



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ENVIRONMENT AND LAND COURT CASE NO. 1106 OF 2005**

**ZEBAK LIMITED.....PLAINTIFF**

**VERSUS**

**NADEM ENTERPRISES LIMITED.....DEFENDANT**

**JUDGMENT**

1. The plaintiff claiming to be the registered owner and entitled to possession of a parcel of land known as **LR No. 3734/731, LR 21582/9** situate at Lavington, Nairobi (hereinafter referred to as in this judgment as “the suit property”) instituted this suit against the defendant vide a plaint dated 9<sup>th</sup> September 2005. The plaintiff claimed that the defendant had by itself, servants or agents wrongfully and unlawfully entered the suit property and had in spite of repeated demands to vacate failed to do so. The plaintiff by the plaint prayed for judgment against the defendant on the following terms:-

- a. **An injunction to restrain the defendant by itself, its servants, agents or employees or otherwise howsoever from remaining on or continuing in occupation of the said property;**
- b. **General damages;**
- c. **Costs of the suit and interest thereon;**
- d. **Further or other relief the court will deem fit and just to grant.**

2. Upon service of the plaint on the defendant, the defendant filed a defence and counterclaim dated 13<sup>th</sup> December 2005. The defendant denied the plaintiff’s claims of ownership of the suit property and averred the defendant was the bonafide registered owner of the suit property having acquired it for valuable consideration and was therefore entitled to the right of access and use as the owner thereof. By the counterclaim the defendant sought a declaration that it was the bonafide registered owner of the suit property and for a permanent injunction restraining the plaintiff from trespassing and/or interfering with the defendant’s quiet enjoyment of the suit property. The plaintiff with leave of the court amended its reply to defence and defence to counterclaim as per the amended reply to defence and defence to counterclaim dated 29<sup>th</sup> September 2010. Before the amendment to the reply to defence and defence to counterclaim the parties had on 10<sup>th</sup> June 2009 filed agreed statement of issues as hereunder:-

1. **Whether it is the plaintiff or the defendant that is the registered owner of parcel No. LR No. 3734/731 LR No. 21582/9.**

**2. Whether the defendant has trespassed onto the said property.**

**3. Whether the title held by the defendant grants it a bonafide interest in the said property.**

**4. Is the plaintiff entitled to the reliefs claimed in the plaint or in the alternative whether the defendant is entitled to reliefs as set out in the counterclaim.**

**5. Whether the plaintiff has a cause of action against the defendant to the exclusion of the Commissioner of Lands and/or chief registrar.**

3. The matter was part heard before **Dulu, J** on 5<sup>th</sup> July 2011 when he took the evidence of one of the plaintiff's witnesses but when the matter was listed for hearing before me on 18<sup>th</sup> April 2013 the parties requested that the suit be heard *denovo* which request was granted. The hearing opened before me on 17<sup>th</sup> May 2013 and was further heard on 13<sup>th</sup> August 2013, 26<sup>th</sup> September 2013, 22<sup>nd</sup> November 2013 and 13<sup>th</sup> February 2014 when the defence closed its case. Although the court on its own motion after the parties had called their witnesses directed the summoning of the Land Registrar who had authorized the issue of the provisional title, the witness for various reasons recorded in the proceedings did not attend to give evidence. The parties opted to dispense with the witness and make their submissions on the basis of the evidence that was on record.

4. The plaintiff called 4 witnesses in support of its case while the defendant called 3 witnesses in support of its defence and the counterclaim. At the close of the case the parties filed final written submissions.

**5. The plaintiff's case;**

It is the plaintiff's case that it was at all material times the registered owner of all that parcel of land known as LR No. 3734/731 registered as IR No. 21582/9 situated in Lavington, Nairobi. The plaintiff contends that as the registered owner of the suit property he is entitled to all rights of ownership including possession and enjoyment of the suit property. The plaintiff states that it purchased the property on 17<sup>th</sup> March 1998 from Azhar Mohamood and Mohamed Parwaiz for the sum of kshs. 14,000,000/= and denies that it has ever transferred the suit property to any other person. The plaintiff avers it still holds and is in possession of the title documents.

6. The plaintiff avers that sometime in June 2005, the defendant by itself and/or through agents, servants wrongfully and unlawfully entered into the suit property and stationed guards thereon thereby denying the plaintiff the right of entry, use and enjoyment of the property. The plaintiff further contends that in the event the suit property is registered in the defendant's name then the property could only have been so registered through fraud and/or collusion and therefore such registration would be null and void and of no legal effect. The plaintiff in the circumstances claims the defendant is a trespasser onto the suit property with no right to or over the property. The plaintiff thus seeks as against the defendant a permanent injunction to restrain the defendant by itself, its servants, agents or employees from remaining or continuing to be in occupation of the said suit property.

**7. The defendant's case;**

The defendant contends that it is the registered owner of the suit property having purchased the property in March 2005 from one Stephen Nyangi Marwa for the consideration of kshs. 18,000,000/=. The defendant states that it purchased the property for valuable consideration in good faith without notice of the plaintiff's interest and that it is in occupation and possession of the property. The defendant asserts that it is an innocent and bonafide purchaser of the property and therefore entitled to the protection of the law as such. The defendant seeks a declaration by the court that it is the bonafide registered owner of the property and further an order of permanent injunction against the plaintiff restraining them from in any manner interfering with the defendant's interest and ownership rights over the suit property.

**8. The evidence by the plaintiff;**

Viri Goswami (PW1) an advocate of the High Court of Kenya who acted for the plaintiff as their lawyer in the purchase of the suit property testified as PW1 and he adopted his witness statement dated 21<sup>st</sup> April 2012 in his evidence. He stated that he acted for both the plaintiff as purchaser, and Azher Mahmood and Mohamed, Parwaiz as the vendors. He testified that he prepared a sale agreement for the sale of the suit property to the plaintiff at the consideration of kshs. 14,000,000/=. Agreement (undated) but executed produced as Plaintiff Exhibit 1. The witness testified that due process was followed in having the sale transaction completed. The full purchase price of kshs. 14,000,000/= was paid to the vendors by way of bankers cheque dated 10<sup>th</sup> March 1998. Copy of bankers cheque produced in evidence as plaintiff exhibit 2 'G'. The witness further testified that he drew the transfer which was duly executed by the vendors, assessed for duty and stamp duty of kshs. 560,000/= duly paid. The transfer was presented for registration and was registered and an endorsement of the registration of the transfer effected on the original title which the witness had released to the lands office for purposes of the registration of the transfer. The transfer from Azhar Mahmood and Mohamed Parwaiz to Zebak Limited was registered on 17<sup>th</sup> March 1998. The original transfer dated 11<sup>th</sup> March 1998 and a certified copy of the certificate of title were produced as plaintiff exhibits 3 and 4 respectively.

9. PW1 confirmed that after the registration of the transfer in favour of the plaintiff he released the original certificate of title IR No. 21582/9 and the original stamped transfer to the plaintiff's director, Mr. Mohamed Soraya for safekeeping. The witness stated he was unaware of the original certificate of title ever having been lost or destroyed and neither was he aware of the plaintiff having sold the property to one Stephen Nyangi Marwa and stated that as far as he knew the original title was still in the plaintiff's custody.

10. The plaintiff's second witness was Azhar Mahmood (PW2). In his testimony before the court he adopted his witness statement dated 18<sup>th</sup> April 2012. The witness testified that in December 1995 he came across an advertisement in one of the dailies that property LR No. 3734/371 was to be sold by public auction on 20<sup>th</sup> December 1995 at Marshi House, Moktar Daddah street at 11.00am on the instructions by a chargee in exercise of its power of sale. Newspaper advertisement was produced and marked as plaintiff exhibit No. 5. The witness and his brother, Mohamed Parwaiz decided to bid for the property and their bid of kshs. 11,400,000/= was accepted as the highest bid. The property was subsequent to the auction transferred to PW2 and his brother Mohamed Parwaiz by the chargee, Ari Credit & Finance Limited by way of transfer dated 26<sup>th</sup> January 1996, which was registered on 1<sup>st</sup> February 1996 produced as plaintiff's exhibit No. 6.

11. PW2 testified that in 1998 they decided to sell the suit property to the plaintiff at the agreed consideration of kshs. 14,000,000/=. They instructed M/s Sobhag H. Shah & V. Goswami Advocates to act for them in the sale transaction and the same firm also acted for the plaintiff, the purchaser in the transaction. The said law firm drew the sale agreement which was executed on 10<sup>th</sup> March 1998. PW2 confirmed the full purchase price of kshs. 14,000,000/= was paid to them and that they executed a transfer in favour of the plaintiff which was duly registered on 17<sup>th</sup> March 1998. It was PW2's further evidence that the original title documents were released to the plaintiff together with the executed transfer.

12. PW3 one, Mohamed Parvez Saroya testified that he was a director of the plaintiff company which he and his deceased wife had registered with the object of acquiring a property and developing the same. The witness in his evidence relied on his witness statement dated 29<sup>th</sup> June 2011. He testified that they identified plot LR No. 3734/731 situated in Lavington which property was owned by his brothers Azhar Mohamood and Mohamed Parvez which they purchased at kshs. 14 Million in the terms of the sale agreement produced as plaintiff's exhibit 4. The witness further testified the sale transaction was completed and the plaintiff was duly registered as the owner of the suit property following registration of the transfer. The witness testified that the full consideration of kshs. 14 Million was paid to the vendors and stamp duty on the transfer of kshs. 560,000/= was also paid.

13. PW3 stated that upon purchase of the property the plaintiff placed its guards on the property to secure the property but stated they could not immediately embark on the development of the property as his wife was in 1999/2000 became sick which necessitated him to take her for treatment in the United Kingdom

(UK) where he remained until 2004. PW3 testified that in March/April 2005 while still in the UK he received information from a nephew of his that his guards had been chased away from the property by some people claiming to be the owners of the property. PW3 stated that immediately after receiving the report he contacted Munir Charundri Advocate and instructed him to take up the matter and sort it out. He testified that Mr. Chaundri Advocate made a report at the Muthangari Police Station and further on 27<sup>th</sup> July 2005 wrote a letter to the Registrar of Titles protesting about the actions of the party invading the plaintiff's property. PW3 further testified that the land registrar vide a letter dated 8<sup>th</sup> December 2005 invited the parties in dispute to attend before him with a view of resolving the dispute.

14. PW3 confirmed that he had his advocate Mr. Chaundri attended before the land registrar and that each of the parties produced separate titles showing each to be the registered party. On the witness being referred to the copy of the provisional certificate of title in regard to the suit property in the defendant's bundle of documents, the witness stated that the plaintiff to date holds the original certificate of title and that the plaintiff has never applied for a provisional certificate of title to the property or transferred the property to any person known as Stephen Marwa. The witness denied that entry No. 8 made against the title on 4<sup>th</sup> November 1998 effecting transfer to Stephen Nyangi Marwa was at their instance. The witness stated he does not know Stephen Nyangi Marwa and that he has never met him. PW3 stated that at no time did the plaintiff desire to sell its property and it never sold and neither did it receive any payment for it from anybody. The witness further stated that he was not aware that any Gazette Notice was issued in regard to the loss of the title to the suit property to enable a provisional certificate to be issued. In conclusion the witness testified that the property has remained idle since 2004 save that the incomplete structure which was on the property appears to have been vandalized. The witness sought for an order restoring the property to the plaintiff.

15. The plaintiff's final witness was Mohamed Munir Chaudhri Advocate, a senior partner in the law firm of Chaudhri & Associates who testified as PW4. He adopted and relied on his witness statement dated 24<sup>th</sup> September 2013. He informed the court that sometime in 2005 a director of Zebak Limited, Mr. Mohamed Parvez Saroya who was then away in the UK contacted him in regard to property **LR No. 3734/731** owned by the plaintiff and reported to him that persons who claimed to be the owners of the property had taken over the property and chased away the plaintiff's guards. Mr. Saroya instructed him to take up the matter on behalf of the plaintiff and further on the instructions PW4 conducted a search on the property at the lands office which the witness stated revealed a provisional certificate of title had been issued and registered as entry No. 7, a transfer had been registered as entry No. 8 to one Mr. Marwa for kshs. 15 Million and a further transfer had been registered as entry No. 9 to M/s Nadem Limited for kshs. 18 Million. PW4 stated he was astonished as to how the Registrar of Titles could issue a provisional certificate of title to another person while the original title was in the possession and custody of the owner.

16. PW4 asked the Registrar whether notice had been issued in the Kenya Gazette before the provisional title was issued but the registrar stated he was not sure. The witness on examining the copy of the provisional certificate and the copy of the original title observed that on the provisional title there is an endorsement by the Registrar to the effect that:

**“Entry No. 6 above is entered in term of section 65 (h) of Registration of Titles Act and is not made on the original Title.”**

Yet in the original title entry No. 6 is the transfer to Zebak Limited. The witness stated that PW3 had indicated to him he had the original title in his possession and as he was not able to get any assistance from the land registrar he reported the matter to CID and further advised PW3 that the plaintiff could file a suit in court for the determination of the dispute. PW4 further testified he wrote the letters dated 25<sup>th</sup> July, 2005 and 25<sup>th</sup> August, 2005 to the Principal Registrar of Titles and the defendant respectively setting forth the plaintiff's position in regard to the dispute (plaintiff exhibits 7 & 8'a' respectively). PW4 stated the defendant responded vide a letter dated 30<sup>th</sup> August 2005 where they stated they had legally and lawfully acquired the property (plaintiff ex. 9). The land registrar on his part summoned both the plaintiff and the defendant to a joint meeting at the lands office which he and his client PW3 attended and

the defendant with their advocate also attended. At the meeting with the registrar, each party produced their title including their respective certificates of title and accordingly the registrar could not make any decision. As a parting shot the witness stated that in his view the provisional title was not issued in compliance with the procedure outlined under the **Registration Titles Act**, Cap 281 (repealed).

#### 17. **The Evidence by the defendant;**

The defendant's 1<sup>st</sup> witness was one Kaburu Paul Ikiugu who testified as DW1. The witness stated that he was a director and shareholder of the defendant and he confirmed having made a witness statement dated 6<sup>th</sup> December 2012 which he relied upon and adopted as his evidence in the case. He testified that **LR No. 3734/731**, the suit property, is owned and registered in the name of the defendant. He stated that the defendant purchased the suit property from one Stephen Nyangi Marwa in February 2005 for the sum of kshs. 18 Million as per the agreement of sale dated 12<sup>th</sup> January 2005 produced in evidence as defence Ex 1. The witness testified that the vendor was represented in the sale transaction by his own advocates M/s Kiarie Kamere & Co. Advocates while the defendant was represented by the firm of Wanjagi Macharia & Company Advocates. DW1 testified that the defendant paid the full purchase price of kshs. 18 Million and produced the payment cheques as DEx. 2. He stated that after payment of the purchase price the suit property was transferred to the defendant and he produced a copy of the transfer executed in favour of the defendant dated 1<sup>st</sup> February 2005 which was registered against the title of the suit property on 11<sup>th</sup> March 2005. DW1 produced the copy of the transfer as DEx. 3 and a copy of the certified provisional certificate of title as DEx. 4. The transfer in favour of the defendant, Nadem Enterprises Limited was registered as entry No. 9 against the provisional certificate of title.

18. DW1 stated that the defendant took possession of the suit property towards the end of April 2005 and at that time the property was vacant but there was a semi completed house on the property. The witness further stated in his evidence that sometime in September 2005 some people claiming to be owners of the property came and wanted to take possession of the property but the defendant did not allow the intruders to take possession and they never came back again. The witness testified that towards the end of 2005 their advocate Wanjagi Macharia notified them that the land registrar had summoned the parties claiming ownership of the property. The parties attended before the land registrar and each produced a title to the property prompting the land registrar to advise that we pursue the resolution of the dispute in court. DW1 testified that the defendant remains in possession of the suit property as the owner and prayed for the dismissal of the plaintiff's suit and for the defendant's claim as per the counterclaim to be granted.

19. The defendant's second witness was Fredrick I. Lubellela a Senior land registrar, lands office Nairobi testified as DW2. He confirmed having made a witness statement dated 4<sup>th</sup> December 2012 which he adopted as his evidence in the case. The witness stated he was familiar with the property the subject matter of the suit. He confirmed a provisional certificate of title in respect of the suit property was issued and registered as LR No. 21582/7 on 21<sup>st</sup> May 1998 and that subsequent to the issue of the provisional certificate of title the property was transferred to one Stephen Nyangi Marwa and to Nadem Enterprises Ltd and the transfers were endorsed on the provisional certificate of title as entry Nos. 8 and 9 respectively. He confirmed that he signed the entries made against the title as the land registrar.

20. DW2 stated that in December 2005 he received a complaint from the plaintiff's advocate that his client's land was being interfered with by the defendant which prompted him to summon both parties and their respective advocates. The complaint was that the transfer effected to Mr. Marwa was fraudulently procured but the witness stated the transfers presented for registration were proper and as per the records held by the lands office the current registered owner is Nadem Enterprises Limited, the defendant herein.

21. The witness under cross-examination affirmed that under Section 71 of the **Registration of Titles Act**, Cap 281 Laws of Kenya it is mandatory for a 90 days notice to be issued before a provisional certificate of title is issued. He further stated that a provisional certificate of title is issued where the original title is certified as having been lost. The witness testified that it was another land registrar one E. N Gicheha who processed the issue of the provisional certificate of title and he stated he was not aware whether the provisions of Section 71 of the Registration of Titles Act had been complied with before the

provisional certificate was issued.

22. The defendant's third and final witness was Wanjagi Macharia who testified as DW3. He was the defendant's advocate in the purchase transaction that resulted in the transfer and the registration of the suit property in the defendant's name. DW3 stated he had made a witness statement on 19<sup>th</sup> July 2013 which he relied on as his evidence in the suit. He confirmed he acted for Nadem Enterprises Ltd in the purchase of LR No. 3734/731 which they were purchasing from one Stephen Marwa who was represented in the transaction by M/s Kiarie Kamere & Company Advocates. The witness testified that he conducted a search on the suit property which confirmed the same was registered in the name of Mr. Marwa and that he approved the sale agreement and had the same executed by his client. He stated the defendant paid the consideration of kshs. 18,000,000/= upon the completion of the transaction. The vendor's advocates by a letter dated 25<sup>th</sup> April 2005 addressed to the witness law firm confirmed receipt of the money (letter exhibited as DEx5). The witness further stated he registered the transfer in favour of the defendant (Dex3) on 11<sup>th</sup> March 2005 and that thereafter the defendant took possession of the suit property.

23. DW3 testified that during the month of June 2005 he received telephone calls from Chaudhri Advocate acting for the plaintiff questioning the defendant's ownership of the suit property to which the witness advised the defendant had purchased the property. DW3 indicated a meeting with the land registrar did not resolve the problem as the records in the lands office indicated the suit property was registered in the name of the defendant yet the plaintiff was claiming to be the owner. According to the witness the land registrar advised the parties to report the matter to the police for investigations.

24. Following the close of the defence case the court *suo moto* directed that the land registrar who had issued the provisional certificate of title be summoned as a witness to shed more light on the circumstances that the provisional certificate of title was issued as it was a pertinent issue in the determination of the suit. Though the officer attended court on 30<sup>th</sup> April 2014 she could not testify because she had no access to the land office records, she having left the Ministry of Lands by then. The parties by consent agreed to dispense with the attendance of the witness and on 23<sup>rd</sup> June 2014 the court directed the parties to file the final and closing submissions. The plaintiff's submissions dated 26<sup>th</sup> June 2015 were filed on 30<sup>th</sup> June 2015 while the defendants submissions dated 14<sup>th</sup> August 2015 were filed on 26<sup>th</sup> August 2015.

#### 25. Submissions by the parties;

The parties in their filed submissions reiterated the evidence as adduced by the parties which I have summarized hereinabove. The plaintiff in particular submitted that the failure by Elizabeth Gicheha, the land registrar who registered the provisional certificate of title and/or the chief land registrar to attend court to adduce evidence as to the issuance of the provisional certificate of title after being issued summons by the court left a lot to be desired and asserted that such failure should lead to the inference that their evidence would have been adverse. In this regard the plaintiff referred the court to the case of **Bukenya & Others –vs- Uganda [1972] E. A 549** where the Court of Appeal held:-

**“The court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case....where the evidence called is barely adequate, the court may infer that evidence of uncalled witnesses would have tended to be adverse...”.**

26. the plaintiff in his submissions contended that the issue of the provisional certificate of title was unlawful and was null and void for failure to comply with the provisions of Section 71 of the Registration of Titles act cap 281 Laws of Kenya and in his view could not confer any interest on the transferees whose transfers were registered subsequently against the same. Section 71 of the **Registration of Titles Act** (repealed) provides as follows:-

**“In the event of a grant or certificate of title being lost or destroyed, the proprietor of the land, together with other persons, if any, having knowledge of the circumstances, may make a declaration, stating the facts of the case, the names and descriptions of the registered owners**

and the particulars of all changes and other matters affecting the land and title thereto to the best of the declarant's knowledge and belief and the registrar, if satisfied as to the truth of the declaration and the bonafides of the transactions, may issue to the proprietor of the land a provisional certificate of title which shall contain an exact copy of the original grant or certificate of title bound up in the register, and of every memorandum and endorsement thereon, and shall contain a statement why the provisional certificate is issued; and the registrar shall, at the same time, enter in the register notice of the issuing of the provisional certificate, and the date thereof, and why it was issued, and the provisional certificate shall be available for all purposes and uses for which the grant or certificate of title so lost or destroyed would have been available and as valid to all intents as the lost grant or certificate.

**Provided that the registrar, before issuing a provisional certificate shall give at least ninety days' notice in the gazette of his intention to do so."**

27. The plaintiff's counsel submitted that the plaintiff had through PW3 testified that the plaintiff had never lost or misplaced its title or declared it lost or misplaced and that PW3 had in fact availed its original title before the court and a certified copy of the same was produced as PEx. 4. The plaintiff further had testified that it had not transferred the property to any body and neither had it applied for a provisional title. The plaintiff on the basis of the facts and the evidence submits that there was no declaration from the proprietor of the land, the plaintiff herein, that the original certificate of title was lost or destroyed. The Registrar of Titles did not make any statement indicating the reasons for issuing the provisional title and the mandatory requirement for the registrar to issue a 90 days notice in the Kenya Gazette before issuing the provisional certificate was not adhered to. In consequence the plaintiff submits the provisional certificate was irregularly issued and is therefore a nullity. To the extent that the provisional certificate of title was used to transfer the suit property to Stephen Nyangi Marwa, the plaintiff argues that the transfer was ineffectual and was null and void *ab initio* the same having been registered by use of a provisional certificate of title which was itself void.

28. In urging the court to hold all the transactions effected using the provisional certificate of title as void the plaintiff referred the court to the case of **Macfoy –vs- United Africa Ltd [1961] 3 ALL ER 1169** where Lord Denning expressed himself as follows:-

**"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."**

The plaintiff further cited another decision of Lord Denning in the case of **Lazarus Estates Limited –vs- Beasley [1956] 1 ALL ER 341** to buttress the argument that where a party has acquired an advantage through illegality occasioned by fraud such party will not be permitted to thrive on the advantageous position. His Lordship stated:

**"No court in this land will allow a person to keep an advantage he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."**

29. The plaintiff further in his submissions argued that the transfer effected in favour of Stephen Nyangi Marwa was null and void *ab initio* and could therefore not pass a good title to the defendant and consequently the transfer registered in favour of the defendant was ineffectual and the title the defendant holds to the property is equally void as the said Stephen Marwa had no title that he could pass. The plaintiff faulted the defendant's failure to call Stephen Nyangi Marwa a witness to prove the bona fides of the title the defendant held. The plaintiff urges the court to draw an adverse inference that the said Stephen Marwa would have given unfavourable evidence against the defendant. In this respect the plaintiff referred the court to the case of **Kimotho –vs- Kenya Commercial Bank [2003] 1 E A 108** where the court held:-

**“Failure by a party to call as a witness any person whom he might reasonably be expected to call if that person’s evidence be favourable to him, may prompt a court to infer that the person’s evidence would not have helped the party’s case.”**

The plaintiff in consequence urged the court to hold that the provisional certificate of title issued in respect of the suit property is null and void for failure to comply with section 71 of the registration of Titles Act, cap 281 Laws of Kenya and flowing from that, the court should further hold and declare that all subsequent transactions affecting the suit property registered under the provisional certificate of title are null and void. The plaintiff in the premises urges the court to declare that the plaintiff is the bonafide owner of the suit property.

30. The defendant for its part submitted that from the documents and evidence tendered in support of the defendant’s case, the defendant has demonstrated and established that it is the registered owner of the suit property. DW1 testified how the defendant acquired the property through purchase for the total consideration of kshs. 18,000,000/= which the defendant duly paid and the transfer of the suit property was effected in favour of the defendant. DW2, Fredrick Lubullela, a land registrar confirmed that he processed and registered the transfer in favour of the defendant as entry No. 9 having previously processed and registered the transfer in favour of Stephen Nyangi Marwa as Entry No. 8. DW2 affirmed that the provisional certificate of title had earlier been issued and registered as entry No. 7 while the transfer in favour of the plaintiff had been registered as entry No. 6. The defendant submits that the land registrar confirmed that as per the record held by the lands office, the defendant is the registered owner of the suit property.

31. The defendant submitted that although the plaintiff advanced its case on the fact that the plaintiff holds its original certificate of title and that the provisional title was fraudulently obtained, the plaintiff did not avail any evidence to prove the defendant was fraudulent in any way or was party to any fraudulent dealing. The defendant submits that the plaintiff merely attempted to show that the provisional title was fraudulently issued but no evidence was tendered and at any rate no evidence to link the defendant with any fraud was adduced. The defendant’s counsel in his submissions referred the court to the cases of **Okere –vs- Kiiyukia [2007] 1 EA 304 and Katende –vs- Haridas & Company Limited [2008] 2 E.A** to illustrate that in fraud cases fraud must not only be specifically pleaded and proved but also that proof is on a standard higher than on a balance of probability though not as high as proof beyond a reasonable doubt. The defendant further submitted that the defendant’s title is absolute and indefeasible in terms of Section 23 of the **Registration of Titles Act** Cap 281 Laws of Kenya (now repealed) and that the same cannot be impeached on account of fraud and further that rectification of the title register under Section 80 of the **Land Registration Act, 2012** would not be available as the defendant regularly and validly obtained title for valuable consideration.

32. On whether the defendant has trespassed onto the suit property, the defendant submitted that it is in possession as the registered proprietor following purchase of the property in March/April 2005. The defendant submits that it took possession after fully paying for the property and after being registered as owner and states that at the time of taking possession the property was vacant.

33. The defendant submits it is a bonafide purchaser for value of the suit property without any notice of the plaintiff’s interest in the suit property and that it holds a title that confers upon it a bonafide interest in the said property. The defendant avers it purchased the property after carrying out due diligence as testified by DW3. As per the title documents held by the lands office the suit property was transferred to the plaintiff on 17<sup>th</sup> March 1998 and an entry no. 6 made on the memorial. The registrar who made the entry made a **Note** that this Entry had not been endorsed on the original title. The note reads:-

**NOTE: “Entry No. 6 above is entered in term of Section 65 (h) of Registration of Titles Act and is not made on the original title.”**

34. On 21<sup>st</sup> May 1998 a provisional certificate of title was issued and registered as entry No. 7 and on 4<sup>th</sup> November 1998 a transfer was registered in favour of Stephen Nyangi Marwa as entry No. 8 and finally on 11<sup>th</sup> March 2005 a transfer was registered in favour of Nadem Enterprises Limited, the defendant

herein as entry No. 9. DW3 conducted a search on behalf of the defendant which revealed the title was unencumbered and on that basis the defendant entered the transaction with Stephen Nyangi Marwa and on that account submits he was an innocent purchaser for value and is entitled to the protection of the law and urges the court to grant the defendant the reliefs sought in the counter claim.

### **35. Analysis and determination;**

Although the plaintiff filed common agreed issues which I set out earlier in this judgment, the plaintiff in his written closing submissions highlighted another set of issues which revolve around the validity or otherwise of the provisional certificate of title issued by the Registrar of Titles in this matter. I have reviewed and considered the issues argued by the plaintiff and I am of the view the same can be determined within the ambit of the issues originally framed and signed by the parties. I will therefore consider and determine the issues as agreed by the parties.

#### **1. Whether it is the plaintiff or the defendant that is the registered owner of parcel LR No. 3734/731 IR No. 21582/9.**

36. On the face of it, this issue is rather simplistic in the sense that it invites the determination of who according to the registration records maintained by the registration records keeper is the person shown to be the registered owner of the property. However the issue is more complex as it invites the consideration of various other issues that bring about a valid registration. The property the subject matter of the suit was registered under the provisions of the **Registration of Titles Act**, Cap 281 Laws of Kenya (now repealed). The plaintiff as per the evidence which is not disputed was registered as owner on 17<sup>th</sup> March, 1998 but also the defendant was pursuant to a transfer dated 1<sup>st</sup> February 2005 registered as owner of the property on 11<sup>th</sup> March 2005 so that its transfer is later in time than that of the plaintiff.

Under Section 23 (1) of the repealed Act, Cap 281 Laws of Kenya a certificate of title is conclusive evidence of proprietorship. Section 23 (1) Cap 281 provides:-

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

37. On the face of it there is evidence that the defendant was registered as proprietor of the suit property on 11<sup>th</sup> march, 2005 following a process of sale and transfer. DW1 adduced evidence of the sale (DEX.1) and payment of the consideration of kshs. 18,000.000/= and execution and registration of the transfer. DW2 the land registrar confirmed that he as the registrar registered the transfer in favour of the defendant. It cannot therefore be disputed that the defendant was registered as owner of the suit property for valuable consideration and that the regular process of obtaining registration was followed.

38. The defendant in its defence and counterclaim dated 13<sup>th</sup> December 2005 under paragraphs 4 and 5 stated:-

**4. The defendant avers that it is the bonafide registered owner of all that parcel known as LR No. 3734/731 IR No. 21582/9 situate in Lavington, having secured it for valuable consideration and without adverse notice from the plaintiff or any party.**

**5. In response to paragraph 4 and 5 of the plaint the defendant avers that being the bonafide registered owner was and is entitled to the right of access, use enjoyment and utilization of the property, without let or hinderance from the plaintiff, and to all the rights in and appurtenant to the said parcel.**

39. The plaintiff's application for leave to enjoin the Commissioner of Lands and the Attorney General as co-defendants and to amend its plaint dated 7<sup>th</sup> August 2007 was disallowed by M. A Ang'awa, J on 3<sup>rd</sup> October 2007. However the plaintiff was granted leave to amend its reply to defence and defence to the counterclaim and by its amended defence to the counterclaim paragraph 4 A the plaintiff pleads as follows:-

**4. A. The plaintiff in response to paragraphs 9 and 10 of the defence and counterclaim states:-**

**(a) In the event that LR No. 3734/731 was registered in the defendant's name as claimed in the defence then the said property could only have been so registered through fraud and/or collusion as set out hereunder:-**

**(i) Applying for and obtaining a provisional title in direct disregard of the law.**

**(ii) Applying for and obtaining title to the suit property despite being fully aware that no transfer had been sanctioned by the plaintiff.**

**(iii) Obtaining title from the registrar yet they were fully aware that the original title had not been reported lost in any way/manner and/or from and no Gazette Notice to that effect had been issued.**

40. I have set out relevant parts of the parties pleadings to contextualize the issue under consideration for determination. The plaintiff challenges the defendant's registration as owner of the suit property and asserts that such registration must have been obtained fraudulently and gives the particulars of fraud. The defendant for its part sets up his title and asserts it is a bonafide purchaser for value without any notice. The burden to prove and establish fraud is thrust on the plaintiff. **How does the plaintiff fare in proving fraud against the defendant?** The plaintiff points to the process and manner through which the provisional certificate of Title was issued. The plaintiff states no declaration of loss of title was made and no notice of 90 days was given by the registrar as required under Section 71 of the Registration of Titles Act and further states it has never sold or transferred the property to anybody and the transfer to Stephen Marwa must have been fraudulent. That is as far as the plaintiff goes. The plaintiff does not adduce any evidence to connect the defendant to the application of provisional certificate of title. The provisional certificate of title was issued in May 1998 and the transfer to Stephen Nyangi Marwa was registered in November 1998. The defendant came onto the scene on 1<sup>st</sup> February 2005 when it executed an agreement to purchase the property from Stephen Nyangi Marwa who was then registered as owner. **Where is the evidence of collusion attributed to the defendant by the plaintiff?** The particulars of fraud ascribed by the plaintiff to the defendant are in my view presumptive. There is no evidence that the defendant was party to the application of the provisional certificate of title. There is further no evidence tendered to show that the defendant was aware that the plaintiff had any interest in the suit property as the record showed the plaintiff had transferred the property out. The plaintiff has not adduced any evidence to show that the defendant as at the time of purchasing the property was aware that the original title had not been reported lost or misplaced.

41. Equally the defendant was entitled to assume the provisional certificate of title was regularly and validly issued as it was the duty of the registrar to satisfy himself/herself that all the conditions had been met before issuing the provisional certificate of title. The defendant would not have been required to inquire whether a Gazette Notice was issued before the provisional certificate of title was issued. On the whole I am not satisfied that the plaintiff has proved to the required standard that the defendant was party to any fraud that may either have been perpetrated in the transfer of the suit property to Stephen Nyangi Marwa or the issuance of the provisional certificate of title in respect of the property.

42. The plaintiff has strongly argued that it has never sold and/or transferred its property to anybody and insists that the transfer to Stephen Nyangi Marwa of the suit property was fraudulent having been made possible by use of the provisional certificate of title which the plaintiff claims was not regularly and validly issued. I have examined the plaintiff's Ex. 4 (the copy of the original title held by the plaintiff) and the defendant's Ex. 4 (the copy of the original provisional certificate of title held by the defendant)

and noted that while the copy of the provisional title has an endorsement that the transfer in favour of the plaintiff entry No. 6 was effected without the production of the original title and that the entry was not made in the original title, the copy of the original title produced by the plaintiff shows the entry was made on the original title contrary to the registrar's notation. On close scrutiny of the entries there is appearance that the entries may have been made using different pens. The entry on the memorial title appears to have been made by use of a pen with a thick font as opposed to the pen used to make the entry on the original title. The entry on the transfer endorsing the entry appears to be with a similar pen as the one that made the entry on the memorial copy of the title. This raises the issue whether the entries were in fact made on the same date or different dates or by the same hand.

43. The endorsement of the note in the memorial copy of the title by the registrar needed to be explained and was not. No copy of the application for registration of the transfer in favour of the plaintiff was tendered in evidence which would have shown the documents which accompanied the application for registration of the transfer in favour of the plaintiff. While I do not make a finding that the entry No. 6 on the memorial copy and entry no. 6 on the original title were made contemporaneously under the same hand I entertain a doubt that they were for the reason I have given. The land registrar, Fredrick Lubullela who testified as DW2 confirmed he registered both the transfer in favour of Stephen Nyangi Marwa Entry No. 8 and the transfer in favour of Nadem Enterprises Limited Entry No. 9 and that the said transfers were in his opinion valid. The registrar who made Entry No. 6 and who made the notation that the original title had not been produced for endorsement was not called to testify. Although registrar, Elizabeth Gicheha who issued the provisional certificate of the title registered as Entry No. 7 was summoned by the court, she never testified as she had ceased to be a registrar at the time she was summoned and she explained she had no access to the records. The court therefore never got to know the circumstances pursuant to which the provisional certificate of title was issued.

44. The plaintiff contended the provisional certificate of title was irregularly and unlawfully issued and consequently null and void and could not therefore be used to effect the transfer of the suit property. **If, indeed the provisional certificate of title was irregularly and unlawfully issued who was responsible for the act? Was the defendant party to the act?** To the extent that the plaintiff points an accusing finger at the registrar of titles, my view is that the plaintiff needed to enjoin the registrar of titles or the Commissioner of Lands as a party to the suit so that they could answer for their misdeeds in case they were culpable. I am aware the plaintiff made an application to enjoin the Registrar of Titles and the Attorney General in the suit but the application was not allowed by Hon. Lady Justice Ang'awa for the reasons that she proffered. It is regrettable that the application was dismissed yet the circumstances in my view would have merited the joinder application to be granted to enable all the issues in the suit to be fully and comprehensively ventilated and a decision on all the issues made. The plaintiff did not appeal the decision and therefore the position remains that the registrar of titles is not a party to this suit and no reliefs/orders can be issued against the Ministry of Lands.

45. The plaintiff by all accounts was a purchaser for value and was registered as owner of the suit property validly. The copy of certificate of official search dated 5<sup>th</sup> October 2005 annexed as "K3" to the replying affidavit of Kaburu AP Ikingu sworn on 6<sup>th</sup> March 2006 in opposition to the plaintiff's Notice of Motion dated 19<sup>th</sup> January 2006 shows the transfer registered in favour of Stephen Nyangi Marwa on 4<sup>th</sup> November 1998 was for the consideration of kshs. 15,000,000/=. The copy of the instrument of transfer was not tendered in evidence and neither was Stephen Nyangi Marwa called as witness to testify in the case. The plaintiff denies either applying for the provisional certificate of title or transferring the property to the said Stephen Nyangi Marwa. The plaintiff was the registered owner at the time the provisional certificate of title was applied for and at the time the transfer was supposedly effected to the said Stephen Nyangi Marwa. If it is not the plaintiff who applied for the provisional certificate of title and/or executed the transfer in favour of Mr. Marwa, then the provisional certificate of title and the transfer to Mr. Marwa must have been fraudulently obtained. Unfortunately no evidence was adduced to show who applied for the provisional certificate of title and/or who executed the instrument of transfer in favour of Mr. Marwa. Ordinarily such copies of documents should be available at the lands office and it is unclear why the plaintiff could not obtain certified copies or summon the registrar of titles as a witness to avail the records.

46. The defendant avers that once its advocate conducted a due diligence and was satisfied that the property was registered in Mr. Marwa's name it agreed to enter into the transaction. Under the provisions of Section 23 of the **Registration of Titles Act**, Cap 281 Laws of Kenya, the defendant was entitled to take it that the person who was shown to be the registered owner of the property was the owner as there was no legal requirement to go behind the register to investigate the title. The defendant dealt with Mr. Marwa in 2005 and the register of the suit property showed Mr. Marwa was registered as owner of the property in 1998 having purchased the same for kshs. 15,000,000/=. The defendant agreed to buy the same property for kshs. 18,000,000/= and there is evidence the defendant paid the full consideration resulting in the property being transferred to the defendant. The defendant has contended that he was an innocent and bonafide purchaser for value without any notice of any defect of the title transferred to it. This court has to determine whether the title registered in favour of the defendant was challengeable or defeasible on account of fraud.

47. Section 23 of the repealed Registration of Titles Act provided that a title issued by the registrar to a purchaser of land shall be taken by all courts as conclusive evidence of that purchaser's absolute and indefeasible ownership. Such ownership may only be challenged on the ground of fraud or misrepresentation to which the purchaser is proved to be a party. Under Section 2 of the repealed Registration of Titles Act "**Fraud**" is defined thus:

**"Fraud" – on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration."**

48. It is instructive to note that Section 23 of the **Registration of Titles Act** (repealed) has somewhat been reproduced more or less on the same terms under section 26 (1) of the **Land Registration Act No. 3 of 2012** which provides as follows:-

**26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all court's as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –**

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party;**  
**or**
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

49. These provisions of the law reiterate sanctity of title which is anchored on the system of land registration popularly known as the "**Torrens System**" named after Sir Robert Torrens, the third premier of South Australia who pioneered the system. The system emphasizes the accuracy of the land register which reflects all the current registrable interests that affect a particular parcel of land. The government as the keeper of all the records under the system guarantees the accuracy of the records and in that regard, the indefeasibility of all rights and interests shown against the land register. In the event of any loss arising from an error in registration, the person affected is entitled to compensation from the government. As the legal provisions indicate the presumption of indefeasibility and conclusiveness of title under the Torrens System which this country applied is only rebuttable by proof of fraud or misrepresentation in which the buyer himself is involved. See the case of **Charles Karthe Kiarie & 2 Others –vs- Administrators of John Wallace Mathare (deceased) & 5 Others [2013] eKLR**. The Court of Appeal in the case of **Dr. Joseph Arap Ngok –vs- Justice Moiwo Ole Keiwa & 5 Others Civil Appeal No. Nai 60 of 1997** while commenting on the application of Section 23 (1) of the **Registration of Titles Act** had this to say:-

**"Section 23 (1) of the Act gives an absolute indefeasible title to the owner of the property.**

**The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. Infact the Act is meant to give such sanctity of title otherwise the whole process of registration of titles and the entire system in relation to own or slup of property in Kenya would be placed in jeopardy.”**

50. The judges in the case of **Charles Karathe Kiarie & 2 Others –vs- Administrators of the Estate of John Wallace Mathare (deceased)** Supra while commenting on the application of the Torrens System of Land Registration observed:-

**“...This statutory presumption of indefeasibility and conclusiveness of title under the Torrens System can be rebutted only by proof of fraud and misrepresentation in which the buyer is himself involved. The object of this philosophy was summarized in the classic privy council decision in Gibbs –vs- Messer [1891]A C 247 at pg 254 as follows:-**

**“The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plant. The object is to save persons dealing with registered proprietors form the trouble and expense of going behind the register, in order to investigate the history of their author’s title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bonafide and for value, from a registered proprietor and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author’s title.”**

51. In essence the Court of Appeal in the above case affirmed the principles of the Torrens system of registration of titles which can be summarized as follows:-

- i. The Government as the custodian of records guarantees indefeasibility of title against the whole world;**
- ii. If, anyone suffers loss as a consequence of the registration, the government is obliged to compensate;**
- iii. A bonafide buyer would not be concerned about past irregularities and/or illegality;**
- iv. A bonafide buyer notwithstanding infirmity of the vendor’s title, acquires indefeasible title;**
- v. The burden of proof of fraud is on who alleges it and the standard is more than a mere balance of probabilities.**

**Hon. Prof. Justice Ngugi** in the case of **David Peterson Kiengo & 2 Others –vs- Kariuki Thuo [2012] eKLR** where a defrauder registered himself as a proprietor of property and then sold the property to innocent buyers who were registered as the owners, the judge having evaluated the Torrens System of registration observed thus:-

**“14. Practically, the principles of indefeasibility has two implications for the instant case. It means that if the parties who acquired interests to the properties from Njendu can demonstrate that they did so in good faith, without notice and did not participate in Njendu’s fraud, their titles will be secure and guaranteed by the state. They were not obligated to do anything more than search the official register to establish ownership. If, as it turned out, the register was inaccurate by reason of malfeasance by land officials, the second implication is that the parties deprived of their property by such inaccuracy or malfeasance may bring an action against the state for recovery of damages but not for possession of ownership of the property.”**

52. As is evident from my review of the various cases where the issue sanctity of title has been raised the test is whether the person last registered as proprietor can be said to be a bonafide purchaser for value without any notice of defect in the title. If he was a bonafide purchaser for value and has been registered as proprietor his title is indefeasible and cannot be challenged. The title of the registered proprietor can only be challenged on the ground of fraud or misrepresentation to which he is shown and proved to be a party. Thus even if the registered proprietor purchased the property from a person who had been registered through fraud as long as the registered proprietor was unaware of the fraud and was not party to the fraud his title cannot be impeached. Hence even though a registration may have been obtained through fraud such registration may nonetheless be a good root of title to a bonafide purchaser for value. This is what judges in Uganda in the case of **Lwanga –vs- Registrar of Titles Misc. Cause No. 7A of 1977 [1980] HCB 24** termed the paradox of registered conveyancing where though registration obtained by fraud was void it was yet capable of becoming a good root of title to a bonafide purchaser for value.

53. There is considerable argument as to whether Article 40 (6) of the Constitution which provides thus:-

**“The rights under this article do not extend to any property that has been found to have been unlawfully acquired”.**

does in effect do, away with the doctrine of sanctity of title conferred by registration under the Torrens System. My position is that it does not and that this constitutional provision has to be read in the context of other legal provisions such as the repealed **Registration of Titles Act** and the **Land Registration Act, 2012** relating to indefeasibility of title of a bonafide purchaser. Thus in my view the most appropriate interpretation of Article 40 (6) of the Constitution and in the same vein Section 26 (1) (b) of the **Land Registration Act, 2012** would be that they would apply to a defrauder and/or fraudster who is registered as owner and that there could have been no intention to deprive an innocent buyer of his property or compensation.

54. In the present case after carefully reviewing the evidence I am persuaded the defendant was a bonafide purchaser for value of the suit property without any notice of any defect in the title and I do not find it was party to any fraud that would entitle its title to be impeached. In my view its title cannot be impeached under Section 26 (1) (a) and (b) of the **Land Registration Act, 2012**. The plaintiff has not proved the defendant was party to any fraudulent dealing and from the evidence adduced it is clear the defendant regularly purchased the property and cannot be said to have acquired the property illegally, unprocedurally or through a corrupt scheme. I am satisfied the defendant met the test laid out in the Uganda case of Appeal in **Katende –vs- Haridas & Company Ltd [2008] 2 E A 174** where the judges of appeal defined a bona fide purchaser thus:

**“A bonafide purchaser is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bonafide doctrine he must prove the following:**

- **He holds a certificate of title;**
- **He purchased the property in good faith;**
- **He had no knowledge of the fraud;**
- **He purchased for valuable consideration;**
- **The vendors had apparent good title;**
- **He purchased without notice of any fraud;**
- **He was not party to any fraud.**

I agree with their Lordships itemization of what a person claiming to be a bonafide purchaser ought to

show and I think the defendant in the instant suit has demonstrated all those requirements.

55. From what I have discussed it should now be evident that my answer to issue No. 1 – Whether it is the plaintiff or the defendant that is the registered owner of parcel **LR No. 3734/731, IR 21582/9** must be answered in favour of the defendant as I have held that the defendant was a bonafide purchaser for value and that it was duly registered as proprietor. Having answered issue No. 1 in favour of the defendant, I must also answer issue No. 3 – **Whether the title held by the defendant grants it a bonafide interest in the said property** affirmatively. The plaintiff has not proved any fraud on the part of the defendant to vitiate the defendant's title. Having resolved issues (1) and (3) issue number (2) whether the defendant has trespassed onto the said property becomes mute. I have held and found that the defendant is the registered proprietor of the suit property by virtue of being a bonafide purchaser for value. The defendant cannot therefore trespass on its own property. It follows therefore the plaintiff cannot be entitled to the reliefs it seeks against the defendant.

56. I have in the course of this judgment expressed my disappointment that the Registrar of Titles was not made a party in this suit as they may have had some explaining to do as to the circumstances under which the provisional certificate of title was issued given that the plaintiff asserts it was irregularly and unlawfully issued. This fact was not conclusively determined as there was no evidence from the Registrar of Titles relating to the circumstances of its issue. The fact, however is that the provisional certificate of title was issued, whether correctly or irregularly and it was used to process consequent transfers of the suit property including the transfer to the defendant. In case the same was irregularly issued the Registrar of Titles would be liable in damages to the plaintiff who stands to lose his property if, indeed, he did not transfer the property to Stephen Nyangi Marwa.

57. In case the lands office through the Registrar of Titles was culpable of any misdeeds where the property of the plaintiff was either through fraud or error transferred, the government would be liable in damages. Section 24 of **Registration of Titles Act**, Cap 281 (repealed) allows for recovery of damages in case of Fraud or error. Section 24 provides:-

**“Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person as proprietor of the land or interest, or in consequence of any error or misdescription in any grant or certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through the fraud, error or misdescription.”**

58. The court in its wisdom did not grant the plaintiff's application seeking to enjoin the Registrar of Titles to the suit and in the circumstances I cannot make any adverse orders against the Registrar of Titles in these proceedings the court having held that any action against the Registrar of Titles would be statute barred. The matter boils down to the legal advisers of the plaintiff and the manner they decided to ventilate their claim. It is indeed unfortunate that the plaintiff finds itself in this unique position but I guess it has recourse against the Registrar of Titles on the basis of this judgment.

59. As the matter stands, I have to determine the issues before me on the basis of the existing legal framework. Taking the totality of the evidence and the material placed before me and considering the parties submissions and the law, I am not persuaded the plaintiff has proved his case against the defendant on a balance of probability. I accordingly dismiss the plaintiff's case against the defendant with costs.

60. On the other hand I find the defendant's counterclaim against the plaintiff proved on a balance of probability. I grant prayers (b) and (c) of the counterclaim and award the costs of the counterclaim to the defendant.

**Judgment dated and signed at Kisii this 23<sup>rd</sup> day of February 2016.**

**J. M MUTUNGI**

**JUDGE**

**Judgment delivered at Nairobi this 17<sup>th</sup> day of March 2016.**

**S. OKONG'O**

**JUDGE**

**In the presence of:**

Mr. Mbaluto for the plaintiff

Mr. Abuya for the defendant

Kajuju Court Assistant

**S. OKONG'O**

**JUDGE**