



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO.1030 OF 2013

HAJI OMARI (*Suing on behalf of the estate of Taabu Binti Yussuf*)

***also known as Tabu Yussuf Marigi (deceased).....*PLAINTIFF**

=VERSUS=

EDWARD NJUGUNA KANG'ETHE.....DEFENDANT

JUDGMENT

1. By a ruling dated 27th March 2015 Honourable Mutungi J consolidated ELC 256 of 2012 and ELC 1030 of 2012 and directed that the lead file be ELC 1030 of 2013.

2. By a Complaint dated 27th August 2013 the Plaintiff seeks judgment against the Defendant for:-

i. A declaration that the sale agreement dated 20th July 2010 and the subsequent indenture dated 6th September 2010 between Edward Njuguna Kang'ethe and Mohammed Twahir Shaban constitutes an illegality and fraud hence null and void in law.

ii. A declaration that the Plaintiff is the lawful owner of all that parcel of land known as plot No. 36/1/133 Eastleigh Section 1 and any entry of the Defendant on that land constitutes trespass upon the Plaintiff's land.

iii. A declaration that the eviction order(s) obtained by the Defendant vide Nairobi ELC No. 159 of 2011 Edward Njuguna Kang'ethe v Mohammed Twahir Shaban is/are an illegality on the face of the law and any subsequent actions undertaken through its /their strength including the eviction carried out by the Defendant on 1st September 2011 at the suit land was an illegality and unlawful.

iv. An order that the Defendant be evicted forthwith from the suit land.

v. A permanent injunction against the Defendant by himself, his agents, representatives, employees, servants and or any other persons claiming through him from interfering with the quiet enjoyment of the suit land by the Plaintiff.

vi. An order for compensation for the lost income to the tune of kshs.95, 600/= per month from September 2011 up to the time that the Defendant vacates the suit land.

vii. General damages for trespass, occupation and the illegal utilization of the suit land by the Defendant.

viii. Interest on (vi) above at bank rates from September 2011 until payment in full.

ix. Costs of this suit.

x. Any other relief that this Honourable Court will deem fit and just to grant.

3. Upon being served with copies of complaint and summons to enter appearance, the Defendant entered appearance and filed a statement of defence dated 10th April 2014.

The Plaintiff's case

4. The Plaintiff's case is that at all material times to this suit, all the parcel of land known as **plot No.36/1/133 Eastleigh Section 1** belonged

and belongs to the Estate of Tabu Binti Yussuf also known as Taabu Yussuf Marigi having purchased the same in 1969 and occupied and developed it.

5. The Plaintiff contended that Tabu Binti Yussuf developed the suit property by constructing 27 houses which she rented out to tenants with a varying rental amount ranging from Kshs.1,500/= to Kshs.5,000/= per month which translates to between Kshs.70,000/= and Kshs.95,000/= per month after deducting administrative and management expenses.

6. It was the Plaintiff's case that Maria Binti Yussuf enjoyed peaceful occupation until the illegal, unlawful and violent eviction conducted by the Defendant on 1st September 2011 following eviction orders issued in **ELC Suit 159 of 2011; Edward Kang'ethe v Mohammed Twahir Shaban**.

7. The Plaintiff stated that **ELC Suit 159 of 2011** emanated from a purported sale agreement dated 20th July 2010 and subsequent Indenture dated 6th September 2010 between the Defendant and one Mohamed Twahir Shaban with the sole purpose of defrauding the Plaintiff. The Plaintiff also particularized fraud and illegality of the stated sale agreement and Indenture signed between the Defendant and one Mohamed Twahir Shaban.

8. It is the Plaintiff's case that all the sale agreement between Mohammed Twahir Shaban and Edward Njuguna (the Defendant) dated 20th July 2010, and the subsequent Indenture dated 6th September 2010 and or any other document purporting to confer legal title to the suit land to the Defendant herein is an illegality as the same were purportedly executed by a person who did not have any property and or proprietary rights over the suit land and further, they are a fraud and an illegality in the face of the law.

9. In paragraph 7 of the Plaintiff's particulars of the fraud and illegality are given as:-

(i) Purporting to convey and or transfer property and proprietary rights over the suit land when actually the purported seller never had or possessed such rights over the suit land.

(ii) Purported to convey and or transfer property and proprietary rights over the suit land when actually the purported documents could not do so as they were never duly lodged and or registered with the registrar of lands as provided for by the law.

(iii) Utilizing fraudulent means to bypass the lawful procedures required by the law in that the purported seller ID number does not match with given seller name and further that the KRA Pin utilized in the documents is a non-existing pin number.

(iv) The documents and the buyer thereof (the defendant herein) utilized a non-existent seller to cause an illegality and fraud with the sole intention of acquiring property and proprietary rights over the suit land.

(v) Purporting to purchase the suit land when the defendant could not do so.

(vi) Conniving with the purported seller to unlawfully acquire property and proprietary rights over the suit land.

10. The Plaintiff further contends that the Defendant was part and or was complacent to the illegalities and fraudulent transactions undertaken by the purported seller. That he used his resources to obstruct the course of justice and hence he was fully aware or ought to have known of these dealings. He cannot claim to be an innocent purchaser for value without notice.

11. The Defendant using the illegal and fraudulent documents moved to court vide **Nairobi HCCC No 159 of 2011; Edward Njuguna Kangethe vs Mohammed Twahir Shaban** seeking an order of eviction of the purported seller from the suit premises and eviction of all persons on the suit premises. The order was granted on 10th August 2011. That as a result, all the Plaintiff's tenants were forcefully ejected from the suit premises causing massive destruction and looting of their properties suffering harassment, assaults and even beatings of the said occupants.

The Defendant's case

12. The Defendant filed a statement of defence dated 10th April 2014 and contended that he is the present registered proprietor of the suit property. He stated that before his lawful acquisition of the property in the year 2010, the property was owned and registered in the name of Mohammed Twahir Shaban who sold it to him.

13. He further stated that the said Mohammed Twahir Shaban failed to deliver vacant possession of the suit property to him prompting him to enforce his proprietary rights over the suit property by filing **Nairobi ELC No.159 of 2011** where he obtained valid eviction orders which he used to carry out a lawful eviction on the suit property.

14. The Defendant contends that he did due diligence by carrying out the relevant searches at the Land's registry and confirmed that Mohammed Twahir Shaban was the registered proprietor.

15. That when the said Mohammed Twahir Shaban failed to deliver vacant possession of the suit premises he sought eviction orders in **HCCC No 159 of 2011** which orders were granted.

16. He prays that the Plaintiff be declared a trespasser in the suit premises as he is not entitled to rights over the same.

The Plaintiff's evidence

17. PW1 Haji Omari testified on 14th October 2019. He told the court that he is Taabu Binti Yussuf's eldest son and Administrator of her estate. He produced a Grant of Letters of Administration of the Estate of Taabu Yussuf Marigi (deceased). He stated that the suit property is registered in Taabu Binti Yussuf's name. He produced the Indenture dated 1st October 1969 showing that the suit property was transferred to Tabu Binti Yussuf.
18. He testified that the suit property had developments managed by M/s Maflora Agencies who collected rent on his behalf from the year 2009 to 2011 when they were demolished by the Defendant.
19. He stated that on 1st September 2011, he got a call from a tenant informing that a group of people had descended on the suit property in company of the police. He further stated that he rushed to the site and approached a police officer with title to the suit land but he was told to go to Pangani police station. He stated that at Pangani police station, he was served with eviction orders emanating from **ELC Suit 159 of 2011; Edward Kange'ethe v Mohammed Twahir Shaban**.
20. He further stated that he took the orders to his lawyers who searched the court file and discovered that the suit land was illegally sold to the Defendant by one Mohammed Twahir Shaban vide a sale agreement dated 20th July 2010. He told the court that his due diligence led him to discover that the Identity Card number used in the transaction by the said Mohammed Twahir Shaban belonged to another person by the name Joyce Kadenyi Tito. He stated that the Kenya Revenue Authority Pin Number used by the said Shaban does not exist at Kenya Revenue Authority records.
21. He stated that a search revealed that the suit land is still registered in the name of his late mother. He produced the letter dated 27th July 2012 addressed to him from the Ministry of lands confirming that the suit property was still registered in the name of Taabu Binti Yussuf and that the conveyance dated 6th September 2010 was a forgery that should be investigated. He further stated that he filed a forgery complaint with the CID against the Defendant who was arrested and charged in **Criminal Case No.230 of 2014; Republic v Edward Kang'ethe Njuguna**. It was his testimony that neither he nor his mother sold the suit property to Edward Kange'ethe.
22. When cross-examined, he stated that his late mother was a business woman and she bought the suit property in 1969 from an Asian but he could not tell how old she was when she bought it. He stated that it is not true that his mother was 15 years old in 1969.
23. He told the court that he is 67 years as he was born in 1952. In 2009, he was 57 years old and living with his mother who was sick in a separate property from the suit property. He stated that his mother got married to one Yussuf but they separated when he was young and he died years before his mother. His mother died in February 2009.
24. He also stated that his late mother had another son called Juma who died in an accident way before his mother. He stated that Taabu Yussuf Marigi and Taabu Binti Yussuf refer to the same person. He also stated that he entered into an agreement with M/s Maflora Agencies to collect rent before he obtained letters of administration of her mother's estate. As regards criminal **case 230 of 2014** instituted against the Defendant, he stated that he testified in that case and the accused was acquitted under Section 215 of the CPC.
25. He testified that the rent collected from the developments on the suit property was given to him and he would bank the money. He also stated that his mother did not sell the suit property. Had she sold it, she would not have retained the original Indenture. As regards the Transfer between the Defendant and Mohammed Twahir Shaban, he stated that it does not exist as he was informed by the lands registry that it is a forged document.
26. When re-examined and referred to the Grant of Letters of Administration, he stated that there were no objections to his application.
27. P.W.2, Gildad Gatwiri Karani, a land registrar at the chief Land Registrar's office; Ardhi house, produced a certificate of official search for **L.R No.36/1/133 F/N No.9416 GLA** which showed that the current owner according to the Indenture dated 1st October 1969 is Tabu Binti Yussuf. She stated that the letter dated 27th July 2012 addressed to Haji Omar originated from the Ministry of lands.
28. When cross-examined; PW2 told the court that she knew C. S. Maina who is her colleague and a fellow Land Registrar. He stated that B.F Atieno was unknown to her. When referred to the certificate of postal search showing that as at 27th April 2010, the current registered proprietor of the suit land was the Defendant and signed by B.F Atieno, land registrar and the certificate of postal search signed by C.S Maina, Land Registrar showing that as at 15th July 2010, the suit land's registered proprietor was Mohammed Twahir Shaban, she maintained that the suit property is registered in the name of Tabu Binti Yussuf.
29. She further stated that if there were other transactions registered later than 1969, she would have known as the folios are put in the specific file.
30. She stated that she did not know that the Defendant was accused of forgery. She also stated that the documents regarding the suit property have not been distorted as the file was kept in the safe.
31. When re-examined and referred to the certificate of official postal search that showed that the suit land was registered in the name of Mohammed Twahir Shaban as at 15th July 2010 and the postal search that showed that the suit land was registered in the name of Tabu Binti Yussuf as at 18th July 2012, she stated that it is possible to come up with any search that is not backed by records.
32. When referred to the letter dated 27th July 2012 addressed to Haji Omari, she stated that the original Indenture dated 1st October 1969 is

still intact and Tabu Bint Yussuf is the registered proprietor of the suit land as per the search dated 21st May 2019, which is the last entry in the file.

33. She stated that there are no documents submitted by Mohammed Twahir Shaban or Edward Kang'ethe Njuguna in the file but that there is a Grant of Letter of Administration ad litem lodged by Haji Omari on 16th June 2012 arising out of **succession cause No.1377 of 2009**.

34. PW3, Pasquale Marangu Njagi is the director of Maflora Agencies Limited. He produced the property management agreement dated 23rd February 2009 signed between M/S Maflora Agencies Limited and Haji Omari authorizing the agency to collect rent from developments on the suit property. He produced returns for the months the agency was collecting rent and stated that the agency collected between Kshs.80,000/= to Kshs.100,000/= per month. He stated that after demolitions, the tenants claimed for their house deposits.

35. When cross-examined, he stated that all the returns are in the company's letter head and the rent collected was paid to the Plaintiff by way of cheques. He also stated that he knew the late Tabu Bint Yussuf and the agency also collected rent of between kshs.80,000-100,000/= for her but their agreement was oral. He stated that he did not have the leases with the respective tenants in court.

The Defendants evidence

36. DW1; Edward Njuguna Kang'ethe the Defendant, testified on 21st June 2021. His statement dated 15th May 2015 was adopted as part of his evidence in chief. He told the court that he is the registered owner of the suit property and produced the certificate of postal search dated 15th July 2010.

37. He stated that before he purchased the suit property, he conducted due diligence and confirmed that Mohammed Twahir Shaban was the owner of the property and the encumbrances were nil. He also stated that he signed the sale agreement dated 20th July 2010 with the said Mohammed Twahir Shaban.

38. It was his testimony that Mohammed Twahir did not give him vacant possession of the suit property thus he went to court, obtained eviction orders. He evicted the occupants of the suit property and put up a block with 52 houses on the suit property within a year. He added that there was no complaint by anybody claiming interest on the suit property during the period that his construction was underway. He stated that it was not brought to his attention that the Plaintiff had gotten the suit property from his mother until this suit was filed.

39. When cross-examined, he stated that the sale agreement dated 20th July 2010 was drawn by M/s Kinyanjui Njau Advocates but he is not a witness in this case. While referring to the search dated 15th July 2010 stamped 235(C.S Maina) he stated that he had the original copy but it was not in court and that he did not know one C.S Maina and she was not his witness in this case.

40. When referred to the letter dated 27th July 2012 from the Ministry of lands addressed to the Plaintiff, he stated that he did not know what transpired as he paid Kshs.12 Million to purchase the suit property. He stated that his lawyers paid 10% of the purchase price and the balance of Kshs.10, 800,000/= was paid in cash by him. He stated that he withdrew the money from his account but he did not have his bank statements in court.

41. When referred to the Indenture dated 6th September 2010, which purportedly transferred a portion of the suit land to him, he stated that the whole suit property was transferred to him. It was his testimony that he met Mohammed Twahir in person and some other people who he did not know. He stated that he would not be calling them as witnesses in this case.

42. He stated that he bought a developed property but he did not know the value of the developments as it had small houses up to ground floor but he has now put up four floors. He stated that he did not know Tabu Binti Yussuf.

43. When referred to the report from National registration Bureau showing that the identity card used by Mohammed Twahir Shaban belonged to another person named Joyce Kadenyi Tito, he stated that he had never seen the report.

44. He also stated that he paid rates during transfer of the suit land and he pays rates but he did not have the receipts in court. He also stated that he pays electricity bills in his name. When referred to the water and electricity bills issued to Tabu Bint Yussuf on 22nd August 2011 by Kenya power and Lighting Company, he stated that he did not take any steps to ensure that his name was reflected as the owner. His name also did not reflect in the records held by Nairobi City Council of Nairobi as the owner.

45. He stated that that he has the original transfer and it was booked in the ministry of lands and it is indicated in the presentation book that it was received on 13th September 2010. He further stated that he did not have the presentation book or evidence of paid stamp duty and that he has never written to the ministry of lands to inquire about the other party claiming to own the suit property.

46. He stated that he has never conducted a search after buying the suit property to confirm who the registered owner is. He told the court that he gets about Kshs.535,000/= per month from the suit premises since 2013 when he finished construction.

47. On re-examination, he stated that he pulled down developments that were on the suit property and began constructing a fresh. On the issue of electricity bills, he stated that the bills refer to the account number and that Nairobi City Council did not raise any complaint.

48. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiff's submissions

49. They are dated 2nd September 2021. Counsel for the Plaintiff raise on the following issues for determination:-

a) *Whether the Plaintiff has a legal title or any proprietary rights of the suit land over the Defendant?*

b) *Whether the Plaintiff is entitled to prayers outlined in the plaint including costs?*

50. He submitted that the suit land is registered in the name of Tabu Binti Yussuf thus she is vested of absolute ownership under **Section 24(a)** of the **Land Registration Act No.3 of 2012**. He further submitted that the Defendant has neither a legal title nor any proprietary rights over the suit land as Tabu Binti Yussuf has never sold or transferred the suit land to any person.

51. He also submitted that the sale agreement dated 20th July 2010 and subsequent Indenture of conveyance dated 6th September 2010 between the Defendant and one Mohammed Twahir Shaban purporting to transfer the suit land to the Defendant is null and void since the alleged seller is non-existent, and did not have any property or proprietary rights over the suit land. He added that the '*nemo dat quod non habet*' rule applies to the impugned transaction as it states that the purchase of a possession from someone who has no ownership right to it also denies the purchaser any ownership rights. He relied on the Court of Appeal decision in **Diamond Trust Bank Kenya Ltd v. Said Hamad Shamisi & 2 Others [2015] e KLR**.

52. He submitted that the Defendant was a trespasser with an intention to defraud the Plaintiff and he fraudulently obtained eviction orders in **ELC No. 159 of 2011; Edward Njuguna Kange'the v Mohammed Twahir Shaban** using falsified documents and subsequently ejected all the Plaintiff's tenants from the suit land and demolished all houses on the land on 1st September 2011.

53. He relied on the case of **Duncan Nderitu Ndegwa v KPC & Another [2013] e KLR** to submit that trespass is actionable *per se* and indeed no proof of damage is necessary for the court to award damages.

54. On the issue whether the Plaintiff is entitled to the prayers sought, he submitted that the Defendant obtained eviction orders using falsified documents on 10th August 2011 and on 1st September 2011, he forcefully ejected all of the Plaintiff's tenants from the suit land causing massive destruction and looting of their properties, suffering, harassment and even assaulting occupants of the Plaintiff's premises. He also submitted that the Defendant did not serve the tenants any eviction notice nor give them time to act on the notice. This was done in bad faith. He cited the case of **Ryce Motors Limited & Another v Elias Muroki (1996) e KLR** to urge the court to award special damages to the Defendant as well as all the other prayers sought.

55. He also asked the court to consider the ruling delivered by Mutungi J in this matter on 22nd January 2015 to find that the Plaintiff is entitled to the prayers sought.

The Defendant's submissions

56. They are dated 21st September 2021. Counsel for the Defendant raised the following issues for determination:-

a) *Whether the Defendant is a bonafide purchaser for value of the suit premises.*

b) *Whether the Plaintiff has proved his case on a balance of probabilities.*

57. On the issue whether the Defendant is a bona fide purchaser for value, he submitted that the Defendant fits the definition of a bona fide purchaser for value as stated in **Martha Wangui Thurura & Another v Henry Gitahi Thurura & 3 Others [2021] eKLR** as he duly conducted a search before the transaction was completed and the search showed no encumbrances on the property.

58. He also submitted that the Defendant held a certificate of title. He relied on **Section 26 of the Land Registration Act** to submit that title in the hands of a person claiming ownership cannot be impugned unless it is proved the title was obtained illegally, un procedurally or through corrupt means. He relied on the case of **Denis Walter Bala v Agricultural Finance Corporation [2021] e KLR** in that regard.

59. He asked the court to consider that the nature of registration of the suit land was under the Government Lands Act where an indenture is prepared and which conveys and transfers property from one person to another. He submitted that the said indenture is made in various copies and if all the copies are not submitted to the registry, a previous owner may still retain a copy of an indenture for a property he has already sold and if found on him after death, it does not imply that he owns the property.

60. On the issue whether the Plaintiff has proved his case on a balance of probabilities, he relied on the case of **Michael J C K Kapsot v Koptut Arap Too [2020] e KLR** to submit that he who alleges must prove. He further submitted that the Plaintiff did not adduce enough evidence to prove the legality of his alleged proprietorship.

61. He submitted that the Plaintiff did not establish that Taabu Yussuf Marigi and Taabu Binti Yussuf referred to the same person. He added that there was no evidence that the said Taabu was the registered owner of the suit property. He also submitted that there was no evidence that the Plaintiff was in possession of the suit property prior to the year 2011 and no evidence that he collected rent from tenants who lived on the suit premises.

62. He also submitted that he was acquitted and vindicated in **Criminal Case No.230 of 2014; Republic v Edward Kang'the Njuguna** of any wrongdoing involving the transaction and prayed that the suit be dismissed.

Analysis and Determination

63. I have considered the pleadings and the evidence on record. I have considered the rival submissions and the authorities cited. The issues for determinant are:-

- (i) ***Whether the Plaintiff has a legal title or proprietary rights over the suit property.***
- (ii) ***Whether the Defendant is a bonafide purchaser for value without notice.***
- (iii) ***Is the Plaintiff entitled to the reliefs sought?***
- (iv) ***Who should bear costs of this suit?***

64. P.W.1 Haji Omari the Plaintiff told the court that he is the only surviving heir of Taabu Yussuf Marigi. He told the court that his mother passed on in the year 2009. He filed Succession Cause NO 1877 of 2009 which culminated to him being granted Letters of Administration intestate on 5th February 2010. He produced the original Indenture of conveyance in favour of Tabu Binti Yussuf from Balwant Singh S/o Hari Singh dated 1st October 1969 as an exhibit in this case. It is for Plot NO 36/1/133 Eastleigh Section. 1 hereinafter referred to as (the "suit property"). He also produced a letter of allotment and certificate of official search as exhibits in this case. There were also receipts for payments of rates, water and electricity in the names of Tabu Binti Yussuf.

65. He also stated that upon the demise of his mother he entered into a property management agreement with M/S Maflora Agencies to collect rent on his behalf from the tenants in the said property. The said agreement dated 23rd February 2009 was produced as exhibit in this case. Following this agreement M/S Maflora Agencies collected rent on his behalf from the year 2009 to 2011.

66. PW2 Gildad Gatwiri Karani a land Registrar, attached to the office of the Chief Land Registrar testified on 16th December 2019 and 19th January 2021. She told the court that Plot NO 36/1/133 Eastleigh Section 1 is registered in the name of Tabu Binti Yussuf by an Indenture of Conveyance dated 1st October 1969. She also stated that a search dated 21st May 2019 confirms that Tabu Binti Yussuf is the registered owner of the suit property.

67. When cross examined by the Defendant's counsel, she told the court that from the records at the lands registry, there were no other entries after 1969. That if there had been, they would have been indicated in the folio. She also stated that the Defendant is not the registered owner of the suit property.

68. Further that Mohammed Twahir Shaban has never been the registered owner of the suit property. She confirmed that the documents could not have been distorted as the file was kept in the safe. She also categorically stated that no documents had been submitted by Mohammed Twahir Shaban or Edward Njuguna Kang'ethe (Defendant) to the lands registry.

69. She stated that the only documents lodged are Grant of Letters of Administration on 16th June 2012 by the Plaintiff following HC Succession Cause No 1377 of 2009.

70. PW3 Pasquale Marangu Njagi, a director of M/S Maflora Agencies confirmed that he entered into a property management agreement with the Plaintiff dated 23rd February 2009. He collected rent on behalf of the Plaintiff. He confirmed that he would collect about Kshs.80,000/- to Kshs.100,000/- per month. He produced the returns for the months they collected the rent between 2009 and 2011 as exhibits in this case.

71. When cross examined by the Defendant's counsel he confirmed that he knew the Plaintiff's late mother. That they collected rent on her behalf though the agreement was verbal. He admitted that he did not have leases for the respective tenants.

72. From the foregoing, it is not in dispute that the Plaintiff is the only surviving heir of Taabu Binti Yussuf alias Taabu Yussuf Marigi (deceased). He is the legal representative of the estate of Taabu Bint Yussuf (deceased) by Grant of Letters of Administration issued on 5th February 2010.

73. It is also not in dispute that the deceased is the registered proprietor of the suit property by Indenture of Conveyance dated 1st October 1969 from Balwant Singh S/o Hari Singh. PW2 confirmed that there are no entries after this until 16th June 2012 when the Plaintiff lodged the Grant of Letters of Administration. This evidence was not rebutted by the Defendant.

74. Upon the demolition of the building on the suit property by the Defendant, the Plaintiff wrote to the Ministry of Lands seeking to confirm the status of the said suit property. The Ministry responded as follows:-

"Our Ref: GLA 9416

Haji Omari

P. O. Box 71548-00622

NAIROBI

The above matter and your letter dated 23rd July 2012 refers.

The above reference property is registered in the name of Tabu Bint Yussuf vide an Indenter of Conveyance dated 1st October 1969 from Balwant s/o Hari Singh registered in Volume N.29 Folio 408/9.

The conveyance dated 6th September 2010 between Mohammed Twahir Shaban and Edward Njuguna Kangethe is clearly a forgery and does not form part of our records. The searches attached thereto were not issued from this office and the same should be treated with contempt they deserve.

You are further advised to report the matter to the Criminal Investigation Department at the CID headquarters, the Land Fraud Section.

Yours faithfully,

C. S. Maina

For: Chief Land Registrar”

75. The above letter says it all. It confirms what PW1, the Land Registrar told the court. That the suit property is still registered in the name of Tabu Bint Yussuf.

76. DW1, Edward Njuguna Kang’ethe relies on the sale agreement between him and Mohammed Twahir Shaban dated 20th July 2010 and the Transfer dated 6th September 2010 and registered at the lands registry on 13th September 2010. PW2 denied that any documents were lodged in respect of the sale and transfer in the land registry. The same have been dismissed as forgeries.

77. Another issue worth pointing out is the identity of Mohamed Twahir Shaban. In the sale agreement dated 20th July 2010, his identity card number is given as 12965436. A search at the National Registration Bureau shows that the holder of the above number is Joyce Kadenyi Tito who hails from Bunyore North, Emuhaya District of Vihiga County. The details are not those of Mohammed Twahir Shaban. The said purported seller was not called to testify in this case.

78. From the foregoing, I find that the Plaintiff has legal proprietary right over the suit property as opposed to the Defendant.

79. Hon. J. Mutungi in a **ruling delivered on 22nd January 2015** observed that:

“.....The Defendant has stated that he is the lawful owner of the suit property having purchased the same and the same having been conveyed to him vide the conveyance dated 6th September 2010. The Ministry of Lands has disowned this conveyance and the certificates of official search tendered by the Defendant to support his claim of ownership terming them as forgeries. The National Registration Bureau has also denied that the person described as Mohammed Twahir Shaban from whom the Defendant claims to have purchased the property is the holder of National Identity card NO. 12965436. The court has further perused the conveyance dated 6th September 2010 and notes that although the conveyance cites the conveyance dated 11th August 2004 as the conveyance that conveyed the suit property to the said Mohammed Twahir Shaban it does not indicate from whom Mohammed Twahir Shaban bought property and no copy of this conveyance has been exhibited. The said conveyance is also contradictory in terms when the penultimate last paragraph is considered. The conveyance states:-

“Now THIS INDENTURE witnesseth that in consideration of sum of shillings Twelve Million (Kshs.12,000,000/-) paid to the Transferor by the Transferer, receipt of which sum is acknowledged, the Transferor conveys into the Transferee ALL THAT interest comprised in the premises which interest is a portion of land contained and conveyed by the recited indenture of conveyance of the first day of October one Thousand Nine Hundred and sixty Nine TOGETHER with all the buildings and other improvements standing or being thereon TO HOLD with the transferor, for an estate in fee simple SUBJECT HOWEVER to the provisions of the Government Lands Act (Chapter 280) and of the rules for the time being in force there under” (emphasis mine).

This conveyance raises issues as to what interest was actually transferred to the Defendant if it was a portion of the land conveyed by the conveyance of 1st October 1969. The conveyance recited in the preamble was one dated 11th August 2004 and not the one of 1st October 1969 which had conveyed the suit property to the plaintiff’s mother. Thus in my view the ownership of the Defendant of the suit property is put to question and needs to be explained at the trial.

Having come to the determination that the plaintiff has demonstrated a prima facie case with a probability of success I need to determine whether the plaintiff would suffer damages that would not be compensatable in damages. The plaintiff states that his mother has owned this property since 1969 when she purchased the same and had effected developments and had tenants in the premises who were paying him over Kshs.95,000/- per month. In the plaint the plaintiff has sought orders for the eviction of the Defendant and for compensation of lost income at the rate of Kshs.95,600/- per month from September 2011 up to the time the Defendant vacates. Quite evidently therefore the lost income and/or mesne profits can be ascertained as at the trial. However land is a unique commodity and as in the present case the plaintiff’s family have claimed to have occupied the suit land for over 40 years since purchasing the same before they were evicted by the Defendant. The plaintiff in my view cannot be adequately

compensated in damages for the loss of the land if indeed the court finds in his favour after the trial. It would not be right or proper for any person to forcefully invade another's property eject them and argue that the person who may indeed turn out to have been unlawfully ejected or evicted cannot be granted an injunction since he/she can be compensated by an award of damages. A person has a right to choose where to invest and own property and having made that choice such a person ought not to be pushed aside by other persons who may be well endowed and therefore in a position to pay damages. The court's ought not to be used to promote and/or encourage impunity and every citizen should always feel that they can seek refuge in the courts of law and have their rights protected.

In the circumstances of this case I am persuaded that the parties should and ought to maintain the obtaining status quo where no party should sell and/or alienate the suit property and consequently the plaintiff's prayer for injunction in terms of prayer (4) of the Notice of Motion is well deserved and I grant the same.

As regards the plaintiff's prayer to have the monthly rental income deposited in court it is my view that the court lacks the machinery to exercise the supervisory authority as requested by the plaintiff. No schedule of tenants and/or the amounts that they pay has been furnished to the court. The plaintiff acknowledges that all his tenants were evicted and his houses demolished by the Defendant who has instead put up his own structures which he rents out. I have elsewhere observed that the plaintiff if he is successful at the trial can be adequately compensated by way of damages as the loss of income can be quantified. I thus decline to grant prayer (5) of the Notice of Motion.

The upshot is that I grant prayer (4) of the plaintiffs Notice of Motion dated 27th August 2013 to the plaintiff and award the costs of the application to the plaintiff. Having regard to the nature of this case I am of the view that the ends of justice would be better served if the hearing and determination of the suit is accelerated and expedited and in that regard I further order and direct that the parties complete compliance with the provisions of Order 11 of the Civil Procedure rules within the next 60 days from the date of this ruling and the matter be and is hereby fixed for a pre trial conference on 30th March 2015 for pre trial directions."

80. I find that the Plaintiff has proved his case on a balance of probabilities as against the Defendant.

81. It is the Defendant's case that he is a bona fide purchaser for value without notice. He told the court that he did not know about Tabu Bint Yussuf at the time he purchased the suit property. He relies on the sale agreement between him and Mohammed Twahir Shaban dated 20th July 2010 and the transfer dated 6th September 2010. The court already stated in the preceding paragraphs that the identity card given by the said vendor belongs to someone else. In the case of **Martha Wangui Thurura & Another vs Henry Gitahi Thurura & 3 Others [2021] e KLR** Judge A. Omollo while quoting the precedents, defined a bona fide purchaser as follows:-

"In several Court of Appeal decisions inter alia Elizabeth Wambui Githinji & 29 others Vs Kenya Urban Roads Authority supra and Lawrence P. Mukiri Mungai, Attorney Francis M. Mwaura Vs A. G. & 4 others the court rendered itself thus;

"Bona fide purchaser, the courts have maintained, is assured of protection, notwithstanding that previous dealings might be shown to have been mired in fraud. See Dr. Joseph Arap Ngok V Justice Moijo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997.

The Ugandan case of Katende v. Haridar & Company Limited (2008) 2 E.A.173, has been cited extensively with approval in many local decisions. It developed the following strictures to be satisfied before a conclusion can be drawn that the purchaser is innocent and acquired the property for value and without notice:-

"..... it suffices to describe a bona fide purchaser as 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 bona fide doctrine, (he) must prove that:

- a. he holds a certificate of title;*
- b. he purchased the property in good faith;*
- c. he had no knowledge of the fraud;*
- d. he purchased for valuable consideration;*
- e. the vendors had apparent valid title;*
- f. he purchased without notice of any fraud;*
- g. he was not party to any fraud.*

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner."

82. Before execution of the sale agreement dated 20th July 2010 the Defendants stated that he did due diligence. He relied on the certificate of postal search dated 15th July 2010 which shows that the registered proprietor of LR NO 36/1/133 measuring 0.1056 acres was Mohammed Twahir Shabir of P. O. Box 80432 Mombasa. The encumbrances are given as Nil. The said search is signed by C. S. Maina No. 235 for Registrar of Lands.

83. He also admitted in cross examination by the Plaintiff's counsel that he bought a developed property which had small houses. He maintained that he visited the suit property. He does not tell the court whether he interviewed the occupants of the small houses in a bid to establish ownership. He does not tell the court if he visited the suit property in the company of the purported vendor Mohamed Twahir Shaban. He told the court that he was not calling C. S. Maina as a witness.

84. **Clause 1** of the Sale Agreement provides that:-

“The property sold is ALL THAT piece of land situate in the City of Nairobi in the Nairobi Area in the Republic of Kenya comprising by measurement approx. 92 by 50 feet thereabouts known as Plot No 133 Section one Eastleigh TOGETHER WITH the buildings and other improvements erected and being thereon (if any) (hereinafter called “the property”).”

One wonders why the property being sold was not described as in the Certificate of Official Search dated 15th July 2010 since the Defendant claims to have done due diligence.

85. Clause 4 of the sale agreement provides that purchase price is Kshs.12,000,000/-. The vendor is said to have acknowledged receipt of Kshs.1,200,000/- being a deposit on execution of the Agreement. The Defendant was put to task by the Plaintiff's counsel as to how he paid the balance of the purchase price. The Defendant stated that he paid the balance being Kshs.10,800,000/- by cash. He said he withdrew the cash from his account but he did not avail bank statements to confirm that he withdrew the said cash. He also stated that he did not know if Mohamed Twahir Shaban is still alive. He told the court that he did pay stamp duty but he did not have the documents. He also confirmed that he did not take any steps to ensure that his name reflects on the Nairobi City County as the owner.

86. The transfer dated 6th September 2010 in clause 2 provides that:-

“The transferor conveys unto the Transferee ALL the interest comprised on the premises which interest is a portion of the land contained and surveyed by the recited indenture of conveyance of the 1st October 1969.....”

It appears to be a contradiction from what is provided for in the sale agreement.

87. The said sale agreement and the transfer are witnessed by Kinyanjui J. M Advocate of Kinyanjui & Njau Advocates. The said advocate was not called as a witness in this case to confirm that he saw Mohammed Twahir Shaban the purported vendor.

88. The Defendant claims to have done due diligence before purchasing the suit property. He relied on a certificate of official search. He does not tell the court what documents he was shown by the said Mohammed Twahir Shaban to convince him that he was the owner of the suit property. Did he have a title document?

Land is now registered under Land Registration Act, after the Registered Land Act was repealed. An application for transfer shall be supported by:-

(a) the original documents;

(b) where applicable, a land rent clearance certificate;

(c) a land rates clearance certificate;

(d) where applicable, the consent of the head lessor;

(e) any consent required for registration unless a particular consent has been endorsed on the instrument of transfer;

(f) where applicable, a form for valuation of stamp duty duly filled and approved by a government valuer;

(g) any other document as may be required under the Act, these Regulations or any other written law.

It is not in dispute that the purported vendor, Mohammed Twahir Shaban did not have any of these documents.

89. I have gone to the details to show that the Defendant cannot be treated as a bonafide purchaser without notice. He is the sole witness. The identity and existence of Mohammed Twahir Shabir is highly doubted. I believe he does not exist. I am of the view that the Defendant forged a sale agreement dated 20th July 2010 and the subsequent Indenture of Conveyance dated 6th September 2010 purporting to transfer the suit property to the Defendant.

90. Before a transfer can be registered, the purchaser is required to pay for stamp duty. The current stamp duty rates are 4% of the valuation for land within municipalities (Leasehold) and 2% for land outside the municipalities (Freehold). In this case the Defendant could not prove

that he paid stamp duty upon transfer.

91. I agree with the Plaintiff's counsel's submissions that the agreements are illegal, null and void because the agreements were executed by a person (if indeed he existed) who did not have any property or proprietary right over the suit property.

92. In the case of **Iqbal Singh Rai vs Mark Lecchini & Registrar of Titles Civ. Case No 1054 of 2001** J Muchelule held as follows:-

“At the time when the 1st defendant sought to buy the land in dispute the registered proprietor was the Plaintiff. There is no dispute that he never dealt with the Plaintiff in the transaction that followed. The person with whom he dealt was not the registered proprietor of the land in dispute. The person was a fraud who had no claim whatsoever to the land. The consequence is that the 1st Defendant was a purchaser who did not deal with the registered proprietor of the land. Section 23(1) protects “title issued to a purchaser upon the transfer or transmission by the proprietor thereof”. The 1st Defendant did not obtain a transfer from the Plaintiff who was the registered proprietor. He obtained a transfer from a fraudulent person who had no claim to the land. He cannot invoke the provisions of Section 23(1) to say he obtained an indefeasible title”.

In the instant case the Defendant did not obtain a transfer from a registered proprietor but from a fraudulent person namely Mohamed Twahir Shaban. As stated earlier it is doubtful if the said Mohamed Twahir Shaban existed.

93. The Court of Appeal in **Diamond Trust Bank Kenya Ltd vs Said Hamad Shamisi & 2 Others [2015] eKLR** thus:-

“In the development of our law, two principles have striven for mastery. The first is for the protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times”.

94. The Defendant forged documents of the transfer of the suit property as evidenced by the letter from the Chief Land Registrar dated 27th July 2012 which confirmed that the suit property is still registered in the name of Tabu Binti Yussuf and that the Indenture of Conveyance by Mohammed Twahir Shaban to the Defendant dated 6th September 2010 does not form part of the records at the Land Registry.

95. From the foregoing, I find that the Defendant is not a bonafide purchaser for value without notice. He participated in the illegalities and cannot be allowed to benefit from the illegality. I dismiss his claim that he is a bonafide purchaser for value.

96. It is not in dispute that using the illegal and fraudulent documents the defendant moved to court in **Nairobi HCCC No 159 of 2011; Edward Njuguna Kang'ethe vs Mohammed Twahir Shaban** requesting for eviction of the purported seller and all other persons from the land.

97. On 1st September 2011, the Defendant evicted the Plaintiff's tenants from the suit property. A perusal of the skeleton file shows that the order to evict emanated from a consent between the Plaintiff's and the Defendant's advocates in that case. What raises curiosity is how a party would consent to be evicted. Mohammed Twahir Shaban was not even in occupation of the suit property. That is if he existed at all. Had the Defendant done due diligence he would have discovered that the said Mohammed Twahir Shaban did not exist. His identity card belonged to someone else. The certificate of official search was also a forgery. It is possible that **HCCC No 159 of 2011: Edward N. Kangethe vs Mohammed Twahir Shaban** was filed to sanitize the forgeries that had taken place. I find that the eviction of the Plaintiff's tenants was done in bad faith.

98. On the advice of the Chief Land Registrar the Plaintiff made a complaint to the Directorate of Criminal Investigations who commenced investigations. The investigation culminated in **Criminal Case No 230 of 2014; Republic vs Edward Njuguna Kang'ethe**. The Defendant was charged with offence of forgery. At the conclusion of the trial the Defendant was acquitted.

99. I have gone through the said proceedings. PW4, Chelimo Sarah Maina, Principal Land Registration Officer at Central Registry denied the signature of the certificate of official search dated 5th July 2010. She also denied that the signature in the Indenture of Conveyance was hers and that it did not originate from the Land Registry. She confirmed that the two documents were forgeries.

100. I have gone through the Judgment in CR 230 of 2014, delivered on 30th May 2018. It is noted by the learned trial Magistrate that certain crucial documents were not subjected to forensic examination. She was also of the view that one witness Betty Atieno was not called as a witness. She was also of the view that the dispute of ownership of the suit property was pending in this court.

101. I am of the view that the acquittal of the Defendant in CR 230 of 2014 does not mean the documents were not forged. It should be noted the standard of proof in criminal case is beyond reasonable doubt. The custodian of all land records the Chief Land Registrar has confirmed the documents used by the Defendant to gain access to the suit property are forgeries.

102. The Plaintiff has given a history of how Tabu Bint Yussuf acquired the suit property. There are documents to show that the said Tabu Bint Yussuff was in possession of the suit property as she paid rates to the City Council of Nairobi and other utility bills like water and electricity in her name. None were presented in the name of Mohammed Twahir Shaban. I find that the Plaintiff is entitled to the reliefs sought.

103. **Section 26(1) (b)** of the Land Registration Act 2012 provides that:-

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

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

104. There is evidence that the Indenture of Conveyance dated 6th September 2010 does not exist hence there is nothing to protect.

105. The Defendant confirms that he has put up a five storey building after demolishing the Plaintiff's building. He confirmed that he gets about 535,000/- per month in rent since 2013. PW3 Pasquale Marangu Njagi the agent told the court that he would collect about Kshs.80,000-100,000 per month from the year 2009 to 2011.

106. Having found that the Defendant took over the suit property using forged documents he is a trespasser on the suit property. In the case of **Duncan Nderitu Ndegwa vs KPC Limited & Another [2013] eKLR** where P. Nywamweya J held:-

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs.100,00/- as compensation of the infringement of the Plaintiff's right to use and enjoy the said property occasioned by the 1st and 2nd Defendants' trespass”

Also in **Elijah Makeri Nyang'wara vs Stephen Mungai Njuguna & Another Eldoret ELC Case No. 609 B of 2012** the court stated as follows:-

“...it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. It means that the title of an innocent purchaser is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26(1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions”.

107. I award Kshs.500,000/- being general damages for trespass which I think is reasonable.

108. I agree with the Plaintiff's submissions that the Defendant fraudulently obtained eviction orders using forged documents on 10th August 2011 and subsequently on 1st September 2011 forcefully evicted the Plaintiff's tenants from the suit property and demolished all houses on the land. This is the height of impunity. The eviction of the tenants and the demolition of the Plaintiff's property has occasioned him substantial financial harm. The Plaintiff has been rendered destitute.

109. There is no evidence tendered to show that the Plaintiff's mother at any time disposed of the interest she acquired in the suit property pursuant to the Indenture of Conveyance of 1st October 1969. There is no evidence that Mohammed Twahir Shaban ever acquired the suit property.

110. I agree with Hon. Mutungi J's observation in his ruling dated 22nd January 2015 that:-

“The court ought not to be used to promote and or encourage impunity and every citizen should always feel that they can seek refuge in the courts of law and have their rights protected.”

111. PW2 confirms that he would collect between Kshs.80,000-100,000/- per month from the tenants and demolition of the building was done on 1st September 2011. The Plaintiff is entitled to rent he was getting from September 2011. PW2 produced the returns for the months he was collecting rent as exhibits in this case. The same were not rebutted by the Defendant. The Defendant admitted that he is now getting Kshs.535,000/- per month as rent.

112. I find that the Plaintiff is entitled to Kshs.90,000/- per month from September 2011 to date which translates to Kshs.11,340,000/-.

113. I rely on the case of **Rhoda S. Kiilu vs Jiangxi & Hydropower Construction Kenya Ltd [2019] e KLR** where the court awarded special damages as well as general damages.

114. Accordingly, Judgment is entered for the Plaintiff as against the Defendant as prayed in the Plaintiff in the following terms: -

i. That a declaration is hereby issued that the sale agreement dated 20th July 2010 and the subsequent indenture dated 6th September 2010 between Edward Njuguna Kange'the and Mohammed Twahir Shaban constitutes an illegality and fraud hence null and void in law.

ii. That a declaration is hereby issued that the Plaintiff is the lawful owner of all that parcel of land known as plot No. 36/1/33 Eastleigh Section 1 and any entry of the Defendant on that land constitutes trespass upon the Plaintiff's land.

iii. That a declaration is hereby issued that the eviction order(s) obtained by the Defendant vide Nairobi ELC No. 159 of 2011 Edward Njuguna Kang'ethe v Mohammed Twahir Shaban is/are an illegality on the face of the law and any subsequent actions undertaken through its /their strength including the eviction carried out by the Defendant on 1st September 2011 at the suit land was an illegality and unlawful.

iv. That an order is hereby issued that the Defendant be evicted forthwith from the suit land.

v. That a permanent injunction is hereby issued against the Defendant by himself, his agents, representatives, employees, servants and or any other persons claiming through him from interfering with the quiet enjoyment of the suit land by the Plaintiff.

vi. Mesne profits Kshs.11,340,000/- with interest from the date of this Judgment until payment in full.

vii. General damages for trespass Kshs.500,000.

viii. Costs of the suit and interest.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 24TH DAY OF FEBRUARY 2022.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Maruja for the Plaintiff

No appearance for the Defendant

Steve - Court Assistant