REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 118 OF 2010

CLIFFORD OKELLO RACHUONYO T/A

RACHUONYO & RACHUONYO ADVOCATES.....PLAINTIFF

VERSUS

MOHAMED YUSUF SAROYA.....DEFENDANT

(BY ORIGINAL SUIT)

MOHAMED YUSUF SAROYA.....PLAINTIFF

VERSUS

CLIFFORD OKELLO RACHUONYO T/A

RACHUONYO & RACHUONYO ADVOCATES.....1ST DEFENDANT

KEDE ENTERPRISES LIMITED.....2ND DEFENDANT

OKERO S. OYUGI T/A

OYUGI & COMPANY ADVOCATES.....3RD DEFENDANT

ROBERT OTACHI KIBAGENDI.....4TH DEFENDANT

(BY COUNTERCLAIM)

J U D G M E N T

In the original action, the Plaintiff filed a Plaint dated 2nd March, 2010 in which he averred that in the cause of his practice as a Legal Practitioner, he received instructions from the Defendant to act for him in a transaction over land title number NAIROBI/ BLOCK 94/184 which was being sold to him. The Plaintiff avers that he took up the task and upon approving the Sale Agreement by amendment and forwarding the Transfer instrument in triplicate to the Vendor's Advocate, M/s Oyugi & Company Advocates, the Defendant without notice to the Plaintiff altered and/or caused another transfer instrument to be prepared by M/S Oyugi & Company Advocates. The said documents were presented for registration a role that should have been done by the Plaintiff as the Purchaser's Advocate.

That notwithstanding, the Plaintiff avers that he made a formal protest to both the Defendant and M/S Oyugi & Company Advocates but none the less the Plaintiff was able to establish with the Chief Land Registrar the validity of registration of the subject property and was also able to obtain a Guarantee from the Vendor's directors and Vendor's Advocates for the sale transaction.

The plaintiff claims that in spite of the Defendant's actions and role in the registration process, on 11th November, 2009 or thereabout, the Defendant falsely and maliciously printed and widely circulated a letter damaging to the Plaintiff's reputation in the following words:-

> ***"I fully paid you the agreed conveyance fee. This notwithstanding, you are aware the transaction later turned out to be a fraud from which CID Nairobi Headquarters are handling and which I have reliably learnt from M/s Umazi and Kiragu of CID that you have been uncooperative in their investigation.***
>
> ***I am further disgusted to learn that instead of forwarding ksh. 4.4 million which was the last and final payment of the purchase price to M/s Oyugi & Co. Advocates acting for alleged vendor, you only forwarded ksh. 4.2 million. What happened to ksh. 200,000?***
>
> ***Your conduct and manner in which you undertook this work , coupled with this letter in question, cast a lot of doubt as to your professionalism to this conveyance and makes it hard for me to know whether it was negligence, collusion or omission that resulted in me loosing that land and / or money.***
>
> ***By a copy of this letter, am also asking the Provincial CID Headquarters Nairobi to look into your letter, together with your failure to cooperate with their fraud investigation and see whether you acted in cahoots with fraudsters, Mr. Otachi and his advocates M/s Oyugi and Co. Advocates.***
>
> ***Yours only alternative is to recover my money which I lost due to your negligence or leave it to the law to take its course"***

That the Letter was copied to:-

> **(a)** Law Society of Kenya.
>
> **(b)** Criminal Investigation Department Nairobi Area Headquarter.
>
> **(c)** The Director of Criminal Investigation Department.
>
> **(d)** The Commissioner of Police.
>
> **(e)** The Attorney General.

The Plaintiff avers that the words were understood to mean that the Plaintiff was untrustworthy and an accomplice in the fraud, that the Plaintiff while forwarding the purchase price retained, stole and or embezzled Kshs. 200,000/=, that the plaintiff is corrupt and not fit to practice as a lawyer , that he is a criminal and a thief .

As a result whereof the Plaintiff claimed that he has been injured in credit and reputation, his profession has been brought to scandal, odium and contempt and he is no longer held in high esteem by the public and colleagues and he has suffered damage.

The Plaintiff therefore prayed for judgment against the Defendant for general damages, costs and any other relief the court may deem fit to grant.

The Plaintiff's claim was denied by the Defendant through a Statement of Defence and Counterclaim

dated 7th April, 2010. The defendant admitted having appointed the Plaintiff to act for him in the sale transaction for land title number Nairobi/Block 94/184. He however denies having revoked his instruction on the same. On the impugned letter, the Defendant averred that the recipients of his letter are persons entitled to receive such communication as the same was communicated to them in their official capacity.

In the Counterclaim, the Defendant enjoined the 2nd, 3rd and 4th Defendants in the suit and claimed that on 12.08.2008, he was called to the Plaintiff's offices where he executed a transfer for Kshs. 6,000,000 but he has since come to learn that the transfer instrument he executed before the Plaintiff was changed to Kshs. 4,000,000/= without any notice to him. The Defendant further claims that he paid for the transaction as follows; Kshs. 1,350,000 to the 3rd Defendant, Kshs. 250,000 to the 4th Defendant and Kshs. 4,400,000 to the Plaintiff.

The Defendant further claims that he instructed the plaintiff not to release the balance of the purchase price until the Plaintiff had ascertained the true ownership status of the suit property but in disregard of the instructions, the Plaintiff purported to call for an indemnity from the 3rd and 4th Defendants and released the balance of the purchase price. The Defendant further avers that upon lodging a complaint with the police, he was informed by the investigating officer that the Plaintiff remitted to the 3rd Defendant Kshs. 4,200,000/= as opposed to Kshs. 4,400,000/=.

The Defendant claims that the Plaintiff was professionally negligent for refusing to account for Kshs. 200,000/=, refusing to call for the completion documents for purposes of lodging the same at the land registry and witnessing the transfer instrument without pointing out that the purchase price had been altered.

The defendant claims that the 2nd, 3rd and 4th defendants acted fraudulently. That the 2nd Defendant in conjunction with the 3rd and 4th defendants purported to be the registered owner of the suit property and received money from him when they knew that the 2nd Defendant was not the registered owner. That they altered the Purchase price on the transfer instrument and fraudulently misrepresented that they were capable of handing over vacant possession of the suit premises. That the 4th defendant received Kshs. 200,000/= on account of fencing when he knew or ought to have known that he could not fence the property.

The defendant prays for enforcement of the indemnity against the 3rd and 4th Defendants.

The defendant therefore prays for-

a) A refund of –

(i) Kshs. 6,000,000 on account of purchase price.

(ii) KShs. 200,000 paid to 4th defendant on account of fencing the property.

(iii) General damages for professional negligence by the Plaintiff.

(iv) General damages for fraud, negligence and collusion by and between the Plaintiff, 2nd, 3rd and 4th Defendants.

(v) A full reimbursement by the 3rd and 4th defendants of all expenses incurred by the defendant in the transaction.

(vi) Interest on a,b,c and d above, and

(vii) Costs of the suit.

In Response, the Plaintiff filed a Reply to the Defendant's Defence and a Defence to the Counterclaim dated 14th April, 2010. As to the Defence, the Plaintiff reiterated the contents of his Plaint and added that the sole purpose of procuring the indemnity was to salvage the Defendant from his dealings behind his back. On the counterclaim, the Plaintiff responded that he drafted a transfer for Kshs. 6,000,000 which was the purchase price as per the sale agreement and waited for a return of the executed Transfer together with the completion documents from the Vendor's Advocate only later on to learn that the defendant colluded with the vendor and the vendor's advocate to prepare another transfer for Kshs. 4,000,000/= and had it registered without his knowledge.

The Plaintiff avers that he conducted all necessary due diligence and paid the balance of Kshs. 4,400,000 in full as per the documented evidence and that the Defendant's letter giving rise to this claim is highly defamatory.

The 3rd Defendant filed a Statement of defence to the Counterclaim dated 28th May, 2010 and averred that the Plaintiff in the Counterclaim altered the amount in the transfer documents from Kshs. 6.000,000/= to Kshs. 4,000,000/= in order to avoid paying the requisite stamp duty and he cannot pretend to deny the responsibility . The itemised particulars of fraud were denied by the 3rd Defendant who stated that the Plaintiff conducted a search at the lands registry and he was satisfied with the results. The 3rd defendant further stated that he was acting as an agent in the transaction and the principle was well known. The 3rd Defendant averred that the suit is misconceived as the claim in the counterclaim is founded on a crime.

The 2nd and 4th defendants also filed their defence dated 22nd June, 2010 and also claimed that the transfer was altered at the instance of the Defendant to avoid paying the requisite stamp duty. They denied the claims on negligence and fraud. It was also contended that the transfer in favour of the Defendant is valid. The defence further stated that the action in the counter claim was founded in crime and henceforth the suit was in contravention of civil procedure rules. The 2nd and 4th defendants also averred that the indemnity could not be enforceable as it related to the process of registration of the Transfer.

At the hearing of the suit, the Plaintiff testified as the sole witness whereas the defendant called 2 witnesses.

Clifford Okello Rachuonyo, the Plaintiff herein, testified on oath as PW1 and adopted his filed written statement. He testified that he was instructed by the Defendant in February, 2008 to act for him in a transaction in which he was purchasing a plot in Nyali Estate, Nairobi for Kshs. 6,000,000/= . That he applied for a search as well as for the full abstract of the title so that he could know the history of the same. He also wanted to know whether the land was paid for upon the initial allocation. He was able to ascertain all that. It was his evidence that after he was satisfied with the results of the search, he reviewed the Sale Agreement and approved it with amendments. Thereafter he drafted a transfer instrument for the purchase sum of Kshs. 6 million and forwarded the same to the 3rd defendant for execution by the Vendor, the 2nd Defendant. He later requested for the completion documents to enable him effect the transfer.

It was his further evidence that he wrote follow up letters asking for the completion documents and after his persuasion, the 3rd defendant wrote to him informing him that the Vendor and the Purchaser had effected the registration of the transfer to his exclusion and that he, the Vendor's Advocate, was aware of the dealings. The Plaintiff protested about the dealings and maintained that he would only release the balance of the purchase price of Kshs. 4,400,000 after he had verified the authenticity of the Transfer. The Plaintiff testified that it was in the process of the verification that he noticed that the transfer amount had been altered to Kshs. 4 Million an issue which he raised with the 3rd Defendant as the Transfer was indicated to have been drafted by the 3rd defendant's law firm. He also noticed that the Defendant's signature had not been witnessed. The Plaintiff told the Court that the 3rd Defendant's response was that the Vendor and the Seller undertook the dealings on their own and that the mistakes apparent on the face

of the transfer were errors which could be rectified at the registry and in deed they were later on rectified.

The Plaintiff rectified the mistakes on the part of the Defendant by stamping his copy of the transfer instrument and witnessing it. That he went further and asked for indemnity from the 2nd and the 3rd Defendants before releasing the balance of the Purchase Price. The Plaintiff also conducted a post-registration search which indicated that the Defendant was the new registered owner of the title. Having been so satisfied, he informed the defendant and released the balance of the purchase price to the 3rd defendant.

From his testimony, the Plaintiff's Claim arose out of a letter written to him by the Defendant and copied to the Commissioner of Police, the Law Society of Kenya, the Criminal Investigations Department Nairobi Area, Director of Criminal Investigations Department and the Attorney General. The Plaintiff further testified that the said letter was defamatory and portrayed him as a fraudster and caused him anguish. In cross examination, PW1 testified that he did not have a copy of the received letter by those who were copied to.

The Defendant, **MOHAMED YUSUF SOROYA,** testified as DW1 and told the Court that he had known the Plaintiff for 30 years. It was his evidence that he paid the full purchase price for the property in the sum of ksh.6,000,000 plus additional Kshs. 200,000 to the 4th Defendant for fencing though he did not get the plot. He testified that there were investigations into the ownership of the plot and he received a letter from, Gilgiri police station stating that the third party who was claiming ownership was not the owner. He stated that he wrote the letter dated 11.11.2009 because he had lost his money. As his lawyer, the Plaintiff herein, did not act in his interest. It was his evidence that he was aware of the indemnity prepared in his favour. According to him, the 3rd and 4th defendants are liable for the loss.

In cross examination, he admitted having written the impugned letter but averred that the persons were copied to in their official capacity and that in any event, the letters were not sent to them but he was only threatening the Plaintiff. He denied having instructed the 3rd defendant at any stage in the transaction. He further stated that he has not sought for an order that the land be transferred back to the 2nd defendant yet he is claiming the money. It was his evidence that he is claiming either the land or the money. He contended that the 3rd defendant made a mistake on the transfer form when he wrote ksh. 4 million instead of 6 million..

The 3rd Defendant **STEPHEN OYUGI** testified as DW2 and told the Court that he was not involved in the negotiations for the purchase of the plot. That he was only instructed by the 2nd Defendant to represent it in the transaction. He stated that the original transfer form prepared by the Plaintiff was for Kshs. 6,000,000 but the Vendor and the Buyer later on agreed to reduce the purchase price to Kshs. 4,000,000/= and that explains the second transfer instrument which was used in the registration process. That the indemnity was prepared after the registration process. That he received not more than Kshs. 6 million which he paid to the Vendor as the purchase price.

In cross -examination he admitted that his firm prepared the documents for registration but the stamp duty was paid by the Vendor and the property is still in the name of the Defendant to date. He further stated that the indemnity was limited to the process of registration only.

At the close of the defence hearing, Counsels agreed to file and exchange written submissions.

The plaintiff filed his submissions dated 21st August, 2017. He provided a chronology of events of the transaction and submitted that in view of the same, and the roles played by the parties involved, the Defendant's letter dated 11th November, 2009 was indisputably defamatory of him. It was submitted that the words were construed to mean that the plaintiff was incompetent, dishonest and a fraudster. That the statement was not justified as there was no evidence that the plaintiff stole Kshs. 200,000/= from the defendant. He urged the court to dismiss the counterclaim as it has been shown that the plaintiff fully implemented the instructions given in spite of his role in the transaction being hijacked and further that

the Defendant failed to prove negligence, improper conduct or fraud on the part of the Plaintiff.

The plaintiff relied on C**ivil case No. 2143 of 1999-Biwott Vs Mbugua** where the Court stated the principles applicable in awarding general and exemplary damages for libel. The plaintiff also relied on the case of **Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR** where the court drew support from the case of **JONES V POLLARD [1997] EMLR 233.243** where a checklist of compensatable factors in libel actions were enumerated as;

> ***a)*** *The objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition.*
>
> ***b)*** *The subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself.*
>
> ***c)*** *Matters tending to mitigate damages, such as the publication of an apology.*
>
> ***d)*** *Matters tending to reduce damages.*
>
> ***e)*** *Vindication of the plaintiff's reputation past and future.*

On quantum of damages, the plaintiff proposed an award of Kshs. 7,500,000/= plus exemplary damages of Kshs. 1,000,000/= and relied on the case of ***Ombura t/a Okoth Ombura & Company Advocates*** where an award of Kshs. 4,000,000 in general damages and Kshs. 500,000 in exemplary damages was made. .

The Defendant filed his submissions dated 15th September, 2017 and argued that the impugned letter was not defamatory as it sought to capture events of what happened in the transaction and the same was written out of furry and frustration. It was also submitted that the said letter was not published to someone else rather than the Plaintiff and relied on the case of **Simpson Vs Mars Inc. 929 P. 2d 966 (Nev. 1997)** . The Defendant admitted having written the letter but averred that the people to whom it was copied were not served with the letter.

On the counter claim, the defendant submitted that the Plaintiff and the 3rd Defendant admitted that the money was paid towards the purchase and that the defendant is yet to have possession of the property. He attributed the failure to acquire possession to collusion of the plaintiff on one side and the 2nd, 3rd and 4th Defendants on the other.

The 2nd, 3rd and 4th Defendants filed joint submissions dated 18th September, 2017 and captured a chronology of the events surrounding the transaction. It was submitted that the transfer used to effect the registration was drafted by the 2nd and the 3rd Defendants. The Counsel submitted that from the evidence adduced before the Court and the documents produced, it is shown that the registered Owner of Nairobi/ Block 94/184 is the Defendant and nobody has ever challenged the registration. That the defendant has not adduced evidence to show that there is a third party claiming ownership of the said parcel.

They relied on **section 26 of the Land Registration Act** which 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.”

It was their submission that the Defendant cannot claim a refund of the purchase price without indication as to whether he would like the suit property transferred back to the 2nd Defendant.

Having read and considered the pleadings filed by the parties, the evidence on record, the submissions, and the authorities cited herein, I identify the following issues for determination;

a) Whether the letter dated 11th November, 2009 was defamatory of the plaintiff's reputation.

b) Whether the Plaintiff is liable for professional negligence.

c) Whether the 2nd, 3rd and 4th Defendants acted fraudulently.

d) Whether the defendant (the plaintiff in the counter claim) is entitled to the sums claimed.

e) Who meets the costs of the suit and of the counterclaim?

The case of Wycliffe **A. Swanya v Toyota East Africa Ltd & another [2009] eKLR** laid down the elements to be considered in a defamation suit when the Court of Appeal observed that:

“For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:-

“(i) That the matter of which the plaintiff complains is defamatory in character.

(ii) That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.

(iii) That it was published maliciously.”

It is admitted by the defendant that the words complained of were published by him. However, the defendant has disputed that the letter was sent to any other persons apart from the Plaintiff. The defendant testified that he listed the persons in the letter in order to threaten the Plaintiff to pursue recovery of his lost money. From the record and evidence before this Court, no evidence has been adduced to show that the Plaintiff's reputation was damaged in the eyes of third parties. In the case of **George Mukuru Muchai Vs The Standard Limited [2001] eKLR** it was held that,

“ In my view the most important ingredient in a defamation case is the effect of the spoken or written words in the mind of third parties about the complainant and not how he/she himself/herself feels the words portray about him/her.”

In a claim for defamation, the Plaintiff has to adduce evidence to show that the complained statement was published to other parties other than himself. The Plaintiff did not call any witness who might have received the impugned letter neither did he provide any evidence to show that the letter complained of was indeed sent to and received by the persons to whom the letter was copied. As was correctly held in the case of **Wycliffe A. Swanya v Toyota East Africa Ltd & another [2009] eKLR** it must be proved;

“(ii) That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.”

I find that the Plaintiff has not discharged this burden. In as much as the court finds that most of the

statements in the letter were not justified by the defendant, the Plaintiff was not able to demonstrate that the letter was published to third parties. This is an integral element of defamation such that if a Plaintiff is not able to prove publication, then it goes without saying that a claim for defamation cannot stand.

On the second issue, the Defendant claims damages from the Plaintiff for professional negligence. It is a well settled principle that liability of an advocate to his client for negligence in performing his professional duties must generally arise from grave negligence and not from an error of judgment on some complicated point or one of doubtful construction.

The facts surrounding this case and the chronology of the events is now very clear in my mind. The Defendant instructed the Plaintiff to act for him in the sale transaction. Once the Plaintiff approved the Sale Agreement and forwarded a draft Transfer instrument to the Vendor's Advocate, the Defendant vanished, altered the original transfer instrument in collusion with the Vendor and behind the Plaintiff's back and without his knowledge. In fact the Plaintiff made follow up on the completion documents to enable him register the transfer but his letters were not being responded to by the 3rd Defendant who later informed him that the defendant and the Vendor had agreed to take the matter into their hands and the 3rd Defendant was aware of that fact.

In the case of **NATIONAL BANK OF KENYA LIMITED v E. MURIU KAMAU & another [2009] eKLR** it was held that,

> "***In my understanding of the defendant's case is that an advocate is only responsible in negligence to his client for gross ignorance or gross negligence in the performance of his professional services. And that the advocates herein did what was expected of them in the circumstances of the case. It is also contended by the defendants that an advocate is not responsible for the failure of a case entrusted to his management when he pursues the ordinary and accustomed course in the conduct of it, except for gross negligence or ignorance. In essence to make an advocate liable there must be evidence to show there was a manifest want of skill or great negligence. And that you can only expect from an advocate that he will be honest and diligent and if there is no fault to be found either with his integrity or diligence, then he is not answerable. It is clear that it would be utterly impossible that you will ever find a class of men who would give a guarantee, binding themselves, in giving legal advice and conducting suits to be always in the right***."

Having regard to the circumstances of this case, and considering the actions of the plaintiff and the steps he took to safeguard the interests of the defendant, it would be unfair to say that the Plaintiff acted in gross negligence in the performance of his professional services. Even after the Defendant went ahead and colluded with the 2nd Defendant to change the transfer form without involving the Plaintiff, the Plaintiff still came to the rescue of the Defendant and indeed demanded for a deed of indemnity before he could release the balance of the purchase price. It is noted that the Plaintiff was constantly informing the Defendant what was happening in the transaction. The Defendant therefore cannot claim that the Plaintiff colluded with the Vendor and their advocate to defraud him. There is no evidence of the said collusion that has been provided by the defendant. In any event, throughout the hearing it was clear that the Plaintiff protested at the actions of the 3rd Defendant. The Plaintiff even advised the Defendant to institute a suit against the vendor for reimbursement of the purchase price which advice was not heeded to.

An advocate is not guilty of negligence if he merely commits an error of judgment whether on matters of discretion or law. The Court of appeal in the case of **Kogo v Nyamogo & Nyamogo Advocates (2004) 1 KLR 367** held that

> **"An advocate is not liable for any reasonable error of judgment or for ignorance of some obscure point of law, but is liable for an act of gross negligence or ignorance of elementary matters of law constantly arising in practice."**

It is the finding by this court that the plaintiff acted in accordance with the instructions given to him by the Defendant and in the best interest of the Defendant. The claim on profession negligence therefore

fails.

The Defendant further claims that the 2nd, 3rd and 4th Defendants acted fraudulently in collusion and as such he has sought a prayer for general damages and reimbursement of the purchase price and the expense incurred in that regard. Allegations of fraud are serious and therefore a need to be specifically pleaded and proved. What constitutes fraud and the standard of proof in fraud cases was well stated by the Court of Appeal in the case of **Athi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** where it was stated that ,

> ***"It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent on pleadings 13th Edition at page 427:***
>
> ***"Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308).***
>
> ***The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (\|Davy V Garrett (1878) 7 ch.D. 473 at 489). "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice".***

The evidence before this court is quite clear that there was transparency in the dealings in the transaction and the defendant was privy to the steps taken from the start. When the transfer was effected, the Defendant's Advocate, the Plaintiff herein, did due diligence to ascertain the validity of the registration and he established indeed the transfer was properly effected and the title issued in favour of the defendant.

Further, when the plaintiff received a letter from a third party claiming ownership of the property, the defendant was duly notified and investigations were conducted with the coperation of the 2nd, 3rd and 4th Defendants following which the Investigating Officer wrote confirming that the 2nd Defendant was the genuine holder of the title deed. In fact since the title was issued in the year 2008, no other person has disputed the same and the Defendant is the absolute owner of the same.

Section 26 of the Lands Act is clear that ***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***."

The Defendant testified that he has never been put into possession of the suit property and that a third party is in possession and is in the process of constructing on the said property. The said third party was not enjoined in these proceeding and therefore it would be prejudicial to determine the aspect of possession against a third party who is not a party to the suit.

This court finds that even though there was alteration of the original transfer, the subsequent one was properly executed by the Defendant with his knowledge and consent. The Plaintiff verified the genuiness of the title issued in favour of the defendant and the same has not been contested to date. Therefore there is no element of fraud which was manifested in the transaction. Fraud is defined in the B**lack's Law Dictionary** thus;

> "**Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another"**

In this case, it has not been established that the 2nd, 3rd and 4th defendants in collusion acted in a deceitful manner with intent to deprive the Defendant of the suit property. Therefore the claim against them as well fails.

Before I conclude this Judgment, the law enjoins me to assess the quantum of damages that this court could have awarded the plaintiff in the main suit had he succeeded. This court has considered the submissions on quantum made by the plaintiff and the suggested figures of ksh. 7,500,000 and ksh. 1,000,000 as general and exemplary damages respectively.

The defendant did not address the court on the quantum of damages to be awarded to the plaintiff in the event that he succeeded in his claim. It is noted that the plaintiff is an advocate of the High court of Kenya who has practiced law since the 18th January, 1982 when he was admitted to the bar. Being guided by the principles set out in the case of **Jones vs pollard (Supra)** and the case **of Obura t/a Okoth Obura & Co. Advocates**, am of the considered view that a total of ksh 5,000,000 would have been reasonable award on general damages. The court would not have awarded any sum, under exemplary damages as no evidence was adduced to justify the award under that head. But as already pointed out, the plaintiff was unable to proof his claim.

In the end the order that commends itself to this court is that both the main and the counter claims are dismissed.

Each party to bear their own costs.

It is so ordered

Dated, Signed and Delivered at Nairobi this 25th Day of January, 2018.

…….

L. NJUGUNA

JUDGE

In the Presence of

……. For the Plaintiff

……..... For the 1st Defendant

……. For the 2nd Defendant

……. For the 3rd Defendant

……. For the 4th Defendant