on 22nd July 2019, the ELC *(K. Bor, J.)* identified two issues for determination; whether the appellants' lease over the suit property had been renewed and whether the suit property was lawfully allocated to the 2nd respondent.

[12] On *whether the appellants' lease over the suit property had been renewed*, the trial court found that the appellants had commenced the process of extending their lease over the suit property before the lease expired. The court also found that the appellants had continued to occupy the suit property from 2001 when their lease expired until 2010, when the plot was allocated to the 2nd respondent. Based on these facts, the court determined that the appellants had a legitimate expectation that their lease would be extended. The court also observed that the 2nd respondent did not take possession until 2014 when it evicted the appellants from the suit property. Notably, during this period, the Commissioner of Lands raised no concerns regarding the appellants' alleged failure to develop the property or any breach of the lease terms that might have justified denying the extension of lease.

[13] The court also concluded that the developments on the suit property, were of a permanent nature. The court, in doing so, placed reliance on the unchallenged evidence to the effect that bulldozers were employed to demolish structures on the land. It reasoned that such machinery would not have been deployed if the structures were merely temporary, as the respondents had claimed. Additionally, the court observed that the 2nd respondent had sold the land to the 1st respondent without undertaking any development. It therefore characterized the 2nd respondent's director as a land broker with no genuine intention of utilizing the property for the purposes outlined in the grant.

[14] On *whether the suit property was lawfully allocated to the 2nd respondent*, the court found that the allocation of the suit property to the 2nd respondent by the Commissioner of Lands had not adhered to the prescribed procedure for allocating town plots under the Government Lands Act (now repealed). Furthermore, no explanation was provided for the discrepancy in the purchase price, which was

stated as Kshs. 12,500,000/- in the transfer documents, despite the sale agreement indicating Kshs. 24,000,000/-. The court concluded that this understatement of the consideration was a deliberate attempt to evade paying the higher stamp duty applicable to the transfer. As such, the misrepresentation of the purchase price in the transfer from the 2nd respondent to the 1st respondent constituted fraud, as it was intended to evade tax obligations.

[15] It was the trial court's further finding that there was no evidence to the effect that the Commissioner of Lands had admonished the appellants for breach of any conditions of the lease or communicated that the lease would not be extended. According to the learned trial Judge, the Director of Survey and Director of Physical Planning having not received any objection to the extension of the appellants' lease further confirmed that the process of extending the lease had been initiated in good time and was still ongoing long after the lease had expired. As a result, the court determined that the appellants had a legitimate expectation that their lease would be extended. The court came to the conclusion on this point that the allocation of the suit property to the 2nd respondent was unlawful.

[16] Consequently, the court allowed the appellants' claim, nullifying the allocation of the suit property to the 2nd respondent and its subsequent transfer to the 1st respondent, thereby restoring ownership to the appellants. It further issued a permanent injunction restraining the 2nd respondent, its agents, servants, tenants, or any persons claiming under it, from occupying, trespassing, entering, using, alienating, charging, encroaching upon, or otherwise interfering with the suit property. Additionally, the court directed that the proprietorship section of the land register for Plot Number 209/2759/9 (I.R. No. 6477) be amended to reflect the appellants as lessees upon their payment of the requisite registration and other fees. The 1st respondent was further instructed to ensure that the suit property was discharged within three months of the Judgment, enabling the 3rd respondent to

register the appellants as the lawful proprietors. The court also ordered that the appellants were to evict the 1st and 2nd respondents, along with their agents, servants, and tenants, from the suit property within three months of the Judgment, with the eviction to be carried out in strict compliance with the law.

[17] The court furthermore found that the appellants had not substantiated their claim for special damages of Kshs. 1,000,000/- per month as *mesne* profits and accordingly declined to grant this relief. However, the court deemed an award of general damages amounting to Kshs. 25,000,000/- to be reasonable compensation for the loss suffered by the appellants due to the demolition of their structures and destruction of their equipment by agents of the 2nd respondent. This sum was awarded to the appellants against the 2nd respondent.

[18] In addition to the above findings and orders, the court determined that the 1st respondent's title, derived from the 2nd respondent's title, which had been successfully contested, was invalid. As a result, the 1st respondent's counterclaim was dismissed for lack of merit, with no order as to costs. The appellants were awarded the costs of the suit, to be borne by the 2nd respondent.

(ii) Proceedings at the Court of Appeal

[19] Dissatisfied with the Judgment of the ELC, the 1st respondent filed ***Civil Appeal No. 463 of 2019***, premised on 10 grounds as set out in the memorandum of appeal, *inter alia* that the learned Judge erred in fact and in law in:

i. *Misapprehending the 1st respondent's defence to the suit and thereby reached findings that took away the 1st respondent's property without compensation, and abrogated the 1st respondent's right under the Constitution of Kenya;*

ii. *Failing to find and hold that the 1st respondent was not involved in the process leading to the acquisition of title by the 2nd respondent and was therefore a bona fide purchaser for value without notice of any defect in the title;*
iii. *Failing to find and hold that the 1st respondent's title was indefeasible under Section 26(1) (a) of the Land Registration Act, No. 3 of 2012;*
iv. *Ordering that the appellants be granted a lease to the property, and in so doing, acted without jurisdiction and usurped the role of the National Land Commission (4th respondent) as prescribed under the Land Act, No. 6 of 2012;*
v. *Allocating the appellants rights of ownership that are unsupported by law;*
vi. *Unilaterally attempting to rewrite the contracts between the 1st respondent and its financier, Prime Bank Limited as captured in the Letter of Offer, Charge, and Further Charge, to the detriment of both the 1st respondent and the said financier;*
vii. *Failing to appreciate or consider very succinct legal points, which were pointed out, and supported by authorities that were binding upon trial court, and some that should have persuaded the court;*
viii. *Granting orders for injunction against the 1st respondent, which amounted to a court of equity acting in vain because the 1st respondent was in possession of the property and had charged it to a financier;*
ix. *Dismissing the 1st respondent's Counterclaim; and*
x. *Arriving at a decision that had no legal basis, and which amounted to a travesty of justice against the 1st respondent.*

[20] The 1st respondent contended that it was a *bona fide* purchaser for value without notice and had no involvement in any alleged fraud that deprived the appellants of ownership of the suit property; that it acquired the property from the

2nd respondent, who is the registered owner, and remained in possession, having secured a loan of Kshs. 61,000,000/- with Prime Bank Ltd, which was discharged after constructing a storied building on the property. It argued that the appellants, as former lessees of the Government of Kenya, did not have their lease renewed upon its lapse, leading to the reversion of the property to the Government, which subsequently allocated the suit property to the 2nd respondent through a letter of allotment dated 30th October 2009 and issued a title thereto. The 1st respondent further argued that the court overstepped its mandate by divesting the property from it and vesting it in the appellants. It asserted that its title was indefeasible under Section 26(1)(a) of the Land Registration Act and protected by Article 40 of the Constitution. Additionally, the order to discharge the property within three months was described as inequitable, impractical, and unjust, effectively rewriting the contract between the 1st respondent and its financier, who was not a party to the suit. Lastly, it was argued that injunction orders could not be issued against a proprietor in possession, as this would amount to equity acting in vain.

[21] The appellants, on their part, argued that prior to the expiration of their lease, they duly exercised their pre-emptive rights by applying for its extension on 13th July 2001. This application was accepted through a letter dated 17th December 2001 from the Ministry of Lands and the Director of Physical Planning. Consequently, they contended that the suit property was not available for re-allotment to the 2nd respondent. The appellants in that regard contended that the learned Judge rightly determined that, despite the unavailability of the suit property's file, the reference number corresponded with that of the 2nd respondent's letter of allotment, indicating that land officials were seized of the matter relating to the extension of their lease over the suit property. Furthermore, they contended that at the time of the alleged allotment to the 2nd respondent, the appellants had not surrendered the original title deed and continued to pay rates

and rent, therefore the 2nd respondent had no property it could sell to the 1st respondent.

[22] They further argued that the 1st respondent could not be considered a *bona fide* purchaser for value without notice, citing inconsistencies between the sale agreement (Kshs. 24,000,000/-) and the transfer document (Kshs. 12,500,000/-) and noting that the purchase occurred while the appellants were in possession. They added that the 1st respondent failed to clarify how it became aware of the property to apply for the lease, yet a witness who testified in support of the 2nd respondent's case stated that the individual who purportedly allotted the property to the 2nd respondent denied doing so. Lastly, the appellants maintained that the learned trial Judge possessed the power to cancel the title, asserting that no property was taken from the 1st respondent, as it had no legitimate claim to it in the first place. The 2nd, 3rd, 5th and 6th respondents on their part supported the appeal.

[23] In a Judgment delivered on 8th October 2021, the Court of Appeal (*Makhandia, Nyamweya and Lesiit, JJ. A*), identified the following three issues for determination; whether the 1st respondent was a *bona fide* purchaser for value without notice; whether the trial Judge had powers to divest the 1st respondent's ownership rights to the suit property and vest them in the appellants; and whether the 1st respondent proved its counterclaim to the required standard.

[24] On *whether the 1st respondent was a bona fide purchaser*, the appellate court answered the question in the affirmative. The court in doing so, found that though there was sufficient evidence that the appellants had applied for the renewal of their lease, and that the same was received and acted upon by the Commissioner of Lands, there was no evidence on record that the lease was renewed or extended. Consequently, as the Government did not respond to the application for extension, the Court of Appeal held that the lease automatically reverted to the Government

upon its expiry . The court further found that, by the time the suit property was being allocated to the 1st respondent, the lease to the appellants had already expired. The court consequently held that the 1st respondent was a *bona fide* purchaser for value without notice of any fraud, illegalities, or irregularities in the acquisition of the property as there was no evidence to suggest that the 1st respondent had participated in any fraudulent dealings involving the property prior to its acquisition from the 2nd respondent. The court further held that the 1st respondent's title was protected under Section 23 of the Registration of Titles Act (now repealed), now re-enacted as Section 26 (1) (a) and (b) of the Land Registration Act Cap 300. It therefore found that the 1st respondent's title was *prima facie* evidence that the 1st respondent was an absolute and indefeasible proprietor of the suit property.

[25] The appellate court, however, cautioned and emphasized that even though there was nothing to prevent the Government from allocating the suit property to another party, any allotment must have followed due process in accordance with the Government Lands Act under Section 9 (allocation is by a Commissioner of Lands if the land is not required for public purpose); Section 12 (by public auction, unless the President otherwise orders); Section 13 (the place and time of auction must be gazetted not less than four weeks or more than three months before the day of the sale) and Section 14 (terms of the sale must be read out to the bidders before commencement of the auction).

[26] On the second issue, *whether the trial Judge had powers to divest the 1st respondent's ownership rights to the suit property and vest them in the appellants,* the Court of Appeal found that the 1st respondent's title was protected under Section 26 of the Land Registration Act and therefore held that the trial court had no power to divest the 1st respondent's ownership of the suit property and to vest it on any party including the appellants, without evidence of the 1st

respondent's involvement in any illegality. The court however noted that, what the appellants lost was not the suit property as the lease had expired and reverted to the Government. Rather, the appellants had lost the structures or developments on the suit property as well as machinery and other property at the time their lease expired. It further noted that the trial court had considered this loss and awarded them damages and costs. However, since there was no counter or cross-appeal on this aspect of the appeal, the Court of Appeal left the issue at that and without making any specific finding on it.

[27] As to *whether the counterclaim was proved*, the appellate court found that while the 1st respondent gave details of how it acquired the suit property, there was no reference in their entire testimony to any incident(s) of harassment suffered by the 1st respondent at the hands of the appellants whether directly or through proxy. In the end, the Court of Appeal allowed the appeal, set aside the Judgment of the trial court and awarded costs to the 1st respondent for both the appeal and the trial court.

(iii) Proceedings at the Supreme Court

[28] Unrelenting and upon certification by the Court of Appeal, the appellants filed the instant appeal. In certifying this appeal in the Ruling dated 10th November 2023, the Court of Appeal delineated three issues as involving matters of general public importance as follows;

> *"15. Having considered the issues raised,* ***we find that indeed, there is uncertainty in the law with regard to the concept of innocent purchaser for value and the indefeasibility of titles as is apparent in the various decisions cited by the parties.*** *This Court is alive to the fact that when this ruling was pending, the Supreme Court pronounced itself on the principle of*

innocent purchaser for value, where the land is not available for allocation in the first place. See ***Dina Management Ltd vs. County Government of Mombasa and Others,*** *Supreme Court Petition No. 8(E010) of 2021. We further note that the applicants have raised important issues that go beyond their case namely;* ***the question of legitimate expectation in the renewal of leases; whether an irregular allocation can create a genuine title; and whether an innocent purchaser's title can be challenged.***

16. ***In our considered view, these questions are not idle. They go beyond the interest of the applicants****. We also form the view that the determination of those issues by the Supreme Court would be of public good, they transcend the dispute between the applicants and the respondents. ….*" [Emphasis ours].

[29] The appeal is challenging the decision of the Court of Appeal on 12 grounds summarized as follows, the learned Judges erred in law in;

i. *Failing to determine the duty of the Government in the processing of applications for extension of leases and legitimate expectation of registered lessees in the renewal process;*
ii. *Holding that the failure by the Government to consider the application for renewal by the appellants and/or renewing the lease automatically meant the suit property reverted back to the Government;*
iii. *Holding that the suit property was available for allocation to the 2nd respondent despite the appellants' pending application for extension of lease;*
iv. *Holding that the suit property was available for allocation to a 3rd party despite the appellants' application for renewal of lease having*

been made before the expiry of the lease which had not been considered or processed in accordance with the law;

v. *Failing to consider whether the failure to consider the appellants' application for extension of lease violated the appellants' right to property as well as their right to fair administrative action guaranteed by Articles 40 and 47 of the Constitution respectively;*

vi. *Setting aside, the ELC Judgment despite making a finding that the 2nd respondent's allocation of the suit property was irregular as due process was not followed, thereby infringing on the appellants' right to property contrary to Article 40 of the Constitution;*

vii. *Finding that the concept of bona fide purchaser for value could be used as a defence by a party who had obtained a title irregularly, illegally, or through a corrupt scheme;*

viii. *Misinterpreting the provisions of Article 40 of the Constitution and Section 26 of the Land Registration Act on the concept of indefeasibility of titles and arriving at an erroneous decision in law;*

ix. *Holding that the 1st respondent was a bona fide purchaser for value and as a result arriving at a perverse decision in law;*

x. *Failing to find that an act by a purchaser to wilfully evade payment of stamp duty in a land purchase negates the argument of an innocent purchaser for value;*

xi. *Disregarding the impact of its decision on irregular allocation and acquisition of titles in Kenya; and*

xii. *Reversing the decision of the ELC and allowing the appeal.*

[30] Consequently, the appellants seek the following reliefs;

i. *The Judgment of the Court of Appeal dated 8th October 2021 be set aside and this Court do make the following orders;*

   a. *Allow the petition and reinstate the Judgment of the ELC dated and delivered on 22nd July 2019;*

   b. *A declaration that the appellants are entitled to the extension of lease over the suit property and the 3rd respondent be compelled*

to extend the lease in accordance with the Land Registration Act;

c. *A cancellation of title issued to the 1st respondent and an entry be made in the proprietorship section of the land register to reflect the appellants as the proprietors of the suit property or the new number after conversion of the title;*

d. *The structures and developments erected by the 1st respondent on the suit property be removed and demolished within ninety days of the Judgment of the Court under supervision by the 5th respondent;*

e. *All costs in relation to the removal of the structures be borne by the 1st, 2nd, 3rd, 5th and 6th respondents;*

ii. *Costs of the appeal and costs of the proceedings before the Court of Appeal and ELC be awarded to the appellants; and*

iii. *Any other orders or reliefs the Court may deem fit to grant.*

[31] In response, the 1st respondent filed a replying affidavit sworn on 11th December 2023 by Charles Kiri Thube, one of its directors, wherein it urged that the 1st respondent was an innocent purchaser for value who had not participated in any fraud allegedly perpetrated by the 2nd respondent. It contended that the appellants' lease expired, was not renewed, and therefore at the time of allocation to the 2nd respondent, the suit property had reverted to the Government. Furthermore, the 1st respondent argued that in any event, the appellants had failed to adduce evidence to the effect that they had indeed made an application for extension of lease.

[32] The 3rd, 5th, and 6th respondents also filed Grounds of Objection dated 26th January 2024 primarily agreeing with the Court of Appeal. They contended that the said decision is sound in law and principle, with the Court of Appeal properly interpreting the Constitution and relevant laws.

D. PARTIES' RESPECTIVE SUBMISSIONS

(i) Appellant's Case

[33] The appellants' submissions are dated 14th June 2024 and filed on even date. They submitted on all their grounds of appeal condensed into three thematic areas that can be delineated as follows for ease of summary; legitimate expectation in renewal of leases; unprocedural allocation of property to the 2nd respondent; and the doctrine of innocent purchaser for value.

[34] On the issue of *legitimate expectation in the renewal of leases (grounds (i to v)*, the appellants contended that for a party to rely on the principle of legitimate expectation, it must establish that it had an expectation in a public body retaining a long-standing practice; the expectation was reasonable and the presentation was one which the decision maker was competent to make. In support of this submission, the appellants cited the principles laid down by this Court in ***Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others*** [2015] KESC 15 (KLR).

[35] It was the appellants' case that they had made their application for extension before the expiry of their lease as acknowledged by the Commissioner of Lands vide a number of letters seeking comments on or objection to the application for extension. They also made reference to the letters from the Director of Physical Planning and the Director of Survey confirming that they had not received any objections to the application for extension of the lease. They further contended that if the Commissioner of Lands did not intend to renew the lease, he would not have sought the comments of the Director of Physical Planning and the Director of Survey. The appellants relied on the case of ***Philan Holdings Limited vs. Mabea & 3 Others*** (Environment & Land Case 443 of 2008) [2023] KEELC 20416 (KLR) as persuasive authority in support of their argument.

[36] Consequently, they urged that the appellants legitimately expected the Commissioner of Lands to renew their lease on grounds that it was a repeated and

regular practice under the Government Lands Act (now repealed) for the Commissioner of Lands to renew leases upon receipt of applications, and the long-standing process could not be withdrawn without due process or consultation. They cited the High Court decisions in ***Diana Kethi Kilonzo & Another vs. IEBC & 10 Others*** [2013] eKLR; ***Rajendra Sanghani & Another vs. Fairmile Investment Limited & Another*** [2021] eKLR; and ***Serah Mweru Muhu vs. Commissioner of Lands & 2 Others*** [2014] eKLR to buttress the principles on legitimate expectation and particularly that once a party establishes a proprietary interest in the suit property worth protection under the Constitution, there was a legitimate expectation that the lease could be extended. Moreover, it was their case that the Commissioner of Lands' inaction or omission amounted to a violation of their rights to fair administrative action protected under Article 47 of the Constitution.

[37] In any event, the appellants urged that they were entitled to pre-emptive rights in the event the Commissioner of Lands decided to allocate the suit property to another party. They relied on the decision by the ELC in ***Kenya Industrial Estates Limited vs. Anne Chepsiror & 5 Others*** [2015] eKLR to the effect that the Commissioner of Lands would not, in fair exercise of administrative authority, grant the lease to another person during the pendency of their application for renewal.

[38] On *whether an irregular/unprocedural allocation could pass a good title (grounds vi to ix)*, it was the appellants' case that the allocation of land within any township must be in accordance with the due process under the applicable law, namely, the Government Lands Act (now repealed). They argued that no proper title could therefore have passed since due process was not followed in allocating the lease to the 2nd respondent.

[39] In addition to the procedural flaws, the appellants further contended that the process of allocation of the suit property to the 2nd respondent was also unlawful

and irregular. To this end, they urged that the Land Officer who had signed the allotment letter not only lacked authority to do so, but had subsequently disowned the same. The appellants further submitted that the Deed Plan, the basis upon which the allotment was made to the 2nd respondent, had an endorsement "for extension of lease" as opposed to "a new allotment". It was argued that being the case, it was unreasonable for the Commissioner of Lands to grant the allotment to the 2nd respondent as opposed to the appellants who had a pending application for extension. In view of the foregoing, it was the appellants' case that the allocation to the 2nd respondent was unlawful as had been determined by both the trial court, and Court of Appeal.

[40] On *whether an innocent purchaser's title can be challenged,* the appellants contended that the 1st respondent was not an innocent purchaser deserving protection under the law as its directors knew of the allocation to the 2nd respondent at the time of its purchase from the 2nd respondent. Further, the appellants submitted that the subsequent transfer to the 1st respondent was marred with irregularities; the 1st respondent knew that the appellants were in possession of the suit property; and that the 1st and 2nd respondents understated the value of the suit property in the transfer to unlawfully evade stamp duty.

[41] As regards the *indefeasibility of title*, the appellants urged that if the process of the acquisition of title did not comply with the law, such a title cannot be indefeasible in line with Article 40(6) of the Constitution. They argued that protection under the said provision does not extend to any property that was unlawfully acquired. They cited this Court's decision, ***Dina Management Limited vs. County Government of Mombasa & 5 Others*** [2023] KESC 30 (KLR) ***(Dina Management Case)*** to the effect that, where the root of title to a property is successfully challenged, a party cannot benefit from the doctrine of a *bona fide* purchaser. The appellants therefore faulted the appellate court for holding that despite the unprocedural allocation of the suit property to the 2nd respondent, the 1st respondent's title to the suit property was indefeasible

and protected by law. The appellants therefore sought to have the petition allowed with costs.

(ii) 1st Respondent's Case

[42] The 1st respondent's undated submissions were filed on 1st July 2024. It addressed the Court on four issues, namely, *the jurisdiction of the Court*; whether the 1st respondent was a *bona fide purchaser* and therefore its title was indefeasible; whether the appellants had a *legitimate expectation* to have their lease renewed; and whether an irregular allocation can create a *genuine title* protected under Article 40(6) of the Constitution.

[43] On the *Court's jurisdiction,* the 1st respondent argued that the appellants have preferred grounds of appeal outside the questions certified by the Court of Appeal and as a result the appeal does not meet the threshold for the exercise of this Court's jurisdiction under Article 163 (4) (b) of the Constitution. The 1st respondent also urged that contrary to the appellants' invitation, in the exercise of this Court's jurisdiction under Article 163 (4) (b), the Supreme Court cannot revisit factual findings by the superior courts below. They relied on this Court's decision in ***Mitu-bell Welfare Society vs. Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa*** *(Amicus Curiae)* [2021] KESC 34 (KLR).

[44] On w*hether the 1st respondent was a bona fide purchaser for value and its title indefeasible,* it was submitted that the 1st respondent acquired the suit property from the 2nd respondent in good faith and was unaware of any impropriety or fraud. Moreover, they argued that it conducted due diligence and it was clear that the 2nd respondent was the registered proprietor of the suit property having been allocated the same by the Government in 2009, following the expiry and non-extention of the appellants' lease. Consequently, the 1st respondent submitted that it is a *bona fide* purchaser for value without notice. They cited the High Court in ***Lawrence Mukiri vs. AG & 4 Others*** [2013] eKLR to persuade

the Court. Regarding the indefeasibility of title, the 1st respondent urged that the appellants had not placed before this Court, any Ruling or definitive finding, by either of the two superior courts, imputing fraudulent conduct on its part. As such, it submitted that its title is indefeasible under Section 23 of the Registration of Titles Act (now repealed).

[45] As regards *legitimate expectation,* the 1st respondent contended that the appellants had not demonstrated that their case was within the ambit of legitimate expectation as settled by this Court in ***Communications Authority of Kenya*** *(supra)*. They further urged that it was a requirement under the Registration of Titles Act (now repealed), that a lessee whose lease was due to expire, had a duty to make an application for extension. It was urged that, as the appellants did not furnish any proof of application for extension of their lease, an extension would not follow as a matter of course.

[46] Lastly, on *whether an irregular allocation can create a genuine title,* the 1st respondent submitted that it would be absurd to give constitutional recognition to illegalities, a position now settled in the ***Dina Management Case*** *(Supra)*. However, the 1st respondent maintained that the foregoing decision was not applicable in this appeal on grounds that the 2nd respondent's title had not been irregularly procured. They urged in that regard that, at the time of its allocation, the suit property was Government land, having reverted upon expiration of the appellants' lease. They also emphasized that this position was supported by the 3rd, 5th, and 6th respondents and so its position on the issue should be sustained.

(iii) 3rd, 5th and 6th Respondent's Case

[47] The 3rd, 5th, and 6th respondents filed their submissions dated 28th June 2024 on 20th September 2024, addressing the Court on three main issues: (i) the *ownership status* of the suit property between 1st October 2001 and 30th October 2009; (ii) whether the Government was *legally and factually estopped from*

allotting the suit property to the 2nd respondent, subject to the finding on the first issue; and (iii) whether the procedure *for allotting the suit property to the 2nd respondent was open for consideration before the superior courts*, and whether the appellant had the *locus standi* to challenge the validity of the allotment and subsequent sale of the suit property to the 1st respondent.

[48] On the issue of ownership, the above respondents urged the Court to consider the unchallenged evidence presented before the trial court and the Court of Appeal. It was submitted that when the appellants purchased the suit property in 1968, they were granted a lease for 59 years, effective from 1st October 1942, expiring on 1st October 2001. It was contended that the appellants applied for an extension of the lease on 13th July 2001 before its expiration, but this application was not acted upon, and the property was subsequently allotted to the 2nd respondent on 30th October 2009. The Attorney General submitted that the legal question revolved around the ownership status between 1st October 2001 and 30th October 2009, when the property was allotted to the 2nd respondent.

[49] It was submitted that, according to Section 100 of the Government Lands Act (now repealed), ownership of Government land only has a legal effect if an extension of the lease is registered. The respondents thus argued that, since there was no extension or registration of a new lease, the suit property reverted to the Government by operation of law. They further noted that the appellants did not challenge the ownership of the property between the expiry of their lease on 1st October 2001 and the allotment of the property to the 2nd respondent on 30th October 2009.

[50] On whether the Government was estopped from allotting the property to the 2nd respondent, the Attorney General argued that the appellants failed to establish legitimate expectation. They relied on the case of ***Communications Authority of Kenya Case*** *(supra)*, asserting that the appellants did not prove any clear, unambiguous promise or commitment from the Commissioner of Lands that the

lease would be renewed, nor did they show that their expectation was reasonable and legally supported.

[51] The respondents further contended that, during the intervening period, the suit property had reverted to the Government, and the appellants' continued occupation without permission, made them trespassers under Sections 40(1) and 142 of the Government Lands Act (now repealed). They cited ***Park Towers Ltd vs. John Mithamo Njika & 7 Others*** [2014] eKLR, to make the point that trespass to land is actionable *per se*, without requiring proof of damage.

[52] Additionally, it was argued that the appellants failed to take any proactive measures to ensure their lease was renewed during the intervening period. Despite having several options, such as filing a suit for specific performance or lease renewal before or immediately after the expiry, the appellants also took no action and waited for over 13 years before filing the suit in 2014. Thus, they could not rely on their application that was not acted upon to claim the property beyond the lease period.

[53] The Office of the Attorney General on their part acknowledged that the 2nd respondent should have exercised due diligence, as required by ***Dina Management Limited*** *(supra)* and ***Torino Enterprises Limited vs. Attorney General*** [2023] KESC 79 (KLR). However, they argued that the failure to do so did not affect the 2nd respondent's interest, as due diligence would have revealed that the lease had already expired. Further, the presence of a building on the property did not in and of itself, mean that there would be an automatic extension of the lease, as the Government had the discretion to extend or decline to extend the lease, under Section 71 of the Government Lands Act (now repealed), they cited ***Embakasi Properties Limited & Another vs. Commissioner of Lands & Another*** [2019] eKLR; in support of their submission.

[54] Regarding the issue of fraud and compliance, the respondents asserted that once the appellants' ownership was extinguished upon expiry of their lease, the

case became one of personal interest rather than public interest litigation. They thus argued, that under the doctrine of privity of contract, only parties to a contract may take action premised on such a contact. Refering to paragraphs 7 to 10 of the appellants' amended plaint, the respondents argued that the said paragraphs had mainly focused on trespass and fraudulent acquisition of the suit property, as opposed to the allotment process itself. Thus, in their view, the issue of allotment was irrelevant to the pleadings.

[55] The above respondents furthermore argued that since parties are bound by their pleadings, any evidence deviating from the pleadings must be rejected. They relied on the case of ***IEBC & Another vs. Stephen Mutinda Mule & 3 Others*** [2014] eKLR by the Court of Appeal and the Supreme Court's decision in ***Odinga & Another vs. Independent Electoral and Boundaries Commission & 2 Others; Aukot & Another (Interested Parties); Attorney General & Another*** *(Amicus Curiae)* [2017] KESC 42 (KLR), to urge that paragraphs 45 to 66 of the Petition of Appeal were legally unsustainable.

E. ANALYSIS AND DETERMINATION

[56] This appeal having been certified as one involving matters of general public importance by the Court of Appeal, and guided by the language of the appellate court at paragraph 28 in so certifying, we have formulated the following issues for determination:

1. ***What is the meaning, scope and extent of applicability of the doctrine of*** *Bona fide/Innocent Purchaser for value without Notice?*
2. ***Whether the doctrine of*** *Bona fide/ Innocent Purchser for Value Without Notice* ***protects a purchaser of an illegally/irregularly allocated title over Public Land.***

3. ***To what extent, if at all, is the doctrine of*** *Legitimate Expectation* ***applicable to the renewal of leases over public land?***

(i) ***Meaning, Scope and Extent of*** *Bona fide/Innocent Purchaser for Value*

[57] We consider it necessary to clarify and restate the doctrine of "*innocent purchaser for value*" in view of the Court of Appeal's pronouncement in certifying this appeal as one involving matters of general public importance, when it stated thus:

> *"Having considered the issues raised, we find that indeed,* ***there is uncertainty in the law with regard to the concept of innocent purchaser for value*** *and the indefeasibility of titles as is apparent in the various decisions cited by the parties."* [Emphasis ours].

[58] It is a fundamental principle of the law of property in land that a purchase of a legal estate for value without notice is an absolute, unqualified and unanswerable defence against the claims of any prior equitable owner or encumbrancer. The onus of proof however lies upon the person claiming to be a *bona fide* purchaser. Three main ingredients must be present for a claimant to mount a successful defence based on the doctrine. These are*, innocence, purchase for value*, and *a legal estate.*

[59] The element of *innocence* means that the purchaser must act in good faith. His conduct must not raise any doubt as to whether indeed, he did not have any notice or knowledge as to the existence of a rival interest in the suit land. If for example, it comes to light that during the process of purchase, the claimant engaged in conduct that was unconscionable in the eyes of equity, such conduct would weaken his claim of innocence as to the existence of a rival interest. The element of innocence also connotes the exercise of diligence expected of any

reasonable purchaser. The claimant must demonstrate that he acted diligently and conducted a reasonable inquiry into the status of the estate or land that he sought to purchase.

[60] In ***Torino Enterprises Limited vs. Attorney General*** (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR), this Court held that an innocent purchaser for value denotes a purchaser who exercised due diligence, which would include, but is not limited to, inspecting the suit property. It explained further as follows;

> *"64. What about the argument to the effect that the appellant was an innocent purchaser for value without notice? It is obvious by now that such argument cannot hold in view of our pronouncements regarding the transactions between Renton and the appellant. … there is evidence on record in the form of correspondence and minutes, confirming that DoD had been granted access by the defunct municipal council and had taken possession of, and erected public infrastructure upon the suit property before the purported purchase…. Further, it is on record that the Ministry of Lands and Settlement was monitoring excision activities by NCC to ensure that the portion occupied by DoD was not affected….* ***Therefore, if the appellant was a diligent purchaser, it ought to have at least known of this fact. An innocent purchaser for value would also denote one was aware of what they were purchasing by inspecting the suit premises. This takes us to the question of whether the appellant had visited the suit premises and if so, what was its impression of the military installations on the suit premises? The fact that the suit land was occupied must have sounded a warning of "buyer be aware" to the appellant. We therefore find that it was***

not an innocent purchaser for value entitled to orders for restoration or compensation" [Emphasis added].

[61] *Purchase for value* means that *consideration in money* or *money's worth* was paid by the claimant in return for the land. The purchaser must actually pay all the money before receiving notice of the exsistence of the equitable interest over the suit land. Mere execution of the instrument of conveyance of the legal estate before notice is received without payment of money, will not avail to the claimant the defence of *innocent purchaser*. A person who takes land without giving value in exchange must take it with all its burdens, equitable as well as legal. Even a person who has given value will be bound if before he obtained the land, he knew of the existence of equitable interest.

[62] For our purposes, the *purchase* must be in reference to *a legal estate* ***vis a vis*** *an equitable interest* in the suit land. In other words, the contending interests must be *a legal estate* and *an equitable interest* in the land. Fully stated therefore, the doctrine means that *an innocent purchaser of a legal estate in land without notice of an equitable interest in the said land, takes free from the encumbrance of the latter interest*. Say for example, x holds land in trust on behalf of y, the legal estate vests in x, while the equitable interest vests in y. Should z purchase the land from x without notice of the trust in favour of y, then he would aquire the land free from the encumbrance of y's interest. Of course the scenario would be different were the contestation be between *an equitable interest* and *a mere equity*.

[63] The doctrine is a classic example of the time hallowed maxim; "*equity follows the law"*. And so aptly stated, legal rights are good against all the world; equitable rights are good against all persons except a *bona fide* purchaser of a legal estate for value without notice. It is worth emphasizing that the *innocent purchaser doctrine* only protects the purchaser against those basing their claims upon an equitable

interest in the suit land [see MEGARRY; *The Law of Real Property; 6th* Ed. Pp 138-150]

[64] Having clarified the meaning, nature, and applicability of the *innocent purchaser doctrine,* we must now consider whether and to what extent if at all, the same is applicable to the purchase of a leasehold estate over public land. Towards this end, it is important to note that an original allottee of a leasehold estate over public land cannot, strictly speaking, be regarded as a purchaser of the land. Such a holder of the leasehold estate remains an "allottee" or more precisely, "a lessee", until he disposes of the entire remainder, or part of his estate, to a third party through sale, gift or transmission. Otherwise, the leasehold estate subsists in favour of the original allottee until it expires through effluxion of time when it reverts to the landlord. The landlord, who in this instance is the Government, holds the reversionary interest during the subsistence of the lease. Anyone who purchases a leasehold from the original allottee can only therefore acquire the unexpired term of the lease.

[65] So under what circumstances, can the doctrine of *innocent purchaser* apply to a leasehold estate over public land? Only in a situation where the original allottee has created an equitable interest over part or whole of the estate in favour of a third party. Such equitable interest would ordinarily be created by way of a trust. Consequently, any person purchasing the land would take it subject to the rights of the third party beneficiary, unless at the time of purchase, the purchaser had no knowledge of the said trust, in which case the doctrine of *innocent purchaser* would kick in.

(ii) Whether the doctrine of *Innocent Purchaser for value Without Notice* ***protects a purchaser of an illegally/irregularly allocated title over public land***

[66] This issue persistently continues to rear its head whenever the legality of a subsequent title over land following a purchase is called into question. The main bone of contention, has always revolved around the concept of "indefeasibility of title" where holders of such titles under challenge, not only erect the latter as a shield, but also tend to fall back upon the doctrine of *innocent purchaser for value without notice*. This Court has since pronounced itself authoritatively and with finality on the question of indefeasibility of title in circumstances where a title is called into question regarding its legality. Holders of impugned titles, especially those acquired before the promulgation of the 2010 Constitution always call into service the provisions of Section 23 of the Registration of Titles Act Cap 281 (now repealed).

[67] Pursuant to Section 23 of the repealed Act, a certificate of title was held as conclusive evidence of proprietorship. It read:

> ***"23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as*** *conclusive evidence* ***that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party."*** [Emphasis added].

[68] Upon repeal (of the Registration of Titles Act), the effects of registration are now governed by Section 26 of the Land Registration Act No. 3 of 2012 which provides;

"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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original." [Emphasis added].

This draws from Article 40 that the right to property does not extend to any " **property that has been found to have been unlawfully acquired."** See Article 40(1) and (6) of the Constitution.

[69] It is important to take note of the critical shift in terminology from the repealed Act to the current statute. Under the Registration of Titles Act, a certificate of title was to be regarded by courts as *conclusive evidence* that the person named therein was the absolute and indefeasible owner of the land. However, under current legislation, a certificate of title is to be regarded by courts as *prima facie evidence* that the person named therein is the absolute and

indefeasible owner of the land. It is therefore no longer possible for a title holder to erect the certificate of title as a barrier to an inquiry into its legality or otherwise.

[70] In ***Dina Management Limited vs. County Government of Mombasa & 5 Others*** (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), this Court held that to determine whether a party is a *bona fide* purchaser for value, a court must first go to the root of the title, we stated:

> ***"94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter."***

[71] Upon examining the root title of the subject property before it, the Court held that;

> ***"110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co (1993) Ltd, who in turn could pass to the appellant.***
>
> ***111…. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of the Constitution. The root of the title having been challenged, as we already noted above, the appellant could not benefit from the doctrine of bona fide purchaser."*** [Emphasis added].

[72] In view of this Court's pronouncement in ***Dina Management Limited*** *(supra)*, the answer as to whether the doctrine of *innocent purchaser for value without notice* protects a purchaser of an illegally or irregularly allocated title to public land lies squarely in the negative. We hasten to add that such a transaction cannot attract the protection of equity because "the latter follows the law". In this regard, two critical elements of the doctrine would be missing because, first, the purchaser must have purchased " a legal estate", and secondly, such purchase must have been without "notice". Since the holder of an illegally allocated title cannot confer a valid title upon a third party, there would be no "legal estate" to be purchased in the first place. Similarly, the absence of "notice" is in reference to the existence of "an equitable interest" in the land and not "the incidence of illegality or irregularity of the title" in question. Therefore, there can be no protectable "purchaser of an illegal title without notice of such illegality". In other words, a purchaser will only be regarded as *bona fide* if he buys property in good faith without notice of any defect or claims against the title. So that if the title in question is illegal or obtained through unlawful means, the purchaser cannot claim protection even if he was not aware of the illegality.

(iii) Whether and to what extent the doctrine of Legitimate Expectation ***applies to the renewal of Leases over public land***

[73] The question of what constitutes "a legitimate expectation' was long settled by the Supreme Court in ***Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others*** (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) ***(CCK Case)***. The Court determined that;

> ***"[265] An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation."***

[74] The Court then went ahead to fashion the following guiding principles, on the basis of which a party may place reliance upon the principle of legitimate exectation. Towards this end, the Court stated:

> ***a. "there must be an express, clear and unambiguous promise given by a public authority;***
> ***b. the expectation itself must be reasonable;***
> ***c. the representation must be one which it was competent and lawful for the decision-maker to make; and***
> ***d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution."***

[75] In ***Kenya Revenue Authority vs. Export Trading Company Limited***, (Petition 20 of 2020) [2022] KESC 31 (KLR), the Court further expounded upon the principles established in the ***CCK Case***, it stated;

> ***"[52] As can be discerned from these two definitions, legitimate expectation may take many forms. It may take the form of an expectation to succeed in a request placed before the decision maker or it may take the objective form that a party may legitimately expect that, before a decision that may be prejudicial is taken, one shall be afforded a hearing.***

[53] Respectfully, we take the view that the question of whether a legitimate expectation arose is more than a factual question. It is not merely confined to whether an expectation exists in the mind of an aggrieved party, but whether viewed objectively, such expectation is in a legal sense, legitimate."

[76] Turning to the issue as to whether the principle of legitimate expectation applies to the renewal of leases over public land, we are constrained to revisit the process by which such leases may be renewed. The most defining element of any leasehold estate, is the element of its subsistence for a definite time, or a time determinable by an event whose occurrence is definite to occur. It follows therefore, that if such a lease is not renewed, or renewable, it ceases to exist upon effluxion of time. A lease of public land may contain an option for its renewal either conditionally or unconditionally. In the first instance, the lease becomes renewable upon the fulfillment of the condition/s by the lessee, in which case, the latter would be free to exercise such option. Where however the lease is either silent or contains an unconditional option for its renewal, the lessee must give an unequivocal indication to the landlord regarding his/her desire to have the lease renewed in his/her favour.

[77] More often than not, public leases contain an option for renewal. However, such renewal must be activated by an application by the lessee to the government agency having authority to renew the lease. It follows therefore that where the lessee makes an application for renewal of his/her lease, his/her application would be considered either way and that, the applicant would be furnished with reasons should the application be declined. It would also be expected that the application would be clear and unambiguous. It is the application for renewal that ignites the legitimate expectation, given the fact that it is addressed to an authority that has the competence to renew the lease.

F. FINAL DETERMINATION

[78] Flowing from our reasoning above, and restatement and clarification of fundamental legal principles applicable to this appeal, we now proceed to render the final determination of the relevant questions.

[79] At the outset, it is critical to determine what the status of ownership of the suit land was, after the expiry of the lease, and before its allotment to the 2nd respondent and subsequent acquisition by the 1st respondent. It is on record as acknowledged by the two superior courts, that three months before the expiry of the lease, the appellants had made an application for its extension. Also on record, is the fact that the Commissioner of Lands, the Director of Physical Planning, and the Director of Survey all acknowledged receipt of the application for extension of lease by the appellants and indicated that there were no objections to the renewal. However, inexplicably, the application for extension of lease remained pending and unacted upon for eight years, when the suit land was allocated to the 2nd respondent.

[80] By the time the suit land was allocated to the 2nd respondent, the lease had long expired. We are therefore in agreement with the Court of Appeal's conclusion that the lease having expired, the land had reverted to the Government. It was no longer a leasehold estate, but government land within the meaning of the Government Lands Act (now repealed). Where did this cruel reality leave the appellants? What rights, if any did the appellants have over the suit land? It was submitted without constestation at the trial court, that after the expiry of the lease, the appellants continued in possession of the land, while paying the applicable land rates and rent. What then was the legal status of the appellants with regard to the land? Can the appellants be considered as having aquired an equitable interest in the land by virtue of their continued stay upon the same? We think not, since through effluxion of time, and reversion to the Government, the lease had become

extinguished for all purposes. No equitable interest over the land could survive such extinction. Whatever remained in favour of the appellants over the land, could at worst be regarded as "a tenancy at will" or at best "a mere equity".

[81] The next issue that logically falls for our consideration is the legality or otherwise of the allotment of the suit land to the 2nd respondent. Towards this end, the record reveals that the trial Judge had arrived at a conclusion to the effect that, the allotment of the land to the 2nd respondent was unprocedural. This finding was informed by the fact that the land was not allocated to the 2nd respondent by the Commissioner of Lands who was at the time responsible for allocation of public land but by "a lands officer" contrary to the provisions of the Government Lands Act (now repealed). The learned Judge also held that other procedural requirements regarding the allocation of town plots had not been met. At the Court of Appeal, the appellant continued to urge that just as the trial court had found, the 2nd respondent could not have aquired valid title to the land in the face of the uncontested procedural irregularities. The appellate court on its part, did not fault the trial Judge's conclusions. In fact, the court emphasized the imperative for all such allocations, to be in consonance with the provisions of the Government Lands Act. Notwithstanding its stance, the appellate court nonetheless held that the 1st respondent had acquired valid title to the land from the 2nd respondent, on grounds that his title was indefeasible under Section 26 of the Land Registration Act. The Court further held that the 1st respondent was a *bona fide purchaser for value without notice of the irregularities.*

[82] In view of our pronouncement in ***Dina Management Ltd*** *(Supra)*, it is our finding that the allotment of the suit land to the 2nd respondent can neither be regarded as legal nor regular. The allocation was made by a person other than the holder of the office of Commissioner of Lands. Neither was the allotment preceded by the requisite advertisements and biddings assuming that it was being allotted for a public purpose. Consequently, the 2nd respondent could not pass valid title to

the 1st respondent given the incurable procedural irregularities that had characterized the allotment. Further, in our considered view, we do not think that Section 26 of the Land Registration Act is a re-enactment of Section 23 of the Registration of Titles Act (now repealed) as far as the element of indefeasibilty of title is concerned. While under the latter, a certificate of title was to be regarded as *conclusive evidence of indefeasiblity of title,* the Land Registration Act only requires courts to treat a certificate of title as *prima facie evidence of indefeasibility*. The courts cannot therefore close their eyes to the irregularities attendant to an allocation of public land.

[83] We now proceed to determine whether and to what extent if at all, the doctrine of *Innocent/Bona fide Purchaser for value Without Notice* protects the 1st respondent's title. In determining this question, the Court of Appeal held *inter alia* that the 1st respondent's title could not be defeated because he was a *bona fide* purchaser for value without notice of the illegalities or irregularities pertaining to the 2nd respondent's title. The court also found that the 1st respondent had not been proven to have participated in any form of fraud or irregularity. In our foregoing analysis, we have in great detail, restated the meaning and clarified the nature of the doctrine of *Bona Fide Purchaser for value without Notice.*

[84] In the circumstances, all we need to determine is whether, the 1st respondent was a *bona fide* purchaser of the suit land, without notice of an existing equitable interest in the land. Did the 1st respondent purchase *a legal estate?* The answer to the foregoing question must be in the negative given the fact that the 2nd respondent was incapable of passing a valid title to the former, having acquired the same illegally. But more critically, the phrase *legal estate* in this instance, is used in so far as it contrasts with *an equitable interest.* We have already determined that after the expiry of the lease, no equitable interest survived in favour of the appellants herein. Therefore, just as the appellant cannot wield the sword of *an equitable interest* to attack the validity of the 1st respondent's title, neither is the

latter capable of raising the shield of *absence of notice* to defend his title. The bottomline, is that the doctrine of *bona fide purchaser for value* cannot be invoked to protect a title to an illegally acquired public land.

[85] ***Is the doctrine of*** *legitimate* ***expectation*** applicable to the application for renewal of lease by the appellants? To this question, it is our finding that indeed, in view of this Court's decision in ***Communication Commission of Kenya*** *(Supra)*, the claim by the appellants to the effect that, they had a legitimate expectation that the Commissioner of Lands would grant an extension of the lease, is not without merit. The record discloses that the appellants made an application for renewal of the lease three months before its expiry. Upon receipt of the application, the Commissioner wrote to both the Director of Physical Planning and the Director of Survey seeking information as to whether there was any objection to the application for extension of the lease. We are unable to deduce from the record, what type of response the Commissioner received from the two directors. What is clear is that no communication was ever sent to the appellants indicating that an objection to their application had been registered in either of the two offices. It is therefore safe to assume that no such objection was ever registered against the appellants' application.

[86] Of more significance, is the fact that pursuant to the application for extension of lease, a Part Development Plan (PDP) was prepared with a view to activating the lease extension process. Indeed, on the Plan, the word "Extension" was entered. There was no entry indicating that the PDP had been prepared to facilitate a "new allotment". Inexplicably, all these actions ended up in the allotment of the suit land to the 2nd respondent in total disregard of the appellant's application for extension of lease. Even more puzzling is the fact that the allotment to the 2nd respondent was made eight years after the application by the appellants. There is nothing on record to show how, and for what purpose the suit land came to be allocated to the 2nd respondent who promptly sold it to the 1st respondent.

[87] Given the chronology of events leading up to the inexplicable allotment of the land to the 2nd respondent, it is only logical to conclude that the appellants had a legitimate expectation that their lease would be extended. Such an expectation was not only reasonable, but was expressed to a competent authority, who at different times, had exercised the powers conferred upon him by the law, to extend the leases of other applicants in a similar position as the appellants. Otherwise, what is a court of law to make of a situation where, a lessee applies for extension of his lease, the same is not responded to, he continues in occupation while paying the applicable rent and rates for years on end, then out of the blue, the property in question is allocated to a different person?

[88] Did the appellants acquire pre-emptive rights over all other prospective applicants by virtue of such legitimate expectation? In our view, not necessarily, as to so hold, would make it nigh impossible for other *bona fide* applicants to aquire leasehold property over public land. By ousting the authority of the Commissioner of Lands (currently the National Land Commission), pre-emptive rights would have the undesired potential to convert leases over public land into absolute proprietorships. The doctrine of legitimate expectation implies that an expectant applicant has a right to have his/her application considered fairly, and to be informed in reasonable time of the decision. It also means that an applicant in possession of the land, is entitled to be furnished with reasons in the event that his/her application is denied. We note that none of these actions were extended to the appellants.

(iv) What reliefs should the Court grant?

[89] From the foregoing disposition, we hereby derive the following declarations and consequential Orders:

i. ***The allotment of the suit propertyto the 2nd respondent was procedurally flawed and hence illegal.***

ii. ***The 1st respondent was not a*** *bona fide* ***purchaser of the suit property for value without notice.***

iii. ***The 1st respondent's title to the suit property is invalid for all purposes.***

iv. ***The appellants had a legitimate expectation that their lease would be extended before expiry.***

v. ***The appellants are entitled to an extension of the lease over the suit property.***

G. ORDERS

(i) The Judgment of the Court of Appeal, dated 8th October 2021 is hereby overturned.

(ii) The Petition of Appeal dated 23rd November 2023 is hereby allowed;

(iii) The Chief Land Registrar (3rd respondent) is hereby directed to effect a cancellation of the 1st respondent's title from the Proprietorship Section of the Land Register;

(iv) The Chief Land Registrar (3rd respondent) is hereby directed to make an entry in the Proprietorship Section of the Land Register to reflect the appellants as the proprietors of the suit property in accordance with the provisions of the Land Registration Act.

(v) The structures and developments erected by the 1st respondent on the suit property be removed and demolished by the 1st respondent within six months from the date of this Judgment under the supervision of the 5th respondent;

H. COSTS

(i) The Costs of the suit at the ELC and the appeal at the Court of Appeal shall be borne by the 1st and 2nd respondents;

(ii) Each party shall bear its own costs of this appeal.

(iii) Security for costs in the sum of Kshs.6,000/- deposited by the appellants be refunded.

DATED and **DELIVERED** at **NAIROBI** this **11th** Day of **April, 2025.**

.....

M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....	.....
S. C. WANJALA **JUSTICE OF THE SUPREME COURT**	**NJOKI NDUNGU** **JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA **JUSTICE OF THE SUPREME COURT**	**W. OUKO** **JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy
of the original

REGISTRAR

SUPREME COURT OF KENYA