REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 1720 OF 2007

M.A. KOINANGE…….....…..... PLAINTIFF

VERSUS

JOYCE GANCHUKU ……..……1ST DEFENDANT

CITY COUNCIL OF NAIROBI……....……2ND DEFENDANT

ATTORNEY GENERAL …….…….....3RD DEFENDANT

JUDGMENT

The plaintiff by a plaint dated 28th November 2005 and filed in court on 30th November 2005 and later amended on 11th March 2009 and further amended on 2nd August 2013 states she was vide a letter dated 14th February 1992 allocated by the 2nd Defendant plot **NO.418 Jamhuri phase II** for residential purposes. The plaintiff states she complied with the terms of allotment including payment of all the necessary dues but before she could be issued with the title documents for the plot the plaintiff states that she obtained information that the plot had been transferred by the 2nd Defendant and the 1st Defendant had been issued with a title being **Nairobi/Block 63/345.**

The plaintiff contends the processing of the title in respect of plot NO. **418 Jamhuri phase II** in favour of the 1st Defendant was fraudulent and null and void and therefore liable to be cancelled. The plaintiff by the plaint prays for judgment for:-

a. An order cancelling the certificate of lease issued to the 1st Defendant.
b. An injunction to restrain the 1st Defendant from alienating, charging or interfering in any manner whatsoever with all that property known as Jamhuri Phase II plot NO. 418, which was subsequently renamed Title Number **Nairobi/block 63/345.**
c. A declaration that the plaintiff is the lawful owner of all that property known as Jamhuri Phase II plot NO. 418 which was subsequently renamed title Number **Nairobi/Block 63/345.**
d. General damages for wrongful deprivation of property.
e. Costs of the suit.
f. Interest on (e) and (f) above at court rates.

g. Such further and/or other relief as this Honourable court may deem to be just and expedient.

The 1st Defendant filed a defence to the plaintiffs claim on 20th March 2007 which was amended on 19th July 2013. The 1st Defendant in her statement of defence denies being aware of the plaintiff's alleged allotment of the suit property and states that she is the lawful and registered owner of land parcel Nairobi/Block 63/345 and that she holds a valid title to the suit property. The 1st Defendant contends she holds a good title to the suit property and hers being a first registration cannot be declared defective and/or challenged for any reason. The 1st Defendant further denies all the allegations of fraud leveled against her in the plaint and puts the plaintiff to proof.

The 2nd Defendant filed its defence dated 6th March 2008 on 18th March 2008 in which the 2nd Defendant denied the particulars of fraud attributed to it by the plaintiff. The 2nd Defendant denied in its defence that it issued the 1st Defendant with a certificate of lease and averred that the lease procured by the 1st Defendant resulting in her being registered as owner of the suit property did not emanate from the 2nd Defendant and was a forgery.

The 3rd Defendant in its filed defence denied the allegations of fraud attributed to the Chief Land Registrar in processing and registering the lease in favour of the 1st Defendant. The 3rd Defendant averred the Land Registrar was performing his statutory duty and his role was merely to process and register the leases based on the allocations by the 2nd Defendant.

The parties save for the 3rd Defendant filed a statement of agreed issues dated 7th June 2012 as follows:-

1. Whether plot NO. 418 situated in Jamhuri Estate, Phase II Nairobi and the property known or described as **Nairobi/block/63/345** refer to one and the same property on the ground.

2. Whether the 2nd Defendant allocated the property NO. 418 situated in Jamhuri, Estate, Phase II Nairobi to the plaintiff.

3. Whether the 2nd Defendant allocated the property known or described as plot **Nairobi/Block 63/345** to the 1st Defendant.

4. Whether the renaming of plot NO. 418 situated in **Jamhuri Estate** Phase II Nairobi to **Nairobi/Block 63/345** without involving the plaintiff who had a legal interest to the said property was lawful.

5. Whether the said plot NO. **Jamhuri Estate Phase II** Nairobi (subsequently renamed **Nairobi/block 63/345**) was available for allocation to the 1st Defendant in view of the plaintiff's legal interest thereon.

6. Who between the plaintiff and the 1st Defendant had a valid claim to the plot **NO. 418 Jamhuri Estate, Phase II Nairobi** (subsequently renamed **Nairobi/Block 63/345.**

7. Whether the 3rd Defendant issued the certificate of lease dated 17th October 2001 to the 1st Defendant.

8. If the answer to NO. 7 above is in the negative, whether the certificate of lease issued on 17th October 2001 ought to be cancelled.

9. Which party should bear the costs of these proceedings.

<u>The Plaintiff's Case</u>

The plaintiff testified as Pw1 and she was the sole witness to testify in support of the plaintiff's case: The plaintiff adopted her witness statement made on 29th June 2011 as her evidence. The plaintiff further relied on her initial bundle of documents dated 29th June 2011 and the supplementary bundle of documents dated 11th May 2012 and filed in court on 14th May 2012.

The plaintiff testified that she previously worked as a teacher in the City Council Education Department and that she was in 1992 allocated a plot NO. 418 Jamhuri Phase II vide a letter of allotment dated 14th February 1992 included in the plaintiff's bundle of documents filed on 29th June 2011 as documents NO.1. The letter of allotment carried various terms which the allottee was required to fulfill among which an allottee was required to accept the offer of the allotment in writing and to pay the necessary dues. The plaintiff testified she accepted the offer and made payment of the requisite charges of Kshs.10,800/- on 10/3/1992. The plaintiff's letter of acceptance of the offer of the plot dated 9th March 1992 and the payment receipt of the stand premium and annual rent for the plot also dated 10th March 1992 are included in the plaintiff's bundle of documents filed on 11th June 1992.

The plaintiff after paying the survey fees as per the survey fees receipt dated 7/7/1992 for Kshs.5,700/- was shown the allocated Plot NO. 418 but did not commence development of the plot immediately. The plaintiff testified that when she was shown the plot the same was vacant as were all the neighbouring plots. The plaintiff however testified when she was ready to develop the plot about 2005 and went back to locate the plot she found many people had developed and built on their plots and as she was not able to identify the plot on the ground she went to the City Council where she was given an officer to assist her to identify her plot. The plaintiff testified that when they located the plot they found that it had been built on by a person she did not know. The plaintiff stated that she had all along been paying rates for her plot and her plot had not been repossessed and neither had the allotment been revoked and/or cancelled by the City Council.

The plaintiff testified that a subsequent search at the Lands Officer revealed that the plot **NO. 418** had been registered as title number **Nairobi/Block 63/345** and a title issued in the name of the 1st Defendant. The plaintif stated that she was never made aware of any changes to her plot and she did not know the 1st Defendant and/or how the 1st Defendant got registered as the owner of the property the subject of the suit. The plaintiff stated that the City Council vide a memo dated 10th February 1998 affirmed vide a list attached thereto and exhibited vide the plaintiff's supplementary bundle of documents that the plaintiff was the allottee of the suit property. In cross-examination the plaintiff reiterated that she was the genuine allottee of the suit property and she was unaware of any double allocations at the **Jamhuri Phase II Estate.** The plaintiff maintained she had satisfied all the conditions of the allotment and that she was legally entitled to the allocated plot.

<u>The 1st Defendant's case.</u>

The 1st Defendant **Joyce Ganchuku** testified in support of her defence and did not call any other witness. The 1st Defendant made a witness statement on 27/3/2012 which she sought to rely on as her evidence. It was the 1st Defendant's evidence that she was in 1991 informed that the City Council was allocating plots in Jamhuri Phase II. She stated that she was given an allotment letter in respect of the suit property which required her to pay a sum of Kshs.10,800/- which she paid and was issued with a receipt. The 1st Defendant further stated that in 2001 they were requested to submit the original documents to facilitate title documentation and thus she submitted her original letter of allotment and the payment receipts. The witness testified that upon survey the plot was changed to **Nairobi/Block 63/345** and that she signed a lease document at the City Council and that she was ultimately issued with a certificate of lease dated 17th October 2001 as per the copy annexed in the 1st Defendant's bundle of documents.

The 1st Defendant further testified that after obtaining title to the plot she commenced development therein and she constructed a residential house which she completed in 2003 and moved in and resides therein. The witness stated that during the period of construction which lasted 2 years neither the plaintiff

and/or any other person raised any issue or complaint. The 1st Defendant testified that she is the registered owner of the suit property having been lawfully allocated and that she lawfully and validly obtained title to the suit land.

The plaintiff objected to the production of the 1st Defendant's payment receipt for the sum of Kshs.10,800/- on the basis that it was a copy and was unclear and appeared to have been tampered with. The plaintiff further objected to the production of the Area list of allottees of Jamhuri Phase II scheme attached to the 1st Defendant supplementary list of documents on the basis that the origin of the list was not shown and neither was the list signed for authentication. The court overruled the first objection while the 1st Defendant's counsel opted to withdraw in its entirely the Defendant's list of supplementary documents dated 8th October 2012 and filed on the same date. The 1st Defendant's supplementary list of documents filed on 8th October 2012 therefore do not form part of the evidence in this suit.

The 1st Defendant denied the allegations of fraud in the allocation and preparation of the title documents stating that she had no role in the preparation of the title documents and the processing of the title and thus contended there was no basis to impugn her title.

On cross-examination the witness admitted that she never made a written acceptance of the terms of the allotment as required under the letter of offer. The witness further admitted her receipt for payment of the allotment dues shows the payment to have been made on 4th September 2001. The witness further admitted there were variances in regard to the receipt issued to the plaintiff and the receipt issued to her by the City Council. The witness stated she was not aware whether any approval for the residential house she developed on the property had been granted by the City Council.

2nd Defendant's Case.

Samson Kungu Ndungu testified on behalf of the 2nd Defendant. The witness stated that he was the personal Assistant to the Director, City Planning and had worked for the City Council since 1988. The witness affirmed that the Department of City Planning was the custodian of all city plots and allocations. He testified that according to the City Council records plot **NO. 418 Jamhuri Phase II** was allocated to **Mrs. M.A. Koinange** on 14/2/1992. He stated this allotment has never been cancelled and neither has there been any repossession or revocation of the same and the record still showed **Mrs. M.A Koinange** as the allottee.

Upon being shown the letter of allocation dated 13/2/1992 made to the 1st Defendant the witness stated thus:-

> **"----all allotment letters made in 1992 had two reference numbers being City Planning and city Valuation. The 2 references were to obviate cases of forgery. The Department of City Planning and City valuation were jointly involved in the allocation and hence the two references".**

The witness made a witness statement dated 7th June 2012 which was filed in court on the same date and the court admitted the same as evidence on the part of the 2nd Defendant in the suit.

Submissions by the Parties

The 3rd Defendant offered no evidence and the parties were directed to exchange written submissions. The plaintiff filed her submissions dated 28th October 2014 and response submissions dated 12th November 2014 on 14th November 2014. The 1st Defendant's submissions dated 22nd October 2014 were filed on the same date while the 3rd Defendant filed his submissions on 29th October 2014. The 1st Defendant's submissions dated 22nd October 2014 were filed on the same date while the 3rd Defendant filed his submissions on 29th October 2014.

The plaintiff in the filed submissions reiterates the facts of the suit and gives an evaluation of the evidence as tendered by the parties and submits on issues of law and has furnished various authorities in support of various legal issues. Likewise the 1st Defendant in her submissions reiterates the facts and evidence in the case and submits on issue of law and refers the court to various legal authorities to buttress her argument. The 3rd Defendant's submissions was to the effect that the plaintiff had demonstrated that she was the lawful allottee of the suit property and that the 1st Defendant had failed to establish she was a bonafide allottee of the suit property and that the title she holds deserves protection of the law.

Consideration of the issues and analysis of the evidence and submissions.

I have considered the pleadings the evidence and the submissions of the parties and broadly the issues that are in dispute and require determination by the court can be summed up as follows:-

a. Who between the plaintiff and the 1st Defendant was allocated plot NO. 418 Jamhuri Phase II and whether this plot is the same as Title NO. Nairobi/Block 63/345.
b. Whether the registration of the 1st Defendant as proprietor of Title NO. Nairobi/Block 63/345 was lawfully procured and whether the same is protected under section 26 (1) of the Land Registration Act 2012.
c. What reliefs and/or orders should the court make?.
d. By whom are the costs of the suit payable?

(i) Who was allocated plot NO. 418 Jamhuri Phase II and was it the same as Title Number Nairobi/Block63/345?

Both the plaintiff and the 1st Defendant claim to have been allocated plot NO. 418 Jamhuri Phase II. The plaintiff has produced her copy of letter of allotment dated 14th February 1992 while the 1st Defendant has produced her copy of the letter of allotment dated 14th February 1992. It is the events and happenings after the alleged allocations which are central in determining the contested issues.

On the part of the plaintiff there is ample and credible evidence that upon being allocated the plot she accepted the terms of allotment vide her written letter of acceptance dated 9th March 1992 of Kshs.10,800/- as per the letter of offer on 10th March 1992 and paid the requisite charges and was duly issued with a receipt by the City Council which conforms to the requirements by the City Council. The plaintiff was issued with a letter dated 8/5/1992 from the City Council's Chief Land Surveyor (Document 5 in the plaintiff's bundle of documents) inviting her to get in touch with the surveyor in charge of the project to be shown the plot beacons against payment of the survey fees.

The plaintiff paid the survey fees on 7/7/1992 as per the receipt issued by the City Council on the same date and as per the endorsement on a copy of the letter dated 8/5/1992 the plaintiff was shown the survey beacons on 9/9/1992 (copy of letter is document NO. 6 on the plaintiff's bundle of documents). The plaintiff apparently went quiet until the year 2005 when she wished to commence to develop her plot only to discover somebody else had built on her plot.

The 1st Defendant for her part hinges her claim to the suit property on the letter of allotment she has exhibited in her bundle of documents dated 14th February 1992. The 1st Defendant was at pains to demonstrate and/or show that she accepted the offer of allotment and in my view her evidence in this regard was contradictory. Firstly, under cross-examination by the plaintiff's counsel she affirmed she did not give a written acceptance of the offer of allotment yet when cross- examined by the 2nd and 3rd Defendants counsels she was wavering and stating she accepted the offer in writing but did not have a copy of her letter of acceptance since she delivered the original to the City Council but did not retain a copy. She could not remember the date she did the acceptance letter but she was quick to assert that it was within 30 days of the letter of allotment. Quite clearly the changed position of the 1st Defendant was so that she could bring herself within the terms of the letter of offer which required that the offer be

accepted in writing within 30 days from the date of the letter of allotment. The 1st Defendant however does not appear to have satisfied the other limb of the terms of the offer which required payment of the dues to be made within 30 days. The proviso to the letter of offer provided as follows:

> **"if acceptance and payment is not received within 30 days from the date hereof the offer herein contained will be considered to have lapsed out further reference to yourself".**

From the evidence adduced by the 1st Defendant she did not pay the allotment dues until 2001 which clearly was way out of the allowed 30 days from the date of the allotment letter. The payment as per the exhibited receipt by the 1st Defendant was made on 4th September 2001 although the computer generated print out shows the payment as having been made on 11/1/2002. The receipt does not show it was made for any specific plot but for a residential plot **Jamhuri II.** If it was for plot **NO. 418** would the 1st Defendant not have been required to pay the annual rent arrears considering that the allotment was made in 1992? It is instructive that as the 1st Defendant was making payment the lease for the suit property was under preparation and the same was infact registered on 17th October 2001 and the 1st Defendant was issued with a certificate of lease. Although the 2nd Defendant by its defence denied executing the lease the 3rd Defendant relied upon to process the title, the 1st Defendant did not avail a copy of the registered lease and the court is left to ponder whether or not there was a registered lease in favour of the 1st Defendant and if so who the signatories to the lease indeed were if the 2nd Defendant states the lease did not originate from them.

The 2nd Defendant's evidence given through **Samson Kungu Ndungu** is that as per their records the plaintiff was the lawful allottee of the suit property as per the letter of allotment dated 14th February 1992. The witness clearly discredits the letter of allotment to the 1st Defendant which he states did not emanate from City Planning Department. The witness clearly distinguished the two letters of allotment holding that at the time letters of allotment were jointly issued by the Planning Department and the Valuation Department stating that the allotment letters carried two distinct references of Departments. As per the witness the letter of allotment issued to the plaintiff was the valid one as it carried the two references while the one to the 1st Defendant only had one reference. The witness further stated that the list from the Director of City Planning forwarded to the Chief Counsel vide the memo of 10th February 1998 annexed to the plaintiff's bundle of documents was authentic and that it contained the list of all the allottees of **Jamhuri Phase II** plots and the list was issued for purposes of facilitating the issuing of titles to the allotees. The 1st Defendant's name does not appear in this list and the plaintiff's name appears against plot NO. 418 whose Block number is 345.

The plaintiff testified that the City Council officials showed her the plot now built upon by the 1st Defendant in 2005 as her original plot NO. **418.** The 1st Defendant does not also dispute that the plot she has occupied is plot NO. 418 which following survey and registration changed to **Nairobi/Block 63/345.** On the basis of the evidence tendered by the plaintiff and the 2nd Defendant, I am satisfied that it is the plaintiff who was indeed allocated plot **NO. 418 Jamhuri Phase II** and that she duly met and satisfied the terms of allotment and that she ought to have had the title to the plot processed and issued in her name.

The evidence by the 1st Defendant was contradictory and inconsistent. I had occasion to watch the 1st Defendant testify and be subjected to cross-examination. The deamenour of the 1st Defendant while giving evidence was wanting. She waivered and changed positions and/or pleaded loss of memory when pressed to respond to questions put to her. She unfortunately painted the picture of a person who somehow found herself thrust to owning a property in regard to which she could not vividly give an account as to how she came to own it. The court got the impression that the 1st Defendant's claim to ownership of the subject plot must somehow have been ignited and engineered sometime in 2001 when out of the blue the 1st Defendant came up to make payment for a plot which she states was allocated to her in 1992 and in regard to which the letter of offer required acceptance to be made and the allotment

dues to be paid not later than 30 days from the date of the offer letter. It must be that somebody indentified a vacant plot and moved fast perhaps in collusion with some officials at the 2nd Defendant's offices and the Lands office to generate documentation to alienate the plot. The court will not allow itself to be duped into validating what otherwise was not a genuine transaction. On the basis of the evidence tendered by the parties I am satisfied the plaintiff is the person who was validly allocated plot **NO. 418** now known as **Nairobi/Block 63/345.**

Whether Registration of 1st Defendant as owner of Nairobi/Block 63/345 was lawfully procured?

The court having held that it is the plaintiff who was validly allocated plot NO. 418 Jamhuri Phase II now Nairobi/Block 63/345 the issue to determine is whether the registration of the 1st Defendant as the owner thereof conferred upon the 1st Defendant absolute rights of ownership which are indefeasible and which are unchallengeable. The plaintiff has submitted that the 1st Defendant was unable to prove by way of documentary evidence the circumstances under which she got registered as the owner of the suit property and yet she had a legal duty and burden to prove that she was legally and validly registered as the owner of the property. The plaintiff submits the transactions leading to the registration of the 1st Defendant as owner of the suit property are simply not substantiated and are shrouded in mystery. In contrast the case for the plaintiff is plain and clear that she was allocated the plot and she met and satisfied the terms of allotment. The plaintiff's only shortfall is that she did not pursue the processing of her title with vigour and neither did she take occupation of the suit land. There is however no time limitation within which a title may be processed and/or issued following allotment.

The fact of the matter remains the plaintiff had by the time the 1st Defendant purported to pay for the suit property in September 2001, the alleged offer vide the letter of allotment of 13th February 1992 lapsed for want of fulfillment of the terms thereof. In the meantime the plaintiff had accepted the offer of allotment and had satisfied the terms of the offer of allotment and had satisfied the terms of the offer there by acquiring a proprietary interest in the suit property and there was no property that the 1st Defendant could have paid for in September 2001. The offer of allotment to the plaintiff which the plaintiff had accepted had not been cancelled and/or or revoked and the plaintiffs proprietary interest in the suit property had crystallized.

It is therefore my view that the 1st Defendant's registration as the owner of the suit property was not procedurally obtained and/or procured. The The 1st Defendant has not proved or shown that she was regularly allocated the suit property by the 2nd Defendant. Indeed the 2nd Defendant has denied it allocated the suit property to the 1st Defendant and branded the alleged letter of allotment to the 1st Defendant and the purported lease used to process title to the 1st Defendant as forgeries. The 1st Defendant has not rebutted this evidence and having regard to the contradictions and inconsistencies in the 1st Defendant's evidence and her deamenour in the witness stand I am inclined to believe and accept the evidence by the plaintiff and the 2nd Defendant which was consistent and supported by the documentation. The plaintiff referred the court to the court of Appeal Case of **Munyu Maina –vs- Hiram Maina (2013) eKLR** (**Civil Appeal NO. 239 of 2009**) to support her submission that where a title is under challenge the title holder needs to show that he/she acquired the title procedurally and legally. In the said case the appellate Judges stated thus:-

> **"it is our considered view that the respondent did not discharge the evidential burden to rebut that testimony of the appellant that it was their deceased father who put both of them into possession of the suit property and to occupy the same in equal share. We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony".**

The 1st Defendant has precisely set up the title issued to her under the provisions of the repealed Registered Land Act Cap 300 Laws of Kenya Sections 27 and 28 and contends that her title is absolute and indefeasible and submits further her title being a first registration under section 143 (1) of the said repealed Act the same cannot be amenable to an order of rectification even if fraud is found to have occurred.

Section 143(1) of the repealed Act provided as follows:-

143.(1) subject to subsection (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake".

The 1st Defendant submits that where a party holds a registered title as in her case such title is protected by the law. In particular the 1st Defendant submits that where a party holds a letter of allotment and another a registered title as in the present case the title should prevail as the same is protected under the law as opposed to a letter of allotment which in real sense is but an invitation to treat. The 1st Defendant relies on the following cases for the proposition that a registered title is supreme and where such registration is a first registration the same is unimpeachable:-

Paul Munira & Another –vs- Jane Kendi Kinyua & 2 others ELC NO. 747 of 2007, Gladys Wanjiru Ngacha –vs- Teresia Chepsant & 4 others (2008) eKLR, Wrek Motor Enterprises –vs- Commissioner of Lands & 3 others Civil Appeal NO. 71 of 1997, Ambale –vs- Masolia (1986) KLR 241, Michael Githinji Kimotho –vs- Nicholas Muratha Mugo Civil Appeal NO. 53 of 1995 and Dr. C.O. Okere –vs- Esther Nduta Kiirukia & 2 others Civil Suit NO. 2 of 2004.

These authorities restate the long held principle that a duly registered title is protected under the law and that the sanctity of title is core to our system of land registration. Indeed it is crucial and critical that the state should be able to set up and maintain a system of land registration that guarantees title to ensure certainty and orderliness in land management and administration. However there are exceptions and limitations. Title will not be guaranteed and/or upheld where it is proved that the title was obtained fraudulently and it is shown the holder of the title was a party to such fraud. Similarly title will not be guaranteed where it is proved that the title was illegally, unprocedurally or acquired through a corrupt scheme. Thus there are circumstances and instances when a registered title will be challenged and these are found in section 26(1) (a) & (b) of the land Registration Act 2012 which replaced the previous section 28 of the repealed Registered Land Act, Cap 300 of the Laws of Kenya and does virtually re enact section 23 of the Registration of Tittles Act, Cap 281 Laws of Kenya also repealed. The plaintiff has submitted that the 1st Defendant did not obtain the allocation of the suit property regularly and that the payment receipts for the stand premium and the alleged lease used to process the title were all forgeries and that the entire transaction leading to the issuance of the title to the 1st Defendant was in consequence a nullity. The plaintiff in support of her submission relied on several authorities notably the case of **Sister of Note Dame de Namur Registered Trustees –vs- The Attorney General & 2 others (2014) e KLR and Judicial Service Commission –vs- Speaker of National Assembly (2013) eKLR.**

In the **Judicial Service case –vs- Speaker of National Assembly & Another (Supra) Odunga J**, cited with approval the court of Appeal holding in the case of **Commercial Bank of Africa Ltd –vs- Isaac Kamau Ndirangu (1990-1994) EA 69** where the Judges held:-

> **"where an act is a nullity, it is trite that it is void and if an act is void then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the court to set it aside, though sometimes it is convenient to have the court declare it to be so. Where the court finds this to be so, the actions taken in pursuance of action taken in breach of a court order must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse---- in my view it does not matter that the person alleged to have been in contempt of court was unaware of the existence of the order. Whereas he may not be committed for**

contempt of an order which he was not aware of, his unawareness does not sanitise the illegal action which would still be null and void".

The court of Appeal in the case of **Festus Ogada –vs- Hans Mollin (2009) eKLR** while dealing with a transaction which they held to have been tainted with illegality quoted with approval the words of **Lindley L.J**. in the case of **Scott –vs- Brown Doering, McNab & co. (3) (1892)QB 792** quoted by the privy council in the case of **Mistry Amar –vs- Serwano Wofunira (1963) EA 409:-**

"Exturpi Causa non oritur action.

This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confirmed to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not the defendant has pleaded illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him".

The plaintiff submits that the 1st Defendant should not be allowed to benefit out of a transaction that was clearly unprocedural and illegal and that the certificate of title she holds by dint of section 26 (1) of the Land Registration Act should not be accorded any protection.

Whether the 1st Defendant's certificate of lease ought to be protected under the provisions of the Law.

As observed above the 1st Defendant contends that she holds an absolute and indefeasible title which should be protected under the law. On the other hand the plaintiff counters that she was the genuine allottee of the suit land and that the 1st Defendant's title was illegally and unprocedurally obtained and that the same cannot and does not qualify to be protected under the law and should be cancelled.

Sections 24 and 25 of the Land Registration Act 2012 vests and confers absolute rights of ownership of land upon a registered owner and such rights and interest are not liable to be defeated except as provided under the Act.

24. Subject to this Act-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 of the Act provides:-

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenance belonging thereto, free from all other interests and claims whatsoever, but subject:-

(a) to the leases charges and other encumbrances and to the conditions and restrictions, if

any, shown in the register, and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expresses in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 26(1) of the Act provides:-

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

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

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

As stated earlier in this judgment the 1st Defendant relies on the repealed sections 27, 28 and 143 (1) of the Registered Land Act, Cap 300 Laws of Kenya. In the recent decision of this court in the case of **Esther Ndegi Njiru & Another –vs- Leonard Gatei (2014) eKLR** I had occasion to consider the application of the referred to provisions of the Registered Land Act and I can do no better than refer to part of my judgment in the said case where I stated thus:-

"----------the plaintiffs further submit the registration of James Kinuthia Waiharo was a first registration and was therefore not liable to be defeated even if it is proved the registration was obtained fraudulently. The plaintiffs refer to section 143 of the repealed Act for this proposition which provided thus:-

"143.(1) subject to subsection (2) the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake".

The plaintiffs further placed reliance on the case of Gladys Wanjiru Ngacha –vs- Teresia Chepsaat & 4 others (2008) eKLR where the court held that:-

"The 3rd Defendant registration being a first registration this court cannot impugn it. To do so will amount to an assault to section 142 and 143 of the same Act. It matters not that the 3rd defendant may have obtained the registration through fraud."

With respect, I think the position has changed with the repeal of the Registered Land Act as section 106(1) of the Land Registration Act NO. 3 of 2012 provides that the repealed Acts shall cease to apply.

Section 106 (1) provides:-

"on the effective date, the repealed Acts shall cease to apply to a parcel of land to which this Act applies".

The equivalent to section 143(1) of the repealed Act is section 80 of the Land Registration

Act which provides:-

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

This provision in the new Act omits reference to ("other than a first registration"). Meaning no registration is exempted from rectification through cancellation or amendment where the court is satisfied that the same was obtained, made or omitted by fraud or mistake. Indeed this was a welcome provision in the new Act as previously the court's hands were shackled even in glaring instances of irregularities perpetuated through fraudulent means where the registration happened to be a first registration. The repealed provision quite clearly could be used as an instrument to perpetuate injustice as it would appear the provision shielded fraudsters so long as they happened to hold "first registrations" of the title that would be the subject matter.

From the date of commencement of the Land Registration Act, 2012 the registers maintained under the repealed Acts were deemed to be the Land register for the corresponding registration unit established under the Land Registration Act pursuant to section 104 of the Act. The titles held under the repealed Acts were equally under section 105 of the Land Registration Act deemed to be titles issued under the said Act. It is thus clear that the applicable law would be the law as presently contained in the new Land Acts".

I have quoted in extensio from my earlier judgment since my views and position in regard to the application of section 143(1) of the Registered Land Act (now repealed) as expressed in the said case have not changed and I saw no need to reinvent the wheel. I am still of the same persuasion.

In the same decision I considered the application of section **26(1) (a) & (b)** of the Land Registration Act and it was my view that even where the holder of a certificate of title is shown or proved not to have been a party to any fraud that led to the registration of the title, such title may nonetheless be impugned on the ground that the title was illegally and/or unprocedurally acquired. In the referred to case of **Esther Ndegi Njiru & Another –vs- Leonard Gatei (supra)** I rendered myself thus:-

"In the present case the plaintiffs cannot shield themselves with the title they hold though without any doubt they were bonafide and innocent purchasers from the 2nd Defendant. The Act of the 2nd Defendant processing the title to his name using fake or forged documents were patently illegal and the 2nd Defendant must have known they were. The processing of the title in his name and thereafter selling the parcel of land to unsuspecting plaintiffs was illegal and unprocedural. The 2nd Defendant must have known what he was doing. He was simply a conman otherwise he would have appeared to defend and/or clear his name. while it is clear the title held by the plaintiffs cannot be impugned under section 26(1) (a) of the Act as they were not party to any fraud or misrepresentation the title is nonetheless impeachable under section 26(1)(b) as the title transferred to them by the 2nd defendant was obtained illegally and unprocedurally".

Further in the same case I observed thus:-

"------Article 40(6) of the constitution coupled with the provisions of section 26(1) (a) and (b) of the Land Registration Act in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as "grabbed public lands". Itis essential to endeavour to ascertain the history and/or root of the title".

<u>Determination and decision</u>

Thus in the matter before me as I have made a finding that the title held by the 1st Defendant was irregularly and unprocedurally acquired it is my position that the same is not protected and is impeachable under section 26(1) (b) of the Land Registration Act 2012. The 1st Defendant was party to the acts that led to the processing of the impugned title and has failed to rebut the evidence that the letter of allotment she used and the lease presented to the Land office for processing of the title were infact forgeries. The 2nd Defendant has stated the 1st Defendant's letter of allotment was not genuine and has denied issuing any lease to the 1st Defendant where did the lease the 1st Defendant presented come from? That we may never know since we did not even have the benefit of scrutinizing a copy since none was availed. The evidence of the plaintiff is credible that she was the genuine allottee of the suit property and is supported by the 2nd Defendant who was responsible for issuing the letters of allotment. I accept the plaintiff's and the 2nd Defendant's evidence.

In the circumstances the court finds the plaintiff's case as against the 1st Defendant proved on a balance of probabilities.

On the reliefs sought by the plaintiff, the plaintiff under prayer (d) in the plaint sought for general damages for wrongful deprivation of property but I must say no basis was provided by way of any evidence to enable the court to make an informed determination. However it is a fact that the plaintiff was deprived of the use of the property at least from 2005 when she had wanted to commence development of the property. The plaintiff did not indicate the development she wished to effect and whether she was ready with the financing to do so. However, it was her property and the 1st Defendant did not have any right to enter into it and to effect the developments that she did. I will for the intrusion and deprivation of the plaintiff of the use of the property award the plaintiff the nominal sum of Kshs.300,000/- as general damages.

In the result I enter judgment for the plaintiff as against the 1st Defendant and make the following orders:-

a. **That the plaintiff be and is hereby declared to be the lawful owner of plot NO. 418 Jamhuri Phase II now known as Title Number Nairobi/Block 63/345.**
b. **That the certificate of lease of title number Nairobi/Block 63/345 issued in the name of Joyce Gachunku be and is hereby ordered to be cancelled.**
c. **That the Land Registrar be and is hereby directed to issue title in respect of Title Number Nairobi/Block 63/345 to M.A. Koinange the plaintiff herein.**
d. **The 1st Defendant is ordered to vacate and deliver vacant possession of land Title Number Nairobi/Block 63/345 to the plaintiff unconditionally within sixty (60) days of this Judgment failing which an eviction order to issue against the 1st Defendant on application.**
e. **That general damages in the sum of Kshs.300,000/- with interest thereon at court rates from the date of this judgment be and is hereby awarded to the plaintiff against the 1st Defendant.**
f. **The 1st Defendant to pay the costs of the suit to the plaintiff.**
g. **The 2nd and 3rd Defendants will meet their own costs of the suit.**

Judgment dated, signed and delivered this **27th** day of **February** 2015.

J. M. MUTUNGI

JUDGE

In the presence of:

MS Weru for Onderi……. For the Plaintiff

Mr. Mutai for Nyaga…….. For the 1st Defendant

Mr. Ogola ……for 2nd Defendant