



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL SUIT NUMBER 34 OF 2003**

**NAKURU INDUSTRIES LIMITED.....PLAINTIFF**

**VERSUS**

**VINOD SHAH.....1<sup>ST</sup> DEFENDANT**

**J.S. SHAH.....2<sup>ND</sup> DEFENDANT**

**B.L.**

**(Sued in their capacities as the Registered Trustees of Shree Visa Oshwal Community - Nakuru)**

**JUDGMENT**

**1. Nakuru Industries Limited**, by its Amended plaint dated 24<sup>th</sup> June 2011 and filed on the 28<sup>th</sup> June 2011 sought against the defendants:

(a) *A declaration that the Defendants have trespassed onto the plaintiffs parcels of land known as L.R. No.21975, L.R. No. 19921 and L.R. No. 11264 within Nakuru Municipality hence an eviction order be issued against the defendants with the results that all buildings, structures and other fixtures on the said pieces of land be demolished and vacant possession be given to the plaintiff.*

(b) *General damages for trespass and mesne profits per month from April 1996 to the date of full payment at such rates as the court may find appropriate.*

(c) *A permanent injunction restraining the defendants by themselves, their agents and servants from entering and or remaining or continuing in occupation of the plaintiffs parcels aforesaid.*

(d) *Costs of the suit.*

2. The defendants filed a statements of defence and counter-claim and denied the plaintiffs claim. In its lengthy defence, it stated how it came into being in possession and occupation of the suit lands and consequential construction of a secondary school, swimming pool, auditorium and play ground to what is called the Shah Lalji Nangpar Academy with a student population of 320 as at date of filing the defence.

3. In its counterclaim, the defendants sought an order of:

(a) *Specific performance of the agreement dated the 7<sup>th</sup> April 1996 by effecting the transfer of the property known as L.R. 21975 to the Defendants as Trustees of Shree Visa Oshwal Community*

– Nakuru and to surrender the road marked “A” in the plan annexed to the agreement aforesaid.

(b) A declaration that the plaintiff holds the properties known as **Title L.R. No. 19921 and L.R. No.11264** in constructive trust for the Defendants as the Trustees of **Shree Visa Oshwal Community –Nakuru** pending the completion of (a) above, and in the alternative,

(c) The plaintiff do pay to the defendants a sum of Kshs.30,000,000/= together with interest thereon at Treasury Bill rates from 16<sup>th</sup> February 1994 until the date of payment in full being costs of development of the Secondary school on **L.R. No. 21975**.

(d) Costs of the suit.

4. In reply to the defence and counterclaim, the plaintiff reiterated its position set out in its plaint and further added that:

(a) The Commissioner of Lands cannot allocate private land to any person nor can the National Museums of Kenya purport to issue any letter of objection to land belonging to a private individual where it has no equitable or legal interest in the title to the property.

(b) That the defendant is guilty of misrepresentation, fraud and deceit that culminated to the Commissioner for Lands allocating it One Point Six (1.6) Hectares of Land.

(c) That the developments by the Defendant were without any colour of right, or consent, authority or knowledge of the plaintiff and therefore illegally constructed.

(d) The purported agreement dated 7<sup>th</sup> April 1996 was obtained through undue influence, duress, threats and intimidation on the plaintiff by the defendant through one Mr. Franklin Bett, then, State House Controller.

(e) That the Commissioner for Lands, after the Grant to the parcels of land, realised that private land cannot be allocated without consent and approval of the plaintiff.

Upon the above pleadings, the plaintiff has urged the court to allow its claim with costs while the defendant has urged for dismissal of the plaintiffs suit and allow its counter-claim.

Together with their respective pleadings, both parties have filed numerous documents in support of their respective positions.

**5. The plaintiff's case** is that the suit lands **L.R. No.21975 and L.R. No 19921 within Nakuru Municipality** were owned by Nagaria Estates Limited, a wholly owned subsidiary company of the plaintiff which was dissolved and struck out from the register of Companies. That the plaintiff, in the year 1966 vide letter dated 25<sup>th</sup> February 1966 donated and surrendered 1.6 Hectares of the said land parcels to the National Museums of Kenya for use as pre-historic sites upon agreed conditions.

Thereafter, the plaintiff donated some land to the defendant where it built a nursery school and a primary school. Later, the defendant needed more land to expand the school within its vicinity so it approached the National Museums of Kenya to cede part of the land donated to it by the plaintiff for that purpose, without consulting or consent of the plaintiff. By its letter dated 10<sup>th</sup> June 1993 the National Museums indicated that it had no objection to the request by the defendant and thus released the said land to it whereupon it commenced construction of the secondary school, swimming pool, auditorium and play ground at an alleged cost of Kshs.30,000,000/=. It is the plaintiff's further case that together with the land, the defendant took certain road reserves and other lands belonging to the plaintiff comprising the three parcels subject of this suit – and that despite its protestations, no heed was taken.

6. It is the plaintiffs further case that while the dispute was pending, the defendant through intimidation, duress, fraud and illegality through undue influence by the then State House Comptroller, Frankline Bett, caused the plaintiff to execute an agreement, prepared at its offices, on a Sunday evening, by its directors and chairman on the one hand and the Defendants trustees on the other hand and dated 7<sup>th</sup> April 1996 which agreement resolved the dispute upon conditions and resolutions, among them that

*(a) the plaintiffs directors agreed to donate land currently fenced and in use by the academy to the trustees (defendants) and that the community was to appreciate the very kind gesture.*

*(b) By the said agreement, the Visa Oshwal Community was to recognise and acknowledge the generosity for the additional land donated to it by the plaintiff.*

*(c) That the original Title Deed to the Lands was to be returned to the Commissioner of Lands by the Trustees for cancellation and issuance of two new title deeds, one to the defendant academy and one to the temple.*

7. Pursuant to the agreement and, by its letter dated 29<sup>th</sup> April 1996, the defendant returned the Original Title Deed for the land together with a copy of the agreement and surrendered the original grant **No. L.R. 64338** to facilitate issuance of the two titles, by the Commissioner of Lands and further caused the same to be approved for transfer to the defendant by His Excellency Daniel Moi, the former President of Kenya, upon which lands the defendant constructed the secondary school alluded to above, without the plaintiffs consent and knowledge.

8. The plaintiff called three witnesses to prove its case.

**PW1 Raj Premchand Shah** was the Managing Director of the plaintiff. It was his testimony that the defendant had trespassed on its land **L.R. No. 21975 (initially No. 19921)** and **No. 11264**, registered in its name. He stated that by a letter dated 25<sup>th</sup> January 1995, the defendant informed the plaintiff that land adjacent to the school was allocated to it yet the plaintiff had not agreed to dispose off the land to it but to the National Museums of Kenya from which they sought to know whether it had donated the land to the defendant to which former director, one Mr. Shah had made a request. It was his testimony that the land donated to the National Museums of Kenya was a gift and could not be donated to anyone else. The plaintiff then failed to surrender the title and by a letter dated 24<sup>th</sup> April 1994 and produced as exhibit, the plaintiff informed the defendant that the land belonged to it (plaintiff) and that there was no compulsory acquisition of the same.

9. PW1 testified that after numerous letters, copies produced as exhibits, and an agreement executed by both parties on the 7<sup>th</sup> April 1996, the defendant surrendered the land documents to the Commissioner of Lands, who issued a title deed in the plaintiffs name, of the lands under dispute measuring about 1.6 Hectares. He stated that as at 15<sup>th</sup> October 1992 the plaintiff through its subsidiary company Nagaria Estates Limited was the registered owner of the suit lands, that it was a private land. He continued that he was aware of the Agreement dated 7<sup>th</sup> April 1996 that he signed it, that it was not stamped and it was made under duress on a Sunday evening when the defendant trustees came to their offices with one Frankline Bett – where they all signed. He stated that the plaintiff disowned the said agreement as they had not invited Frankline Bett to be an arbitrator and only signed because they were afraid as he was the State House Comptroller. He stated that the company did not comply with the terms of the agreement as it was signed under duress and undue influence.

10. On cross examination, PW1 stated that the portion under dispute was gazetted as a national pre-historic site in 1943 and had not been de-gazetted. He admitted that he saw the construction of the school in 1991/1992 and that his children attended the school built on the disputed land. He further confirmed that his family did not protest nor inform the defendant that it had trespassed on the lands, nor was any steps taken to stop the construction. He also confirmed that the original Title was never transferred to Nakuru Industries Limited by Nagaria Estates Limited, but was later transferred in its favour after the Defendants surrendered the title to the Commissioner of Lands, pursuant to the Sale Agreement dated the

7<sup>th</sup> April 1996, on the 29<sup>th</sup> April 1996.

11. PW1 agreed that he did not indicate in any of his numerous letters to the Defendant that there was duress in entering and executing into the agreement dated 7<sup>th</sup> April 1996 but the defendant failed to acknowledge the generosity of his family for the donation of the land to it and the manner of acknowledgment was not specified but was to be in writing. He agreed that after surrender of the Titles by the Defendant, the new titles were to be issued to the Defendant and the temple, and not to Nakuru Industries the plaintiff, and further, stated that if the lands were to revert to the owner, it would have been to Nagaria Estates Limited and not Nakuru Industries Limited. He told the court that he was not asking for the demolition of the structures but that the land be given back to the company(plaintiff) or in the alternative, the Defendant to buy the lands from the company. He also stated that the plaintiff did not have intentions of taking the land back from the National Museums of Kenya to whom it had made a donation.

On further cross examination, PW1 stated that the reason for receding the agreement was that the community(defendant) had not acknowledged his family donation. Being asked by the trial court (Judge W. Ouko (as he then was), what type of donation the plaintiff expected, he stated that the gesture they expected from the community was to be in form of a letter informing the entire community that his family was willing to donate the land, but the community did not do so, instead it insulted his father and have no respect for him.

12. **PW2 Jayankumar Gilabeded Karania** stated that he was a member of the Visa Oshwal Community, the defendant, and during the material times was its Chairman, but was never a trustee. He testified that during his tenure as chairman, he spearheaded an amicable solution to the land dispute over **L.R. NO. 19921** and by April 1996 he became aware of the settlement of the dispute after the meeting of the 7<sup>th</sup> April 1996 when an agreement was executed resolving the dispute. It was his testimony that on 22<sup>nd</sup> April 1996 after signing the agreement, a general meeting was called to approve the resolution and settlement of the land dispute with the Defendant.

On cross-examination, he stated that there was no objection to the construction of the secondary school, auditorium and the swimming pool by the defendant and that the same was with the blessings of the plaintiff's managing director, P.N. Shah.

13. **PW3 Ammunitalal M. Shah** confirmed that he was chairman and member of the Defendant Community during the period 2000-2002 and current trustee. He too confirmed that the land dispute between the plaintiff and the defendant was settled amicably by the signing of the agreement on the 7<sup>th</sup> April 1996 in the plaintiffs offices, which meeting he learnt on the Friday before the Sunday meeting to sign the agreement and where he signed as a witness. He testified that no pressure was exerted upon the plaintiffs directors, and that the agreement was read over to the parties before signing and it did not indicate the form of appreciation to the plaintiff. He further stated that in accordance with the terms of agreement, the community was to surrender the title which was done, and the land was to be subdivided into two portions to be registered, one to the community and the other to the temple, and that the appreciation was to be done after the defendant got the title in its name.

It was his testimony that after the title was surrendered to the Commissioner of Lands, the plaintiff went behind the community and obtained a title to itself. In re-examination, he stated that there was no time limit for acknowledging the donation to the plaintiff and that he did not know who appointed Franklin Bett to arbitrate over the dispute.

14. **The Defendants case** was urged through one witness.

**DW1 Mahendra Shamji Shah**, a member of the Visa Oshwal Community confirmed to have been aware of land dispute and the agreement dated 7<sup>th</sup> April 1996. He stated that the gist of the agreement was that the plaintiff was to donate the lands in dispute to the Defendant and in return the defendant was to thank them. That pursuant to the agreement the defendant returned the Title deed to the Commissioner of Lands

for issuance of fresh title to the defendant but instead a title was issued in the plaintiffs favour. He confirmed that no objection was raised by the plaintiff during construction of the Secondary school, auditorium and play ground and stated that the community will honour “Mzee.” - Premchand Shah – once the title is issued to the community in terms of the agreement.

15. Upon the above evidence and the parties respective pleadings, the plaintiff formulated a set of issues for the court's determination and the defendant adopted the same. These are:

1. *Whether the plaintiff legally surrendered the suit property to the National Museums of Kenya.*
2. *Whether or not the land now occupied by the defendant comprising the secondary school, the swimming pool, the auditorium and playground lawfully belong to the plaintiff.*
3. *Whether the Defendants are trespassers on to the land and whether the land in question is private land.*
4. *Whether or not approvals by the former President D.T. Arap Moi to the proposed acquisition by the Defendant were lawful and whether it conferred valid transition of the title to the land to the Defendant.*
5. *Whether the agreement made on 7<sup>th</sup> April 1996 is valid or whether the same was made under intimidation, undue influence and duress exerted upon the plaintiff by one Mr. Franklin Bett, the former Controller of State House, and hence whether or not the plaintiff was justified in withdrawing from it.*
6. *Did the plaintiff request Mr. Frankline Bett to preside over any reconciliation meeting between it and the Defendants concerning the disputed land.*
7. *Whether the plaintiff as a corporate person was party to the agreement dated 7<sup>th</sup> April 1996.*
8. *Whether or not the Commissioner of Lands was misled into allocating **L.R. No. 19921** measuring 1.6 Hectares to the Defendant.*
9. *Whether the development upon the suit property was justified and whether it was done with the express or implied authority of the plaintiff, and whether the plaintiff consented to the said development.*
10. *Whether the plaintiff title can be defeated.*
11. *Whether the Commissioner of Lands had authority to allocate private land upon a no objection letter by the National Museums of Kenya without following the correct procedure.*
12. *Whether there is a valid counter-claim and whether the defendant is entitled to an order of specific performance and or orders to recover Kshs.30,000,000/= and mesne profits.*

16. The court has considered the above issues as formulated. It is its view that all the issues are intertwined, though both the plaintiff and the defendant proceeded to submit on each separately in their written submissions. The court will proceed to interrogate the parties submissions jointly and or severally as may be appropriate.

17. **Issue No. 1**

The plaintiff's submission is that the plaintiff did not legally surrender the suit property to the National Museums of Kenya, a submission echoed by the Defendant, though, vide different arguments and reasons. The plaintiff's “No” answer was premised on the evidence of PW1 Raj Premchand Shah who is submitted all along misled the Defendant, its members, the then President of the Republic of Kenya

and Franklin Bett together with the Commissioner of Lands who fraudulently and illegally acquired land for his own benefit and that of others, which titles were thereafter surrendered by his failure to declare his interest when he chaired meetings to discuss the lands in dispute.

The defendant on its part submitted that by **Legal Notice No. 1007 of 1943**, the suit property was gazetted as a monument within the meaning of Archaeological and Palaeontological interest ordinance, 1943, that the plaintiff concealed the information that the suit property was owned by Nagaria Estates Limited, a subsidiary of the plaintiff, since dissolved and that the said title was never transferred to Nakuru Industries by Nagaria Estates, and therefore the said Nakuru Industries could not surrender or transfer that which it did not own. Citing **Salomon -vs- Salomon Co. (1897) Ac 22**, it was submitted that a company is a legal entity distinct from its members, and that the property of a company does not belong to its members either in law or in equity.

Under **Section 154 Companies Act**, it was submitted that the relationship between a subsidiary company and the holding company merely revolves around ownership of shares, but does not grant the holding company the right to sue upon a cause of action resident with the subsidiary company. To that extent, it was urged that the plaintiff cannot urge any interest on behalf of Nagaria Estates Limited in whose name the suit properties were registered. Relying on **Pennington's Company Law 8<sup>th</sup> Edition and Palmers Company Law Volume I** as well as **Grower and Davis Principles of Modern Company Law 7<sup>th</sup> Edition**, the defendant urged this court to find that the plaintiff had no legal interest in the suit property to donate or surrender to the National Museums of Kenya.

#### 18. Issue No. 2

Both parties agree that the land occupied by the defendant comprising of the secondary school, swimming pool, the auditorium and playground were never owned by the plaintiff but by Nagaria Estates Limited. This is supported by the evidence of PW1, PW2 and DW1. The plaintiff was registered as the owner after signing of the agreement dated 7<sup>th</sup> April 1996 when the original title was surrendered by the defendant to the Commissioner of Lands and illegally the title was issued in the plaintiff's name, in place of one sub-division being registered to the Defendant and the other to the temple. Interestingly, DW1 agreed on the Evidence of PW1 and PW2 that the title was illegally and fraudulently issued to the plaintiff after the parties agreed that the dispute was amicably settled and culminated in the signing of the agreement on the 7<sup>th</sup> April 1996 – which the plaintiff went behind and deceitfully obtained registration to its name. In answer to that issue the court finds that the land upon which the secondary school, swimming pool, auditorium and play ground does not legally belong to the plaintiff, but it is held on constructive trust by the plaintiff on behalf of the defendant.

19. The matter of constructive trust was ably discussed in the Defendants submissions that it is automatically imposed in circumstances where it is unconscionable or contrary to fundamental equitable principles for the owner of a particular property to hold it purely for his own use. It is imposed irrespective of the intention of the person concerned, though it may coincide with their original intentions. The plaintiffs submission was that the suit premises legally belonged to the plaintiff without elaborating how the plaintiff acquired the title after the agreement of the 7<sup>th</sup> April 1996 which acquisition was highly questionable as stated above.

The court will address the issue of the legality of agreement dated 7<sup>th</sup> April 1996 herebelow and relate it to the plaintiff's acquisition of the suit title.

#### 20. Issue No. 3

Whether the Defendants are trespassers on the suit land and whether the said land is private property. The plaintiff answered this question in one sentence, that the land is private land and that the Defendants are trespassers therein. There is no dispute that the suit land was and remains a private property, registered in the plaintiff's favour in November 1998 after the agreement of 7<sup>th</sup> April 1996, but prior, in the name of Nagaria Estates Limited, both being Private Limited Companies.

The defendant submitted that it cannot be a trespasser as it occupied and developed the suit property by consent authority and permission of the plaintiff. It is further submitted that there being a constructive trust as stated above, then, the plaintiff holds the suit property on behalf of the defendant and to that, it cannot be a trespasser on its own land.

The court notes that **PW1, PW2, PW3 and DW1** all testified that the construction of the secondary school and the other structures were built with full knowledge, authority and acquiescence of the plaintiff. There were no objections whatsoever. The issues raised by the plaintiff of none compliance with the agreement dated 7<sup>th</sup> April 1996 by not acknowledging the generosity of the plaintiff for the donation of the suit land will be addressed below- under issue No 5. The court makes a finding that the Defendants were not trespassers on the lands in dispute.

#### **21. Issue No. 4**

The issue of whether the transfer of the suit property from the plaintiff to the defendant was approved by the former President of Kenya, His Excellency Daniel T. Arap Moi, and whether such approval was valid is a matter that, in my view, that ought to have been raised in a Judicial Review application as it seeks to challenge the powers of the former president who under the Old Constitution of Kenya had powers to allocate public land. The suit land is a private property, it therefore follows, without prejudice to my statement above, that the said approval was invalid and illegal, that the former president had no authority whatsoever to allocate or transfer private land to an individual or to any entity, save under the doctrine of compulsory acquisition, for purposes of using the land for public purposes and whose procedure is quite elaborate, not just signing an approval letter for the acquisition and transfer of land from one person or legal entity to another.

#### **22. Issue No. 5 and 6**

The plaintiff in its Amended plaint dated 24<sup>th</sup> June 2011 Paragraph 6 stated that the agreement dated 7<sup>th</sup> April 1996 was secured under duress exerted to the plaintiffs directors by the former State House Comptroller, Frankline Bett. I have perused the said plaint. No particulars of duress or intimidation are pleaded and/or itemised. In its submissions the plaintiff states that a former director of the plaintiff mislead the defendant, its members, the former President, the former State House Comptroller and the Commissioner of Lands and fraudulently and illegally acquired land for his benefit. No link has been laid by the plaintiff to the acquisition of the land by the former director and the matter at hand. PW1 in his testimony testified that the suit land was a gift donated to the National Museums of Kenya, that he signed the agreement under duress as he had not invited the State House Comptroller. It was his testimony that after the signing of the agreement, he wrote many letters to the defendant but he did not raise issue of the alleged duress in any of them. That he did not indicate the plaintiff's intentions of taking the suit land back, but only sought the acknowledgement indicated in the agreement. He further stated that he did not seek to have the structures constructed on the suit property demolished and confirmed that the construction was with their full knowledge and consent without any objections at all.

23. In my considered view, this is not testimony of someone who signed an agreement under duress or intimidation. My reading and understanding of all the plaintiff's and defence witnesses evidence was that the dispute of ownership of the suit lands was settled amicably, that no pressure or undue influence was exerted upon the plaintiff's directors to enter into the agreement. PW2, testified that the understanding when the agreement was signed was that the suit lands would be subdivided and one portion registered in the defendants name and the other in the Temples' name. All the plaintiffs witnesses supported the defendants case. None supported the plaintiffs case and all wondered how the plaintiff got registered as the proprietor of the suit land, and all concluded it was illegally and fraudulently obtained. DW1 supported the plaintiff's evidence too and no where did he mention that the agreement was signed under pressure from the former State House Comptroller. Parties are bound by their pleadings. As no particulars of coercion and intimidation were stated nor proved, such allegations remain as such. On an answer upon a question by the court, PW1 stated that the reason for the withdrawal from the agreement was because the defendant had not acknowledged the family donation of the land and that the defendant community had no respect for his father. If indeed there was intimidation and duress, it would have been

the easiest thing to tell the court the particulars of the alleged intimidation, coercion and pressure and in what manner Frankline Bett exerted such pressure if any. The court is of the opinion that the issue of coercion, intimidation and duress were nothing but an afterthought which is exhibited by PW1's evidence that he only wanted the community (Defendant) to buy the land from the plaintiff. He disowned his prayers in the plaint. He did not want the defendant evicted from the suit lands nor did he want the structures built thereon demolished. That is an admission, by the plaintiff's main witness, the Managing Director, that the plaintiff had no plausible case against the defendants.

*In Chitty on Contracts, 26<sup>th</sup> Edition Vol 1, Paragraph 504, the words "Duress of a person" is defined as follows:*

***"Duress of the person may consist in violence to the person or threats of violence, or imprisonment whether actual or threatened. It is further stated that duress does not literally deprive the person affected of all choice, it leaves him with a choice --- Duress prevents the law from accepting what has happened as a contract valid in law."***

*Also in the case Kenya Commercial Bank Ltd -vs- Harunani (2002) 2 KLR, the court held that:*

***"in commercial dealings, there is freedom of contract which should be respected. The courts can only intervene when there are vitiating factors in a transaction – where it is plain that there was fraud when the contracts were entered into or where one party uses its superior position to force another into contractual obligations which were oppressive."***

This court finds no evidence, even remotely, to suggest that the defendant forced the plaintiff directors into signing the agreement and as such no vitiating factors have been demonstrated to call for the court's interference with the contract and intentions of the parties.

#### 24. Issue No. 5

##### **Validity of the 7<sup>th</sup> April 1996 Agreement.**

I have seen the agreement. It is dated and signed by the plaintiff's directors and the defendant's trustees, and witnessed by Frankline Bett, referred to as the Chairman and Arbitrator. The agreement is not duty-stamped under the **Stamp Duty Act, Chapter 480 Laws of Kenya** nor is it registered. Both the defendant and the plaintiff in their respective pleadings did not raise any issue as to the validity of the agreement. PW1 in his evidence alluded to the fact that the agreement was not registered nor was stamp duty paid for it. He however testified at length on the contents of the said agreement which he confirmed he signed together with the other directors of the plaintiff. He is the one who produced the said agreement as PExhI. No objection was raised on its production by the defendant. It is upon the said agreement that the defendant surrendered the title to the Commissioner of Lands leading to the issue of a title in its favour. In its submissions through its learned Advocate Mr. Adala, the plaintiff terms the document as an illegal agreement which was meant to enable the defendant to annex, acquire and expropriate private land belonging to the plaintiff. He urges the court to declare it as inadmissible as it was made under unfavourable circumstances to the plaintiff, duress, intimidation, overbearing and undue influence.

He cited **Section 3 and 5 of the Stamp Duty Act, Chapter 480** and the Schedule thereto, that reads:

***(3) "--- every instrument specified in the schedule, wheresoever executed, which relates to property situated, or to any matter or thing done or to be done in Kenya shall be chargeable with stamp duty specified in that schedule----"***

Citing the case **Westlands Residential Resorts Ltd -vs- Kwanja Limited**, he urged the court to expunge the agreement dated 7<sup>th</sup> April 1996 from the court records.

The above case involved sale and transfer of land. The sale agreement had not been duty-stamped.

Invoking **Section 3(b)**, it was submitted that a person seeking to rely on the instrument can approach the court for leave to have it duty-stamped out of time. Since no leave by either party was sought, the court held that the agreement for sale was not admissible for use in a civil court.

25. Similar circumstances obtain in the present case. The parties to this case relied heavily on the agreement dated 7<sup>th</sup> April 1996 and none sought leave to have it duty stamped-out of time.

On that point, Mr. Chacha, Advocate for the defendant submitted that failure to duty-stamp an agreement does not make it unenforceable and that does not change the facts in the unstamped agreement but make it only inadmissible but not unenforceable. He relied on the case **Lucy Njeri Njoroge -vs- Njoroge Kalyahe HCCC No 14 of 1998 Justice Waki, J.A** where it was stated that **Section 19 of the Stamp Duty Act** offers no absolute prohibition of admissibility of unstamped documents. The Judge went on to hold that none stamping does not declare a document a nullity and that the parties actions and intentions are not affected by the section. This court is of the same considered opinions that whether stamped or not, the parties intentions as expressed in an agreement entered into are enforceable. In this case, it is upon the terms of the agreement entered into by the parties on the 7<sup>th</sup> April 1996 that the defendant surrendered the original title and the plaintiff obtained the title in its favour in respect of the suit lands. It would be uncounsonable to deny the validity and enforceability of the said agreement after obtaining full benefits from the enforcement of the said agreement through an illegality as the manner of obtaining the said title was contrary and against the express provisions of the said agreement.

26. This court has already addressed the issue of undue influence, intimidation and duress and made a finding that no demonstration of such acts of undue influence and duress by the defendant upon the plaintiffs directors were pleaded and or proved. Just to reiterate, the behaviour prior to and after the execution of the agreement that I have found to be enforceable, the agreement was prepared and signed at the plaintiffs offices after which execution the plaintiffs hosted a dinner for the parties. Even assuming that the plaintiff's directors were afraid of Mr. Frankline Bett, they had a choice to take action thereafter. The plaintiffs managing director confirmed that after the execution of the agreement, he wrote several letters to the defendants and that no complaint was raised as to show that undue influence was exerted on the plaintiffs directors to sign the agreement. The court agrees with the plaintiffs Advocate that a document that is not stamped makes is admissible in a civil court. But again, the plaintiff raised no objection on its admissibility or enforcement. This case is premised on the said agreement from which the plaintiff was a beneficiary. Without it, plaintiff's case would be a none-starter. The court finds that the agreement dated the 7<sup>th</sup> April 1996 is enforceable against both parties to the agreement.

**27. It is trite that failure to pay duty stamp does not on a document make it absolutely inadmissible in a civil court of law.**

In the case **Heptulla -vs- Noormohamed (1984) KLR 580**, the Court of Appeal held that no court ought to enforce an illegal contract where the illegality is bought to its notice and if the person invoking the aid of the court is himself implicated in the illegality. The plaintiff benefited from the unstamped agreement by committing an illegality, and obtaining a title to the lands under dispute.

The Courts makes a finding that even though the agreement dated 7<sup>th</sup> April 1996 was not duty stamped nor registered, the parties intentions expressed therein are enforceable and failure to duty stamp and registration cannot make the agreement absolutely inadmissible for reason advanced above. There was no justification as none was shown in the evidence adduced by the plaintiff's witness of withdrawing and/or failure to comply with the terms of the agreement. It is on record in PW1's evidence that the only reason the plaintiff withdrew from the agreement was that the plaintiff wanted the defendant to pay for or buy the suit lands from it, a condition that was not expressed in the agreement. To that extent, it is evident that there were no good reasons or at all for the plaintiff's failure to comply with the terms thereof and instead illegally and fraudulently obtained title in its favour contrary to the express provisions and intentions of the parties to the agreement.

**28. Issue No. 7**

There is no dispute as to the legal status of the plaintiff as it is a body corporate with power to sue or being sued. As none was shown, it was within its powers to enter into the agreement under review. Failure by the plaintiff to have the agreement signed under seal of the company may not be an absolute bar to its enforceability. The intentions of the parties as expressed are paramount. The parties acted on the terms of agreement save that the plaintiff decided to go back on the terms and took undue benefit from the said agreement. See the case **Lucy Njeri Njoroge (Supra) and Heptulla -vs- Noor Mohamed (Supra)**.

## **29. Issues No. 10 and 11**

The plaintiffs title to the suit property was obtained contrary to the express provisions of the agreement dated 7<sup>th</sup> April 1996. It was expressly agreed that the Commissioner of Lands would subdivide the land and issue two titles in the names of the defendant and the temple. Instead, and without notice to the defendant the plaintiff caused titles to be issued in its favour.

PW1 in his testimony, the plaintiff testified that when the title documents were surrendered to the to the Commissioner of Lands by the defendant on the 29<sup>th</sup> April 1996 pursuant to the agreement between the parties, the Commissioner of Lands issued the title deed to the plaintiff. It was his evidence that there as no agreement that the title would be issued to Nakuru Industries Limited, the plaintiff, and that the Commissioner of Lands did not follow the terms of the agreement and that if the land was to revert to the owner, it would have reverted to Nagaria Estates Limited, the original owner. That in its own admission, the title issued to Nakuru Industries Limited in November 1998 was illegally done. PW2 agreed with PW1 that the suit land belonged to Nagaria Estates Limited, a separate Legal entity. Likewise PW3 agreed that the land was to be subdivided and two titles would be issued to the community and to the temple. He stated that after surrender of the titles, the plaintiff went behind it and obtained a title to itself.

From the above evidence it is evident that the plaintiff's title was obtained through an illegal manner by deceit and/or fraud, and the plaintiff actively participated in the illegality.

It is the defendants submission that consequences of an illegal transaction is that a party cannot base a claim on such illegality. It is clear to the court that the title issued to the plaintiff was tainted with illegality and fraud, and if such is the case, and the court is so persuaded then, the said title is capable of being challenged and defeated.

**30. Section 26 of the Land Registration Act, 2012** gives instances when a title to may be cancelled if it is obtained through misrepresentation, illegality and fraud. The sanctity of title is protected under the Kenyan Constitution by dint of **Article 40** which provides that no person shall arbitrarily deprive a person of property of any description or of any interest or right unless the interest or title has been found to have been unlawfully acquired (**Article 40 (2) and (6)**).

A certificate of title issued upon a transfer or transmission by a proprietor shall be taken as conclusive evidence that the person named therein as proprietor is the absolute and indefeasible owner thereof and that title shall not be subject to challenge, except on grounds of fraud or misrepresentation to which he is proved to be a party – See **JR No 77 of 2010 Republic -vs- The Semor Registrar of titles (2012) KLR**.

In the present case, the title was issued to the plaintiff by the Commissioner of Lands. The plaintiffs own witnesses testified that they did not know how the title was issued to itself, that it was so issued through fraud and misrepresentation. No transfer document was produced to court to confirm who the transferee was. Indeed the plaintiff's witnesses testified that the title should have reverted to Nagaria Estates Limited who were the original owners and not Nakuru Industries Limited, who went behind the back of the defendant and obtained registration in its favour contrary to the terms of the agreement, that upon surrender of the original title to the suit land, two titles were to be issued to the Defendant and the temple.

31. The answer to that issue is that upon fraud, illegality, deceit or misrepresentation being proved against a registered owner of property in the manner of obtaining the title, then the courts will always order rectification of the register in favour of the rightful party. This goes into answering **Issue No. 11**. The

Commissioner of Lands had no authority whatsoever to allocate and/or transfer the suit land without following due process and procedure and upon such realization, the Commissioner proceeded to cancel the allocation of 1.6 Hectares to the defendant. It followed up as shown above to further the illegality by transferring the suit land to the plaintiff without the necessary transfer documents or consents from the rightful owner, Nagaria Estates Limited in support and in total disregard to the agreement entered into by the parties in this suit on their intentions. The plaintiff was a party to the illegal acquisition of the title in its favour in November 1998. By dint of **Section 26** above, the said title ought to be rectified.

### **32. Issue Number 12.**

The defendants counter-claim sought an order of specific performance of the agreement dated 7<sup>th</sup> April 1996 by effecting transfer of the suit property **L.R. No 21975** to itself as Trustee of the Shree Visa Oshwal Community and a declaration that the plaintiff holds titles **L.R. 19921** and **L.R. No 11264** in constructive trust for the defendant.

I have stated above, and evidence was tendered by the plaintiffs and defendants witnesses that the plaintiff obtained the title fraudulently. I have also made a finding on issues **Number 10 and 11** that the plaintiff obtained the title in its favour through illegality and the same ought to be rectified in favour of the rightful party. The matter of constructive trust was also addressed in **Issue No 3.** that touched on alleged trespass by the defendant upon the plaintiff's lands. It was the courts finding that the defendants are not trespassers having entered into and constructed on the suit properties with full authority, consent and approval of the plaintiff. It was a further finding, based on evidence adduced by all witnesses, that constructive trust was automatically imposed in unconscionable circumstances and contrary to fundamental equitable principles. All witnesses, both for the plaintiff and for the defendant agreed in principle that the titles ought to have issued to the defendant and the temple and not to the plaintiff. To that extent, the title by the plaintiff can only be said to have been so obtained on behalf of the defendant.

33. It is upon the obvious illegality that the plaintiff based this suit. The court will always guard against causes of action based on illegalities to preserve the integrity of the Judicial system and to right wrongs, that once detected, the court will take the necessary action to redress the illegality.

In the **Heptulla -vs- NoorMohamed (Supra)**, the Judge of Appeal Nyarangi summed up the legal position as follows:

***“No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Defendant has pleaded illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him.”***

34. The plaintiffs claim is that the defendant has trespassed onto its land parcels **No. L.R. 21975, L.R. No. 19921 and L.R. 21975 and L.R. No. 11264.** How did the plaintiff obtain ownership of the land parcels stated above? Evidence adduced was that the said lands belonged to Nagaria Estates Limited, a wholly owned subsidiary of the plaintiff, that were donated to the defendant approximately 6(six) Acres to construct a school, and later sought additional land to extend and construct a secondary school, auditorium and a playground. The full history on the donation of the said lands from the plaintiffs subsidiary company to the defendant and subsequent registration of the same in favour of the plaintiff has been stated in paragraph 5 of this Judgment. I need not repeat the same.

35. Suffice to state that the counter-claim is well founded both in fact and in law. The said lands ought to have been registered in the defendant's favour pursuant to the parties express intentions in the agreement dated 7<sup>th</sup> April 1996 that brought an amicable settlement to the ownership dispute. The court having found that the said registration was obtained through an illegality, then, the rightful thing is to right the

wrong, as held in the **Hepatulla -vs- Noormohamed** case. The Commissioner of Lands will not be left out of the blatant illegality. Without surrender of the original Grant comprising land **L.R. No. 21975** and title that was to be surrendered being **L.R. No 21914** and without consent of the defendant, and in total breach of the agreement, the Commissioner of Lands issued the plaintiff with the title to the lands under dispute.

The court after considering all the evidence tendered, submissions of counsel and authorities submitted, I am satisfied that Titles in favour of the Plaintiff being **L.R. No. 21975, L.R. No. 19921 and L.R. No. 11264** within Nakuru Municipality were illegally and unlawfully obtained through unprocedurally corrupt scheme by the plaintiff.

36. While allowing the prayers sought in the defendants counter-claim, I have considered the following authorities:

**(1) ELC Case No 600(B) of 2012 Elijah Makeri Nyangwae -vs- Stephen Mungai Njuguna (2013) KLR.**

*The court in this case established that the titles to the lands was obtained illegally and unlawfully. The court directed that the title be cancelled and the names of the proprietor be removed and the plaintiff be registered as the proprietor.*

**(2) ELC NO. 56 of 2014 Paulina Chemutai Chirchir -vs-Kipyegon Arap Sang and Three Others (2015) KLR** for reasons of fraud, illegalities and unlawful registration of the title in favour of the defendant, the court granted an order of cancellation of the title and restoration of the plaintiff's name as the lawful proprietor.

**37. Section 26 of the Land Registration Act No. 3 of 2012** provides that a certificate of title issued upon registration to a purchaser of land upon transfer or transmission shall be taken as *prima facie* evidence that the person so registered is the absolute and indefeasible owner 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.**

38. The plaintiff's claim stood on very weak legs and its witnesses were unable to persuade or convince the court through their evidence that the titles were obtained lawfully and procedurally and capable of being trespassed upon by the Defendant. The defendant established by evidence, principally adduced by the plaintiff's witnesses that the said titles were obtained through misrepresentation, fraud and illegality.

The **Land Registration Act No. 3 of 2012, Section 26** confers authority to the court to order and direct cancellation of titles obtained through fraud and misrepresentation or illegally or unprocedurally. For the above reasons, the court finds that the plaintiff has not proved its case on a balance of probability and declines to issue the orders sought. The plaintiff's suit is therefore dismissed.

39. I have made a finding that the defendants counterclaim is well founded. The court proceeds to enter judgment for the defendants against the plaintiff in the following terms:

**(a)---** *That an order of specific performance of the agreement dated 7<sup>th</sup> April 1996 by effecting the transfer of the property known as **L.R. No. 21975** to the Defendants as Trustees of **Shree Visa Oshwal Community – Nakuru** and to surrender the road marked “A” in the plan annexed to the agreement.*

**(b)** *That a declaration is issued that the plaintiff holds the properties known as **Title L.R. No 19921 and L.R. No. 11264** in constructive trust for the Defendants as the trustees of the **Shree Visa Oshwal Community – Nakuru** pending the completion of (a) above.*

*(c) In view of the Orders made in (a) and (b) above, the defendants claim, in the alternative for Kshs.30,000,000/= with interest being costs of development of the school on L.R. No. 21975 cannot be sustained. It is dismissed.*

*(d) The Defendants shall have costs of the suit.*

**Dated, signed and delivered in open court this 24<sup>th</sup> day of March 2016.**

**JANET MULWA**

**JUDGE**