



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI LAW COURTS  
COMMERCIAL & ADMIRALTY DIVISION  
CIVIL SUIT NUMBER 423 OF 2009

CAPTAIN MOSES KARIUKI WACHIRA.....PLAINTIFF

- V E R S U S -

JOSEPH MURIITHI KANYITA.....1<sup>ST</sup> DEFENDANT

MONICA JAMES.....2<sup>ND</sup> DEFENDANT

JOHN MBURU.....3<sup>RD</sup> DEFENDANT

INVESTMENT & MORTGAGE BANK LTD.....4<sup>TH</sup> DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff came to this Court by way of the Plaint dated 30<sup>th</sup> May, 2009 and filed in Court on 15<sup>th</sup> July, 2009. The Plaintiff sought for judgment against the Defendants as follows:-

- i. An injunctive Order be made restraining the Defendants whether by themselves or through their agents , servants or employees from transferring, leasing, selling charging, subdividing and/or disposing off in any manner the suit property L.R. Nairobi Block 94/170, Nyari.
- ii. A permanent injunction be made restraining the Defendants whether by themselves or through their agents, servants or employees from trespassing into or breaking into the property or from harassing, intimidating or threatening the Plaintiff, his servants and agents or from removing any property from or evicting the Plaintiff, his servants and/or agents from the Plaintiff's property L.R. Nairobi Block 94/170, Nyari.
- iii. A permanent injunction Order be made restraining the Defendants whether by themselves or through their agents, servants or employees from developing, constructing and/or erecting any temporary or permanent building or any temporary or permanent structure on L.R Nairobi Block 94/170 Nyari.
- iv. A declaration be made, holding that the 2<sup>nd</sup> Defendant was holding the Title to L.R. Nairobi Block 94/170 Nyari in trust for the Plaintiff.
- v. That a finding be made that the 2<sup>nd</sup> Defendant has breached the trust she held in favour of the Plaintiff.
- vi. A declaration be made that the sale transaction between the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant vide the sale agreement dated 23.03.2009, and the consequent transfer of title to the 1<sup>st</sup> Defendant, was fraudulent, null and void.
- vii. An order be made rectifying the Land Register and cancelling the said title given to the 1<sup>st</sup> Defendant and all encumbrances over L.R. Nairobi Block/94/170 Nyari.

viii. An order be made determining the trust between the Plaintiff and the 2<sup>nd</sup> Defendant and vesting the suit property in favour of the Plaintiff by having the 2<sup>nd</sup> Defendant's title cancelled and transferred back to the Plaintiff.

ix. General damages

x. Special damages as more particularly pleaded in paragraph 45 herein-above for Kshs. 540,000.00 and U.S \$4,000 together with interest thereon at Court rates from the date of filing suit until payment in full.

xi. Costs of this suit together with interest thereon at such rates and for such period as this Honourable Court may deem fit.

xii. Any other relief as this Honourable court may deem fit to grant.

2. In response to the Plaintiff's claim, the Defendants filed their respective Defences. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their Statements of Defence on 11<sup>th</sup> September, 2009 and 27<sup>th</sup> February, 2012 respectively. The 3<sup>rd</sup> Defendant also responded to the claim on 27<sup>th</sup> March, 2010 by filing the Defence and a cross-claim both dated 23<sup>rd</sup> March, 2012. The 4<sup>th</sup> Defendant did not file a Defence. It however participated in the hearing and filed its final submissions on 2<sup>nd</sup> June, 2015.

### **THE PLAINTIFF'S CASE**

3. The Plaintiff sought for several prayers in his Plaintiff but in essence he has sued the Defendants for breach of trust, fraudulent transfer of his property and special damages. The Plaintiff averred that at all material times to this suit, he was the beneficial and true owner of the property known as Land Reference Number Nairobi/Block/94/170 Nyari (herein referred to as the Suit Property) having purchased the same in September 2004 from Milka Njeri Gitau and Joseph Mwaniki Gitau being the Legal Administrators of the Estate of the late Samson Mwaura Gitau. The purchase price of the suit property was at Kshs. 3,800,000/=. After purchasing the property the Plaintiff directed that the same be transferred to his nominee, the 2<sup>nd</sup> Defendant, who was then his wife and is also the mother of his two children.

4. The Plaintiff further averred that it was at all times his intention that the 2<sup>nd</sup> Defendant would by virtue of *inter alia* the relationship between them, hold the suit property in trust on his behalf and for his benefit. The Plaintiff also intended that the 2<sup>nd</sup> Defendant would at all times not deal with the suit property except with his consent and pursuant to his instructions and that she would honestly deal with the suit property keeping in mind the Plaintiff's beneficial interest. He also expected the 2<sup>nd</sup> Defendant to account to him of the dealings done on the suit property. The Plaintiff later on commenced construction on the said suit property. He averred that at the time of filing the suit he had spent approximately Kshs. 20 million on the development and ongoing construction of the suit property.

5. It was also averred by the Plaintiff that sometime in March 2008 he requested the 2<sup>nd</sup> Defendant to donate a general Power of Attorney to his then Advocate Anne Njeri Kimani of Musyimi & Co. Advocates for the purposes of charging the suit property to obtain a credit facility from Savings and Loan Mortgage Company in the sum of Kshs. 5,000,000.00 or to sell the land if need be. The Plaintiff stated that the 2<sup>nd</sup> Defendant acted on the said instructions while in Kenya having travelled from the United States of America and she appeared before Advocate Rowlands Nadida on the 8<sup>th</sup> of March 2008 whereby she executed and donated a general Power of Attorney to Advocate Anne Njeri Kimani. However, the Plaintiff did not obtain the intended loan as he resolved to finish the construction using his own resources.

6. Later on and to the Plaintiff's surprise, shock and dismay his immediate previous Advocates, Musyimi & Co. Advocates, received a letter from S.G Mbaabu & Co. Advocates dated 12<sup>th</sup> March 2009, allegedly revoking the Power of Attorney donated to Anne Njeri Kimani and cautioned any dealing with the suit property. It is thereafter that he learnt from his cousin, one Charles Muturi Wangai that there had been an attempt by the 3<sup>rd</sup> Defendant herein who was claiming to be the owner of the property, to enter into the suit property and to evict his caretaker and place an alternate caretaker at the suit property. It was the Plaintiff's assertion that it was then that he commenced discreet investigations and learnt that the 3<sup>rd</sup> Defendant had entered into a sale agreement dated 27.01.2009, with one Joseph Muriithi, the 1<sup>st</sup> Defendant herein to purchase the Suit Property. Prior to that, the 1<sup>st</sup> Defendant had allegedly donated a Power of Attorney to one Michael Mwangi Ngugi, vide a Power of Attorney dated 5.03.2007. It was on the basis of that Power of Attorney that the said Michael Mwangi Ngugi allegedly entered into a Sale Agreement dated 23.03.2007, purportedly selling the property to the 1<sup>st</sup> Defendant for the sum of Kshs. 3,800,000/=. Thereafter, the suit Property was allegedly transferred to the 3<sup>rd</sup> Defendant vide a Transfer dated 13.09.2007. Consequently, the 1<sup>st</sup> Defendant proceeded to charge the same in favor of the 4<sup>th</sup> Defendant for a financial advance of about Kshs.18, 000,000/=.

7. It was the Plaintiff's position that the said power of Attorney dated 5.03.2007 was a forgery and fraudulent. The particulars of forgery and fraud are to be found at paragraph 23 of the Plaintiff among them being that the alleged Power of Attorney was never executed by the 2<sup>nd</sup> Defendant and that it was neither drawn nor attested by the Advocate whose name appears on the same. The Plaintiff lodged a caution with the Land's Registry and on May 2009 he lodged a complaint with the Kenya Police Economic Crimes Unit.

8. The Plaintiff also averred that the 1<sup>st</sup> Defendant had always been known to him and that the said 1<sup>st</sup> Defendant had always known that he was the one who purchased the suit property. The Plaintiff further averred that after the alleged sale, vide the agreement dated 23.03.2007, the 1<sup>st</sup> Defendant never took possession nor control or occupation of the suit property.

9. The Plaintiff accused the 2<sup>nd</sup> Defendant for breach of trust and averred that the 2<sup>nd</sup> Defendant ignored his interest over the suit property, when she knew fully well, it was the Plaintiff's and that she was merely holding the legal title in trust for him. He further averred that the 2<sup>nd</sup> Defendant dealt with the suit property and the developments thereon, with neither his consent nor by his instructions by selling it to the 1<sup>st</sup> Defendant. It is the Plaintiff's contention that the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants jointly and/or severally acted fraudulently with respect to the transaction between them, vide the Sale Agreement dated 23.03.2007. It was also his contention that the consideration for which the suit property was allegedly sold and transferred to the 1<sup>st</sup> Defendant was grossly inadequate as it was sold for Kshs 3,800,000/= yet as at 2007, the property had been substantially developed to at least over 50% and as at 2007, ½ acre plots in Nyari were beyond Kshs.10,000,000/=.

10. The Plaintiff further avers that the transaction between the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant was also tainted with fraud given that consideration for the sale was grossly inadequate as the value of the suit property and the developments was not less than Kshs. 45,000,000/=.

11. In view of the foregoing circumstances, the Plaintiff instituted the present suit as he was apprehensive that if the Defendants were not restrained the suit property would be transferred to the 3<sup>rd</sup> Defendant who would in turn be at liberty to transfer the same to other 3<sup>rd</sup> parties. The Plaintiff was further apprehensive that the 4<sup>th</sup> Defendant having charge over the suit property was likely to attempt to exercise its statutory power of sale, to his prejudice and detriment.

### **THE 1<sup>ST</sup> AND 2<sup>ND</sup> DEFENDANTS' CASE**

12. The 1<sup>st</sup> Defendant filed a Defence and Counterclaim in which he denied all allegations made by the Plaintiff against him. He admitted the purchase of the suit property from the 2<sup>nd</sup> Defendant the charge to the 4<sup>th</sup> Defendant and the sale and transfer to the 3<sup>rd</sup> Defendant. He averred that he had been in possession of the suit property since its transfer to him by the 2<sup>nd</sup> Defendant and gave vacant possession to the 3<sup>rd</sup> Defendant.

13. It was the 1<sup>st</sup> Defendant's case that he purchased the suit property from the 2<sup>nd</sup> Defendant for value without notice of the allegations of existence and breach of trust or fraud against the 2<sup>nd</sup> Defendant. In that case he denied the allegations of fraud made against him by the Plaintiff.

12. In the counterclaim, it is the 1<sup>st</sup> Defendant's case that the caution was wrongfully lodged and continued by the Defendant in the Counterclaim (the Plaintiff herein) without reasonable cause as he (the 1<sup>st</sup> Defendant) had purchased the suit property from the 2<sup>nd</sup> Defendant in the main suit for value without notice of the allegations of existence and breach of trust or fraud against the 2<sup>nd</sup> Defendant in the main suit. It was also the 1<sup>st</sup> Defendant's case that upon lodging the unlawful caution against the property on the 26<sup>th</sup> day of April, 2009 the Plaintiff wrongfully entered the property and wrongfully took possession of the same and thereby trespassed thereon and is still trespassing. As a result of the foregoing it was the 1<sup>st</sup> Defendant's case that he had been wrongfully restrained from transacting any dealings in respect of the suit property and completing the sale and transfer of the property in terms of the agreement with the 3<sup>rd</sup> Defendant in the main suit and had thereby suffered damage and loss for which he held the Plaintiff liable.

15. In the circumstances, the 1<sup>st</sup> Defendant in his counterclaim prayed for judgment against the Plaintiff herein for, *inter alia*, general damages, that the caution lodged against him in the suit property be removed, mesne profits in the sum of Kshs. 250,000/= and possession of the suit property.

16. The 2<sup>nd</sup> Defendant also put in a Defence and denied all the allegations made against her by the Plaintiff. In particular she denied the allegations of fraud and forgery with regard to the power of attorney and also the transfer of land. She also denied the allegations of breach of trust. She averred that she was married to the Plaintiff from 1990 to 1996 when the marriage was dissolved and that she was presently married to Kenneth Ronald James. She further averred that in the year 2004 the Plaintiff purchased the suit property as a gift for her and had the title transferred and registered directly in her name and thereby she became the absolute owner. It was therefore her position that at no one time was it intended that the 2<sup>nd</sup> Defendant should hold the title to the property in trust for the Plaintiff. It was also her position that there could not have been any implied trust in favour of the Plaintiff as she was no longer married to the Plaintiff at the time of purchase and transfer of the property to her.

17. The 2<sup>nd</sup> Defendant also averred that upon the registration and transfer of the property in her name, the Plaintiff delivered to her the original title, which title she held until the transfer of the property to the 1<sup>st</sup> Defendant. She further averred that On 5<sup>th</sup> March, 2007 she appointed Michael Njugi Mwangi as her attorney for the purposes of sale and transfer of the property to the 1<sup>st</sup> Defendant. It was therefore her contention that the Plaintiff never instructed nor could he have had any authority to instruct her to donate a power of attorney over the property. The 2<sup>nd</sup> Defendant therefore pleaded that the present suit disclosed no cause of action against her.

### **THE 3<sup>RD</sup> DEFENDANT'S CASE**

18. The 3<sup>rd</sup> Defendant filed his Defence on 27<sup>th</sup> March, 2012 and denied the allegations made by the Plaintiff in the Plaint. He averred that he lawfully purchased the suit property from the 1<sup>st</sup> Defendant vide a sale agreement dated 27<sup>th</sup> January, 2007 and the same was transferred to him vide a transfer dated 23<sup>rd</sup> March 2009. He further averred that at the time he purchased the property, he was not aware of, and neither was he notified of any claim to the said property by any other person. He therefore denied entering the suit property illegally.

19. The 3<sup>rd</sup> Defendant's case is that he is an innocent purchaser for value without notice of any defect in title and his interest in the suit property cannot be defeated by allegations of fraud that he was never a party to. It was therefore his contention that he was entitled to have the transfer registered and title perfected in his name for the suit property.

#### **THE 4<sup>TH</sup> DEFENDANT'S CASE**

20. As earlier stated, the 4<sup>th</sup> Defendant did not file a Defence. However, it participated in the hearing and filed its final submissions on **2<sup>nd</sup> June, 2015**.

21. The 4<sup>th</sup> Defendant submitted that sometime in September 2007, the 1<sup>st</sup> Defendant approached it and requested to be advanced credit facilities upto a maximum of Kshs. 18,000,000/=. The 1<sup>st</sup> Defendant offered the suit property as security for the said lending. It is the 4<sup>th</sup> Defendant's submission that it conducted an official search over the suit property which confirmed that the 1<sup>st</sup> Defendant was the registered proprietor and that there were no encumbrances. It is on the strength of the said search that the 4<sup>th</sup> Defendant granted the 1<sup>st</sup> Defendant the credit facilities applied for and a Charge dated 14<sup>th</sup> November 2007 was created in favour of the 4<sup>th</sup> Defendant to secure repayment of the sum of Kshs. 18,000,000/=.

22. It was the 4<sup>th</sup> Defendant's position that, it diligently carried out its obligation of establishing that the security offered to it by the 1<sup>st</sup> Defendant was unencumbered and that the same was registered in his name. The 4<sup>th</sup> Defendant also averred that it was unaware of any fraud, omission or mistake in consequence of which the Plaintiff's claim arose. It was therefore the 4<sup>th</sup> Defendant's case that the Charge was validly made, in good faith upon exercise of due diligence. The Defendant also submitted that the credit facilities issued to the 1<sup>st</sup> Defendant were subsisting and the same had not been repaid. The 4<sup>th</sup> Defendant disclosed that it had instituted separate proceedings against the 1<sup>st</sup> Defendant and another guarantor for the recovery of the money.

#### **THE HEARING**

23. The hearing of the suit commenced on **21<sup>st</sup> June, 2012** and was concluded on **26<sup>th</sup> March, 2015**. It was part-heard before the Honourable Justice Mutava. The Plaintiff called a total of eleven witnesses while the Defendants testified on their own behalf. The evidence given by both parties were extensive and the Court will substantially consider the same in its judgment herein.

#### **THE WRITTEN SUBMISSIONS**

24. The Plaintiff filed his submissions dated **16<sup>th</sup> April, 2015** on **17<sup>th</sup> April, 2015**. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their written submissions dated **4<sup>th</sup> June, 2015** on **5<sup>th</sup> June 2015** while the 3<sup>rd</sup> Defendant filed his submissions dated **15<sup>th</sup> June, 2015** on **16<sup>th</sup> June, 2015**. The 4<sup>th</sup> Defendant filed its submissions dated **28<sup>th</sup> May, 2015** on **2<sup>nd</sup> June, 2015**.

#### **ISSUES FOR DETERMINATION AND ANALYSIS**

25. I have considered the pleadings herein, the oral evidence given by various witnesses and the written submissions by Counsel for the respective parties. Having done so, this Court considers the issues for determination in the present suit to be as follows:-

1. **Whether the 2<sup>nd</sup> Defendant held the suit property herein in trust on behalf of the Plaintiff;**
2. **If No. 1 is in the affirmative, whether there was a breach of trust;**
3. **Whether there was fraud in the transfer of the suit property from the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant and subsequently the 3<sup>rd</sup> Defendant;**
4. **Whether the Plaintiff is entitled to special damages;**
5. **Whether the Plaintiff is entitled to general damages;**

26. I will begin with the first issue which is whether the 2<sup>nd</sup> Defendant held the suit property in trust for the Plaintiff.

27. The Plaintiff's case is that he is the true and beneficial owner of the suit property having purchased the same from **Milka Njeri Gitau** and **Joseph Mwaniki Gitau** being the administrators of the estate of **the late Samson Mwaura Gitau**. He referred the Court to the sale agreement dated **21<sup>st</sup> September, 2004** which provided that the Vendor would if so requested by the purchaser transfer the property to the nominees nominated by the purchaser. The Plaintiff averred that it was on the basis of this sale agreement that he purchased the suit property and directed that the same be transferred to the 2<sup>nd</sup> Defendant as his nominee.

28. In the submissions, Counsel for the Plaintiff submitted that there was a trust between the Plaintiff and the 2<sup>nd</sup> Defendant as

the parties were married. The Plaintiff's testimony was that they got married under customary law in 1998. The 2<sup>nd</sup> Defendant however denied this allegation and testified that she was not aware of any payment of dowry by the Plaintiff. She admitted that she had been married to the Plaintiff but the marriage was dissolved in 1996. It is in the same year that she got married to Kenneth James. The 2<sup>nd</sup> Defendant produced a Certificate of marriage showing that indeed she got married to the said Kenneth James in 1996. The Plaintiff admitted the said marriage but his defence was that the marriage of the 2<sup>nd</sup> Defendant to Kenneth James in 1996 was for purposes of the 2<sup>nd</sup> Defendant acquiring citizenship in the United States. However, the law doesn't provide for such kind of marriages or arrangements and the same is an illegality which the Courts of law and more so this Court cannot recognize. The fact is that the two lawfully got married under the relevant laws of the particular state and they had capacity to do so.

29. There was no evidence tendered in Court to show that the 2<sup>nd</sup> Defendant and Kenneth James had a divorce. It therefore follows that the 2<sup>nd</sup> Defendant did not have capacity to enter into another marriage while the statutory one subsisted. In that case the customary marriage that purportedly took place in 1998 as is averred by the Plaintiff was a nullity as the same cannot override a statutory marriage and as earlier stated the 2<sup>nd</sup> Defendant did not have capacity to enter into another marriage. See **JMK & GMI vs DMK (2013) eKLR** as cited by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. In the said case the Court clarified that by virtue of **section 3 (2) of the Judicature Act**, Statutory law was superior to Customary Law.

30. In the alternative, Counsel for the Plaintiff submitted that there arose a presumption of marriage between the Plaintiff and the 2<sup>nd</sup> Defendant as they had cohabited for a long period of time. It was submitted that the two had lived together from 1988 to 2009 and they got two children in 1993 and 2000 respectively. However, the 2<sup>nd</sup> Defendant testified that from 1996 to 2008 she never lived with the Plaintiff. She maintained that she was married to one Kenneth James since 1996 and they lived together since then. The evidence before this Court was not convincing to the effect that the 2<sup>nd</sup> Defendant had lived with the said Kenneth James since 1996 when they got married. There were compelling circumstances to show that the Plaintiff and the 2<sup>nd</sup> Defendant had related as husband and wife after 1996 when the 2<sup>nd</sup> Defendant was already statutorily married. In cross-examination it was apparent that the 2<sup>nd</sup> Defendant did not know much about the said Kenneth James. In addition, some of the Plaintiff's witnesses testified that the Plaintiff and 2<sup>nd</sup> Defendant lived together after 1996 and related as husband as wife in the instances they met them. However, this Court being a commercial court will not dwell much on this issue of marriage as the competent court to deal with a presumption of marriage is the Family Division. Besides, it has already been determined that a statutory marriage takes precedence over customary marriage. There is no evidence that the Statutory marriage of 1996 was dissolved and therefore the customary marriage of 1998 was a nullity and presumption of marriage may not be available in this situation.

31. Moving on, still on the issue of whether there was a trust between the Plaintiff and the 2<sup>nd</sup> Defendant, Counsel for the Plaintiff submitted that it was possible for the Court to infer that there was a resulting or constructive trust from the relationship of the parties whether by cohabitation or otherwise. The Plaintiff relied on the case of **NWK vs JKM & Another (2013) eKLR** to make out his case for a resulting trust. In the said case while dealing with resulting trust the Court citing **Halsbury's Laws of England, 5<sup>th</sup> Edition Vol. 72 para 280** stated,

**“Subject to any express declaration of trust, where property is purchased in one party's name but both parties contribute to the purchase price, the other party acquires an interest under a resulting trust proportionate to his or her contribution to the purchase price...”**

Additionally, **Halsbury's Laws of England, 5<sup>th</sup> Edition Volume 98 page 132** states that,

**“A resulting trust is a trust arising by operation of law. Such a trust arises where A makes a voluntary transfer of property to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, when there is a presumption that A did not intend to make a gift to B. The property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. This has been described as a presumed resulting trust. It is, however, not to be relied upon in determining interests in a property occupied as a family home instead reliance is placed upon the common intention constructive trust.”** (Emphasis supplied)

32. In the present case it is not in dispute that the suit property was solely purchased by the Plaintiff and the 2<sup>nd</sup> Defendant was registered as the proprietor/owner of the said property. The Plaintiff's case is that the 2<sup>nd</sup> Defendant was to hold the property in trust for him. The 2<sup>nd</sup> Defendant on the other hand testified that the Plaintiff gave her the suit property as a gift when she gave birth to a daughter. There was no document to ascertain the 2<sup>nd</sup> Defendant's claim that the property was given to her as a gift and the presumption is that if that was the case, which the Plaintiff denied, the same was done orally.

33. On the other hand, there was no express instrument of trust between the Plaintiff and the 2<sup>nd</sup> Defendant with regard to the suit property. However, the fact that the sale agreement relating to the suit property required the Vendor to transfer the property to a nominee of the purchaser (the Plaintiff herein) if so requested meant that the property would either be transferred in the Plaintiff's name or his nominee who would in turn hold it in trust for him. This amounts to an implied trust. As was held in the case of **Chogera v. Kimani & 2 Others (2005) 2 KLR 214**, a registered proprietor's title is subject to trust even where such trust is not registered on the title or instrument of acquisition of the land. It therefore means that a trust is either express or implied. Under the Trustee Act (Cap 167), “...the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”

34. As earlier indicated the Plaintiff paid the entire purchase price and transferred it in the name of the 2<sup>nd</sup> Defendant as had been contemplated in the sale agreement. The Plaintiff denied the 2<sup>nd</sup> Defendant's claim that he gave the suit property to her as a gift and there is nothing on record to show that the property was indeed given as a gift to the 2<sup>nd</sup> Defendant. In this case the definition of a resulting trust as provided for under **Halsbury's Laws of England, 5<sup>th</sup> Edition Volume 98 page 132** (already quoted above) is applicable.

35. The facts of this case and the evidence adduced also lean more on the conclusion that the suit property was transferred in the 2<sup>nd</sup> Defendant's name to hold it in trust and not as a gift. The Plaintiff testified that the Certificate of title of the suit property had always been in the custody of his then lawyer Anne Mbugua. This was confirmed by the said lawyer who also testified in this Court as one of the Plaintiff's witness. If the Plaintiff intended the suit property to be a gift nothing would have been easier than presenting the said title to the 2<sup>nd</sup> Defendant for her keeping and to deal with the property as she deemed fit. The Plaintiff further demonstrated that he commenced the construction of a family home in the suit property and solely provided funds for the same. It is highly unlikely that the Plaintiff would have made such a move that involved financial commitment if indeed he had gifted the suit property to the 2<sup>nd</sup> Defendant. It was further his testimony that he requested the 2<sup>nd</sup> Defendant to donate a power of attorney to his Advocate Anne Mbugua for purposes of charging the property. This is a clear indication that the 2<sup>nd</sup> Defendant was acting under the instructions of the Plaintiff with regard to the suit property. The only intention that can be inferred from the foregoing circumstances is that the Plaintiff intended that the 2<sup>nd</sup> Defendant hold the suit property in trust.

36. Having established that the 2<sup>nd</sup> Defendant held the suit property in trust for the Plaintiff the answer to the second issue as to whether there was a breach of trust is in the affirmative. It is apparent the 2<sup>nd</sup> Defendant dealt with the suit property in a manner that was not beneficial to the Plaintiff and without his consent having transferred it to subsequent third parties.

37. The third issue is whether there was fraud in the transfer of the suit property from the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant and subsequently the 3<sup>rd</sup> Defendant.

38. It was the Plaintiff's assertion that in 2009, he learnt that the suit property was occupied by the 3<sup>rd</sup> Defendant. He contacted the 3<sup>rd</sup> Defendant who informed him that he had bought the property from the 1<sup>st</sup> Defendant who had earlier bought the property from the 2<sup>nd</sup> Defendant. The Plaintiff's case is that the transfers were fraudulent as he had always been in possession of the property and that the Original title was in custody of his lawyer Anne Mbugua.

39. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied the allegations of fraud with regard to the transfer of the suit property. The 2<sup>nd</sup> Defendant maintained that she was the absolute owner of the suit property and that she donated a power of attorney to one Michael Ngugi in order to transfer the property to the 1<sup>st</sup> Defendant. She also averred that she had the original title to the suit property. The 1<sup>st</sup> Defendant's case was that he had no notice of any arrangement of trust between the Plaintiff and the 2<sup>nd</sup> Defendant and that he purchased the property for valuable consideration.

40. Similarly, the 3<sup>rd</sup> Defendant's case was that he had no notice of the trust between the Plaintiff and the 2<sup>nd</sup> Defendant and that he lawfully purchased the suit property from the 1<sup>st</sup> Defendant. It was therefore his case that he was an innocent purchaser for value without notice of any defect in the title.

41. The Plaintiff called witnesses and produced various documents which pointed to the fact that there was apparent fraud in the transfer of the suit property from the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant.

42. To begin with, it appears that the Power of attorney donated to one Michael Ngugi by the 2<sup>nd</sup> Defendant was forged. The lawyers who supposedly drafted the said Power of attorney denied ever drafting such a document or even having met the 2<sup>nd</sup> Defendant and Michael Ngugi. Mr. Daniel Wokabi, an Advocate in the firm of Kimandu Gichohi testified that his firm did not draft the alleged power of attorney. In addition the passport that the 2<sup>nd</sup> Defendant apparently used in the year 2007 when the said Power of attorney was donated had already been reported as destroyed in a fire in the Plaintiff's house in San Diego. It is therefore incredible that the lost/destroyed passport was the very one used in drawing the alleged power of attorney to Michael Ngugi.

43. It was also the testimony of PW 4, Corporal Maria Musima that during her investigations she concluded that the power of attorney issued by the 2<sup>nd</sup> Defendant to one Michael Ngugi was a forgery. PW 4 had also testified in Criminal Case No. 1110 of 2010 in which the 1<sup>st</sup> Defendant had been charged of fraud relating to the transfer of the suit property and he was later convicted on all counts.

44. The Plaintiff testified that in the year 2008 he intended to take a loan from a Bank using the suit property as security. He therefore requested the 2<sup>nd</sup> Defendant to donate a power of attorney to his lawyer Anne Mbugua. The evidence before this Court shows that the 2<sup>nd</sup> Defendant donated a power of attorney to Anne Mbugua on 8<sup>th</sup> March 2008. Anne Mbugua testified that the power of attorney was prepared by one Nadida Rowlands who was an Advocate at the firm of Musyimi & Co. Advocates where she is a partner. Pw 2, Arnold Mahero, who is also an Advocate of the High Court and works with the said firm testified that the said Power of Attorney was executed by the 2<sup>nd</sup> Defendant. There is also a letter from S.G Mbaabu & Co. Advocates addressed to Anne Mbugua to the effect that the power of attorney donated to her by the 2<sup>nd</sup> Defendant had since been revoked.(see pages 78 to 79 of the Plaintiff's List of Documents). A copy of the Power of Attorney was also produced by the Plaintiff in his bundle of documents. In the circumstances, the 2<sup>nd</sup> Defendant's testimony to the effect that she never donated a power of attorney to Anne Mbugua is not convincing.

45. It was also the Plaintiff's case that the transfer of the suit property by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant was fraudulent as the 2<sup>nd</sup> Defendant did not have the original title. The same was in the custody of his then Advocate, Anne Mbugua of Musyimi & Co. Advocates. Pw 3, Rosina Mule who at the time the current matter arose worked at the ministry of lands testified that after investigations she concluded that the title presented to the Lands office in support of the transfer from the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant was a forgery. It was her testimony that the title presented did not issue from the Lands office and that it later emerged that the valid title was in the custody of Musyimi & Co. Advocates who were then the Advocates of the Plaintiff. Anne Mbugua, a partner in the said firm testified to having the said original title in her custody since November 2005. The same was brought to her law firm by the Plaintiff for her safe keeping. The 2<sup>nd</sup> Defendant maintained that she had the original title. However, there was no evidence to support her position. It is apparent that the 2<sup>nd</sup> Defendant could not have lawfully effected the transfer to the 1<sup>st</sup> Defendant without an original title. There was also no indication of any application to the Registrar to issue a Certificate of title on the account that the original one was either lost or destroyed. Having established that she did not have the original title with her at the time of the transfer, it therefore follows that the transfer of the suit property to the 1<sup>st</sup> Defendant was a fraud and therefore a nullity. The 1<sup>st</sup> Defendant not having good title could not have had capacity to transfer the same to a subsequent third party. The 1<sup>st</sup> Defendant also did not have good title to the suit property to enable him charge it in favour of the 4<sup>th</sup> Defendant.

46. Considering the foregoing circumstances, it is difficult to believe that the 1<sup>st</sup> Defendant did not know of the arrangement of trust between the 2<sup>nd</sup> Defendant and the Plaintiff. Even if he did not know, the fact that he was implicated and later charged with fraud in the transfer of the suit property denies him the chance to claim that he was an innocent purchaser for value without notice. Furthermore, the trend by the Courts nowadays appears to be that where there is fraud or an illegality in the transfer of property, the defence of 'innocent purchaser' is not available. In the case of ***Elijah Makeri Nyangwara v Stephen Mungai Njunguna & Another (2013) eKLR*** the Court considered the implication of Section 26(1) of the Land Registration Act No. 3 of 2012 with regard to innocent purchaser,

***“...The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”***

47. In the above case, the Court applied the current Land Registration Act which took effect in May 2012. With regard to the doctrine of innocent purchaser the applicable law when the present suit was filed is section 23 of the Registration of Titles Act. Even under the said section, Courts have held that the doctrine of innocent purchaser cannot apply where there is fraud. In the High Court case of ***West End Butchery Ltd vs Athi Highway Developers Ltd & 6 Others (2012) eKLR***, Justice Nyamweya was of the view that it was unjust and inequitable that an innocent proprietor can be dispossessed of his or her legal title to land through the acts of a fraudster, and this cannot have been the intention of section 23 of the Registration of Titles Act. In holding so the court relied on the statements made in ***Alberta Mae Gacie V Attorney General & 4 Others (2006) eKLR*** where the court (Hon. Justice Onyancha) stated as follows:

***“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come....”***

The Judgment by Justice Nyamweya was later upheld by the Court of Appeal in Civil Appeal No. 246 of 2013, ***Athi Highway Developers Ltd Vs West End Butchery Ltd & 6 Others (2015) eKLR***. The common thread in these cases is that the defence of 'innocent purchaser' is not applicable where there has been fraud or illegality in the transfer of property.

48. In the present case, the 2<sup>nd</sup> Defendant might have been registered as the proprietor of the suit property. However, it turns out that she was holding the same in trust for the Plaintiff who was the beneficial owner of the same. Therefore, the 2<sup>nd</sup> Defendant was not at liberty to deal with the suit property at her will without the consent of the Plaintiff. It has since been determined that she transferred the said property to the 1<sup>st</sup> Defendant fraudulently of which fraud the 1<sup>st</sup> Defendant was implicated. In the circumstances the 1<sup>st</sup> Defendant cannot plead to be an innocent purchaser or having obtained good title from the 2<sup>nd</sup> Defendant.

49. The 3<sup>rd</sup> Defendant bought the suit property at Kshs. 25 million and he testified that he had already paid Kshs. 5 million. It was established before this Court that the property was undervalued as at that time of the transfer to the 3<sup>rd</sup> Defendant the market rate was approximately Kshs. 50 million. According to the Plaintiff the 3<sup>rd</sup> Defendant was not an innocent purchaser as he ought to have established the value of the property at the time of purchasing. The 3<sup>rd</sup> Defendant testified that he was not aware of the valuation at the time. He was not also able to get an official search of the property at the time and he bought it on the assurance of the 4<sup>th</sup> Defendant that there was no defect in the title. It appears that the 3<sup>rd</sup> Defendant did not perform the required due diligence and thus cannot claim to be an innocent purchaser. In any event, even if he was an innocent purchaser it is apparent that the transfer of the suit property to the 1<sup>st</sup> Defendant was fraudulent and illegal and therefore the 1<sup>st</sup> Defendant did not have good title capable of being transferred to third parties. In any case, the suit property had not yet been transferred to the 3<sup>rd</sup> Defendant.

50. Having established that the alleged sale and subsequent transfer to the 1<sup>st</sup> Defendant was fraudulent, it was the Plaintiff's submission that the provisions of section 26 of the Land Registration Act No. 3 of 2012 had been met to enable this Court to cancel the title of the 1<sup>st</sup> Defendant. Section 26 of the said Land Registration Act states as follows:-

**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 the title has been acquired illegally, unprocedurally or through a corrupt scheme.**

Further Section 80 of the Land Registration Act gives the court power to order the cancellation of a registration and order a rectification and states that

**“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.**

**(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”**

In the present case, it has already been determined that there was fraud in the transfer of the suit property from the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Defendant who is currently registered as the proprietor was involved in the said fraud or had knowledge of the same. Therefore the Plaintiff is entitled to the orders of cancellation of title from the 1<sup>st</sup> Defendant and all encumbrances over the suit property including the Charge registered in favour of the 4<sup>th</sup> Defendant.

51. On the issue of general damages, this would be determined in terms of the unquantifiable loss that has been occasioned to the Plaintiff arising from the events leading to the present suit. Further, the award of general damages is an exercise of judicial discretion. Counsel for the Plaintiff submitted that his client had lost use for the property during the subsistence of the case. It was his submission that if it were not for the case, the Plaintiff would have completed the house and rented it out. The Plaintiff indicated that he intended or at least was in the process of constructing a family home on the suit property. The Plaintiff might have lost time and money with regard to the suit property but this Court cannot turn a blind eye to the fact that this dispute had a 'family' angle to it. From the facts of the case the Plaintiff and the 2<sup>nd</sup> Defendant used to be husband and wife. The Plaintiff appears to have registered the suit property in the 2<sup>nd</sup> Defendant's name as he believed that they were still a couple much as the 2<sup>nd</sup> Defendant denied this position. In summary and considering the circumstances of this case this Court is not inclined to grant any general damages as this might just aggravate the already strained relationship between the Plaintiff and the 2<sup>nd</sup> Defendant. As for the 1<sup>st</sup> Defendant, who was already charged with fraud relating to the transfer of the suit property, this Court is also not inclined to order him to pay general damages to the Plaintiff. The property was transferred to him by the 2<sup>nd</sup> Defendant who was apparently not sued or charged for any fraud. Therefore, since the Court has decided that the 2<sup>nd</sup> Defendant should not pay general damages the same will apply to the 1<sup>st</sup> Defendant. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants were not directly implicated for any breach or fraud in the transfer of the suit property and are therefore not liable to pay any damages.

52. As for special damages, the same can only be computed from actual loss suffered as proved through evidence. The special damages pleaded by the Plaintiff in his Plaint include: Air travel and expenses for US \$ 4,000, Security for Kshs. 200,000/=, accommodation for Kshs. 150,000/=, car hire for Kshs. 80,000/= and communication for Kshs. 110,000/=. The expenses that have been specifically proven by the Plaintiff include accommodation expenses (see the receipt from Nairobi Safari Club for Kshs. 87,594/= at pages 160 to 161 of the Plaintiff's Supplementary List of Documents "PSLD" as well as other several receipts for rent from Samima Investments at pages 196 to 198 totaling to Kshs. 1,761,000/=). However, in his Plaint the Plaintiff only pleaded for Kshs. 150,000/= as accommodation expenses. It is trite law that special damages must be specifically pleaded and proved. The Plaintiff did not amend the Plaint to include the additional expenses. This Court will therefore award only that which was pleaded. The Plaintiff also produced receipts from Pax adventures to prove car hire expenses which came to a total of Kshs. 1,103,600/= (see pages 188 to 195 of the PSLD). In his Plaint the Plaintiff had only pleaded for Kshs. 80,000/= for the car hire expenses. This Court can therefore only award the said amount of Kshs. 80,000/= as pleaded. The Plaintiff further produced air tickets from the United States to Kenya totaling to USD 9,445. The Plaintiff used an exchange rate of Kshs. 90 giving a total of Kshs. 850,050/= for the air travel expenses to Kenya. The Court will however only award a total of USD 4,000 (Kshs. 360,000) as specifically pleaded in the Plaint.

## **DISPOSITION**

53. In the upshot, Judgment is herein entered for the Plaintiff in the following terms:-

a. **A permanent injunction is hereby made restraining the Defendants whether by themselves or through their agents, servants or employees from trespassing into or breaking into the suit property or from harassing,**

intimidating or threatening the Plaintiff, his servants and agents or from removing any property from or evicting the Plaintiff, his servants and or agents from the suit property, L.R. Nairobi Block 94/170, Nyari.

b. A permanent injunction is hereby made restraining the Defendants whether by themselves or through their agents, servants or employees from developing, constructing and/or erecting any temporary or permanent building or any temporary or permanent structure on L.R Nairobi Block 94/170 Nyari.

c. A declaration is hereby made that the 2<sup>nd</sup> Defendant was holding the Title to L.R. Nairobi Block 94/170 Nyari in trust for the Plaintiff.

d. A finding is hereby made that the 2<sup>nd</sup> Defendant has breached the trust she held in favour of the Plaintiff.

e. A declaration is hereby made that the sale transaction between the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant vide the sale agreement dated 23.03.2009, and the consequent transfer of title to the 1<sup>st</sup> Defendant, was fraudulent ad null and void.

f. An order is hereby made for rectifying the Land Register and canceling the said title given to the 1<sup>st</sup> Defendant and all encumbrances over L.R. Nairobi Block/94/170 Nyari.

g. An order is hereby made determining the trust between the Plaintiff and the 2<sup>nd</sup> Defendant and vesting the suit property in favour of the Plaintiff by having the 2<sup>nd</sup> Defendant's title cancelled and transferred back to the Plaintiff.

h. Special damages as follows:-

- Air travel and expenses- USD 4,000 (at Kshs. 90 exchange rate)
- Accommodation- Kshs. 150,000/=
- Car hire- Kshs. 80,000/=

together with interest thereon at Court rates from the date of filing suit until payment in full.

i. Costs of this suit together with interest thereon at Court rates from the date of this judgment until payment in full.

j. The court hereby finds and declares that in September 2007, when the suit property was given as security to the 4<sup>th</sup> Defendant by the 1<sup>st</sup> Defendant and a charge drawn thereon on 14<sup>th</sup> November 2007 the suit property belonged to the Plaintiff and the 1<sup>st</sup> Defendant had no capacity to charge it to the 4<sup>th</sup> Defendant. The charge dated 14<sup>th</sup> November 2007 between the 1<sup>st</sup> Defendant and the 4<sup>th</sup> Defendant is therefore illegal null and void and has got no contractual effect whatsoever. The 4<sup>th</sup> Defendant's remedy, if any, shall lie in debt or restitution against the 1<sup>st</sup> Defendant.

**READ, DELIVERED AND DATED, AT NAIROBI THIS 19<sup>TH</sup> DAY OF FEBRUARY 2016.**

**E. K. O. OGOLA**

**JUDGE**

**Ruling Read in open court in the presence of:**

Mr. Otrieno hb Kanjama for Plaintiff

M/s Shitubi for 1<sup>st</sup> & 2<sup>nd</sup> Defendant

Mr Markronald hb Gathemia for 3<sup>rd</sup> Defendant

M/s Weru hb Munyu for 4<sup>th</sup> Defendant

Teresia – Court Clerk