



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. SUIT NO 519 OF 2008

TERESIA KAMENE KINGOOPLAINTIFF

VERSUS

HARUN EDWARD MWANGI & ANO.....DEFENDANT

JUDGEMENT

By an Amended Complaint dated 15th June, 2011, the Plaintiff herein ***Teresia Kamene King'oo*** filed this claim against the Defendant, ***Harun Edward Mwangi*** and sought for the following Orders.

- a. *A declaration that the suit land LR No. 12661/28, is the lawfully registered property of the Plaintiff.*
- b. *A declaration that the purported transfer in favour of the 1st Defendant is fraudulent and contrary to the provisions of the Law thus abinitio null and void and of no legal effect.*
- c. *A permanent injunction restraining the 1st Defendant and/or its agents from interfering with the Plaintiff's open and peaceful possession, charging the suit land, transferring it, alienating it, subdividing and/or prejudicially dealing with the suit property forthwith.*
- d. *In the alternative a declaration that by virtue of adverse possession, the Plaintiff has forthwith acquired a registrable interest on the suit land.*

On his part, Defendant herein filed his Amended Defence and Counter-Claim and denied all the allegations made by the Plaintiff. He further sought for these Orders;-

- a. *A declaration that the Defendant is the lawful owner/proprietor of LR No. 12261/28 .*
- b. *A Order for the Plaintiff to vacate LR.No.12661/28 forthwith.*
- c. *A permanent injunction restraining the Plaintiff by herself , her servant or agents from entering, remaining in or in any way interfering with the Defendant's possession and ownership of LR No. 12661/28 .*
- d. *An Order to the Registrar of Titles , Nairobi to cancel entres No. 7,8,9 and 10 registered against LR No.12661/28 (I.R 39614)*
- e. *Damages for trespass.*

f. *Costs of the suit.*

The Plaintiff in her Complaint had averred that jointly with her deceased husband, **Alphonse King'oo Kioko**, they purchased **LR NO. 12661/27** and erected their matrimonial home thereon. Further, they also purchased LR No. **12661/28** (suit land) which lies on the lower end of Mbagathi River and is situated downhill **LR No. 12661/27** and can only be accessed via pathway which was excised by the Plaintiff on the extreme left part of **LR 12661/27** vide survey plan **No. 239/63**. It was her contention that she has been in continuous uninterrupted, exclusive possession of the suit land since **1984**. She further contended that she sold a portion of the suit land to Mark Kimeli Sang on **July 2008**. She also stated that she lawfully caused a statutory amalgamation and subsequent subdivision of **LR No. 12661/27 and LR No. 12661/28** (suit land) after obtaining the necessary statutory approvals and consents to amalgamate and subsequently subdivide the amalgamated parcels of land. The new land numbers were **LR No. 12261/51 , LR No. 12661/52 , LR NO. 12661/53 and LR No. 12661/54**. It was therefore contended that after the lawful subdivisions, the suit land previously being **LR No. 12661/28** became **LR NO. 12661/53** and it was consequently legally extinguished in the year 1993.

Plaintiff further averred that **one Jayant Kumar Jamnadas Ruparel** had advanced them (Plaintiff and her deceased husband) some money against the security of the suit land and entries were entered against the said certificate of title. However, they fully liquidated the said debt borrowed from **Jamnadas**, and he obtained and registered discharge of charge in respect of the suit land. It was contended that the said discharge of charge was booked and entered in the **presentation Book as NO. 1500**, and stamped with the official stamps on 21st December, 1995. The Plaintiff further averred that upon registration of the discharge, the said **Jamnadas Ruparel** released to them the certificate of title in respect of the suit land. She further contended that upon receipt of the original certificate of title in respect of the suit land, and **LR No. 12661/27**, she presented them to the Ministry of Lands to lodge for registration of the Deed Plans. That the Plaintiff waited for registration process to be completed but after a long wait she was informed by the Ministry of lands that the said documents could not be traced and that the Deed file in respect of **LR No. 12661/28** was missing from Land Titles Registry in Nairobi.

It was further stated in the Complaint that the Plaintiff's deceased husband was diagnosed with hypertension which rendered him immobile on the better part of the year 1995. He subsequently passed on intestate at Nairobi hospital on 13th August 1996. Subsequent to the death of her husband, she was appointed an administrator of the Estate of **Alphonse Kingoo Kioko** together with her co wife one Alice.

At the confirmation of grant, the Plaintiff was granted the suit land as from 11th February, 1999. The Plaintiff therefore became the lawful owner of the suit land and in exclusive and quiet possession of the said suit land and paid all the accrued **City Council of Nairobi Statutory Land Rates**.

Plaintiff alleged that on 7th July 2008, she carried out a search at the Land's Registry and she was shocked to hear that the suit land was registered in the name of the Defendant herein. She further alleged that neither her nor her deceased husband had disposed off the suit land in 1995 as alleged by the Defendant. It was her contention that from the correspondence file, there was no consent to transfer the suitland to the Defendant and there were no land rent and land rates clearance certificates attached which are mandatory statutory requirements and which are ordinarily obtained by the vendor. She contended that neither herself nor her deceased husband obtained the above documents so as to facilitate lawful transfer if any.

Therefore, it was the Plaintiff's allegation that the purported registration of the 1st Defendant as the proprietor of LR No. 12661/28, was fraudulently misrepresentation, premised on forgery and of no legal effects and his ownership is defeasible. The Plaintiff further particularized the particulars of fraud, forgery and misrepresentation in her paragraph 34 of the Complaint.

It was her further contention that the purported signature of her deceased husband appearing on the purported transfer is a forgery and so is her purported signature appearing too on the said transfer. She alleged that she has already disposed off by way of sale approximately 1 acre to Mr Mark Sang, from the

suit land as she is the legitimate owner of the said suit land.

Alternatively, the Plaintiff claimed ownership of the suit land through adverse possession. She alleged that she has been in continuous, uninterrupted, exclusive and peaceful possession of the suit land from 1984 to date. She therefore alleged that she has acquired registrable interest to the suit land as provided by Limitation of Actions Act, Cap 22 Laws of Kenya. Plaintiff laid out the specific particulars of adverse possession in Paragraph 39 of the Plaint and it was her contention that the 1st Defendant is a complete stranger to her and he has never been in possession of the suit land.

On his amended defence and counter claim dated 30th June 2011, the Defendant denied all the allegations made by the Plaintiff. He further denied that the suit land ever became amalgamated with LR NO. 12661/27 and that it became extinguished in 1993 or at any other time. He did put the Plaintiff to strict proof as to those claims.

It was the Defendant's contention that by a sale agreement entered into between himself, the Plaintiff and her husband **King'oo Kioko** as vendors, dated 24th October, 1995, the Defendant purchased LR No. 12661/28, from the said vendors for consideration of **Kshs. 3000,000/=**. Further that the property was sold in vacant possession and their joint Advocates in the sale transaction **M/s Kembi & Muhia Advocates**, were authorized to make necessary payments to **Jamnadas Ruparel**, (now deceased) from deposits paid by the Defendant so as to produce the original title document for the subject land from the said **Jamnadas Ruparel** as the same had been charged with him for the financial facilities granted by himself to the vendors. He further alleged that upon the payment of the loan balance to **Jamnadas Ruparel**, the said joint advocates obtained from him the original title document for the suit land as well as duly executed discharge of charge document which discharge document was to be registered against the title at the lands office so as to cancel a charge registered against the title by the said **Jamnadas Ruparel** as entry No.4. He further contended that the said joint advocate also prepared a transfer document in respect of the suit land which document was signed by both vendors and executed before **P M Karingu Advocate**, a partner in the said joint firm of advocates and who was also handling that particular sale transaction. That further, the said Advocates proceeded to book the said discharge of charge and transfer documents at the lands office and the said discharge document was registered on **21st December, 1995** and the transfer in favour of the Defendant on **22nd December, 1995**. It was therefore his contention that since 22nd December, 1995, he has been the lawful registered owner of the suit land and has lawfully had in his custody its original title document. The Defendant also denied that the financial facility or loan from **Jamnadas Ruparel** was paid by the Plaintiff but he contended that plaintiff never obtained the discharge of charge document from **Jamnadas Ruparel** as alleged in her paragraph 17 of the plaint. It was also his contention that the original title document were released to **M/s Kembi & Muhia Advocates** by **Jamnadas Ruparel** after the vendors loan with him had been repaid through the joint advocates. He thereafter contended that the Plaintiff did not have the original title document to the suit land as alleged in the Plaint as the same was in custody of the Defendant as the lawful registered proprietor.

The Defendant also denied that the suit land was capable of being devolved to the Plaintiff upon the death of her husband in 1996 as at that time, the suit land was already registered in the 1st Defendant name and the listing of the suit land as one of the assets of the deceased was an act of fraud by the Plaintiff.

He averred that he is the lawful owner and in possession of the suit land until December, 2010 when he visited the suit land and found that the Plaintiff had encroached into it as a trespasser. He also reiterated that all the necessary clearances and consents were obtained by the joint advocates who were conducting the subject sale transaction in respect of the suit land between the Defendant and the vendors and the same were presented to the lands office as required and denied any false misinterpretation or his part at all and did put the Plaintiff to strict proof thereof. He also denied that his registration as the proprietor of the suit land was out of fraudulent misrepresentation premised on forgery or at all and that the same is defeasible in any way. He denied all the particulars of fraud, forgery and/or unlawful misrepresentation generalized in paragraph 34 of the Plaint and did put the Plaintiff to strict proof thereof.

It was the Defendant's contention that the Plaintiff and her deceased husband as vendors duly executed the transfer documents before their said joint advocates for the transfer of the said land to the Defendant. He further contended that the said transfer was presented to the lands office on 22nd December, 1995 and was duly registered in the name of the Defendant and the Defendant was later handed the original title document which document he holds to-date. Further, he contended that he had no knowledge of how the land titles Registry operates and/or deals with document once presented to it.

Defendant further denied that the Plaintiff was entitled to the suit land by adverse possession as claimed in paragraph 39 of the Plaintiff or at all and contended that such claim is misplaced and incapable of being granted in the circumstances of this case. He also denied the specific particulars of adverse possession enumerated in the Plaintiff.

Further, the Defendant in his counter-claim alleged that he was shocked when he carried out a search on the suit land and discovered that the Plaintiff had obtained various **adverse Orders** which Orders she had at various times registered against the title as entries **No. 7,8,9**, and 10 without the knowledge of the 1st Defendant. That the said Orders were irregular and fraudulent as the Defendant was never involved in the proceedings pursuant to which the said orders were obtained and the Defendant was never a party to **HCC No. 760 of 2003**, where **Consent Order** had been entered on 23rd September 2010, in Court. Defendant further contended that he was further shocked when he visited the suit land and found that the Plaintiff had erected a new fence around the suit property as well as having a new dwelling structure built on it. He therefore stated that as lawful registered proprietor of suit land, the Plaintiff action amounts to trespass and gross violation of his ownership rights and he urged the court to allow his counter claim.

The Plaintiff on her part denied all the allegations made by the Defendant in his counter claim and did put the Defendant to strict proof thereof. She reiterated that the Defendant was aware of the existence of this suit and also had material knowledge of the Court Orders issued and registered thereafter but took no action to enforce his purported rights. That as a legitimate owner of the suit land, she was entitled to use, enjoy and dispose the suit land as lawfully sanctioned. Further that though the Defendant was not a party to **HCC No. 760 of 2003**, the Orders obtained thereof were not irregular and/or fraudulent as alleged. She further contended that the Defendant was being insincere and guilty of material non-disclosure as the Defendant was served with the suit papers and also informed of the vesting Orders though his advocates, **Karingu & Co. Advocates** by a letter dated **21st October, 2009**. Moreover, she had sold a portion of the suit property to **Mark Kemeli Sang**, way back in the year 2008 and the said Sang took possession of the said portion and even constructed a dwelling house thereon.

It was upon the intent to transfer the said portion of land to Mark Sang that she discovered the purported transfer of her land to the Defendant. Plaintiff also reiterated that she is the lawful owner of the suit land and she has never transferred the same to the Defendant and did not execute any documents in connection to transfer of the suit property to the Defendant. She also reiterated that the said purported registration of the Defendant as the registered proprietor of **LR No. 12661/28** was fraudulent and of no legal effect. The Plaintiff therefore prayed for the dismissal of the Defendant's counter-claim with costs to the Plaintiff.

The matter proceeded by way of viva voce evidence. The Plaintiff herein **Teresia Kamene King'oo** gave evidence and called three more witnesses. In her evidence, the Plaintiff reiterated the contents of the Plaintiff and stated that the suit land was owned by herself and her deceased husband, having purchased the same from one **Stanley Njindo Matiba**, in the year 1984. She further claimed that they borrowed some money from one **Jamnadas Ruparel**, and used the suit land as security whereas a charge was registered over the suit property. It was her claim that the suit land was never sold or transferred to the Defendant as alleged by him. She testified that the title to the suit land got lost at the lands office when she allegedly took it together with **Title No. LR No. 12661/27**, to complete an alleged process of amalgamating the two titles and obtaining new titles after subdivisions of the amalgamated pieces of land. Plaintiff also testified that neither her nor her deceased husband signed the sale agreement nor the transfer documents in the year 1995. She further testified that in the year 1995, her husband was ailing from hypertension and prior to his death, he had suffered a stroke and was partially paralysed and could not

write or walk. She therefore testified that due to her husband ailment, he could not have signed the sale agreement nor the transfer in the year 1995 as alleged by the Defendant. She also testified that she continued to pay the land rates at the Nairobi City Council and records at the City Council show the suit land is in their joint names (Plaintiff and her late husband). She further testified that she has never sold the suit land to the Defendant. It was her testimony that she only sold a portion of the suit land to one **Mark Sang**, who has now built a dwelling house. It was her testimony that she did not know the Defendant herein and only saw him in the year **2008**, when he allegedly went to view the suit land and alleged that the suit land was sold to him by her late husband in the year 1995. The plaintiff further testified that though her husband had borrowed money from one **Jamnadas Ruparel**, they later repaid the said loan and **Jamnadas Ruparel** registered a discharge of charge in the year 1995 and released the original title document to them. She therefore denied that her husband sold the suit land to the Defendant and/or anyone and testified that the alleged signatures on the sale agreement and transfer document were a forgery as her husband could not write or sign anything in the year 1995 as he was partially paralysed . She also testified that she has been in continuous occupation of the suit land and the Defendant has never taken possession of the suit land.

PW2 Martin Esakula Papa, a document examiner, a Director of Global Forensic Society stated that he was instructed by the Plaintiff's advocate to compare and examine signature samples on exhibit **B1** and **B4** and **C1** and **C5**.

He compared them with the questioned signatures on exhibits **A1** and **A2** with the standard signatures on **Exhibit B1 and B4** and he found no indication of common origin. **PW2** deduced that they were not made by the same hand. He further compared and examined the signatures in exhibit **A1** and **A3** with the standard signature in **Exhibit B3** and specimen signatures in Exhibit **C1** and **C5** and found that they did not have a common origin. The signature on **A1** were allegedly those of **Kioko King'oo** and **Teresia Kamene** (the Plaintiff herein) . **B1** to **B4** were samples of the signatures for the two. He testified on the methodology used to compare and examine the signatures. It was his conclusion that the signatures on **A1** and **A2** were forged signatures.

On his part, **PW3 Mote Mbithuka**, testified that he was a long serving employee of the Plaintiff and testified that he has worked for the Plaintiff since 1996. He further testified that he has worked on the suit land since then growing various crops and rearing livestock. It was his testimony that the suit land was fenced all round without any gate. It was his further testimony that only one **Mark Sang**, has recently constructed a gate after he was sold a portion of land from the suit land in the year **2008**. He also testified that in the year 2008, the Defendant went to the Plaintiff compound and stated that he wanted to view the suit land. He testified that since his employment, he had never seen the Defendant before.

PW4: Antony Kilonzo testified that he is the son of the Plaintiff and **Alphonse King'oo Kioko** (Deceased) . He further testified that the suit land is owned by her parents who moved to the suit land in the year 1984. It was his testimony that the suit land was accessible via **LR No. 12661/27**, and that this land has never been sold to anyone particularly the Defendant. He confirmed that recently, the Plaintiff sold a portion of this suit land to one **Mark Sang** who has put up a dwelling house.

He also testified that he did not know the Defendant and only saw him for the first time at Hardy Police Station. It was his testimony that his father **King'oo Kioko** was ailing in the year 1995 and he used to drive him around and he could not do anything without informing him. He told the court that in the year 1995, he never drove his father to any advocates office and that his father never sold the suit land to the Defendant. He also testified that he has never seen the Defendant on the suit land but he is aware that part of the suitland is now sold to one Mark Sang.

PW 5 Edwin Wafula, a Land Registrar based at Ardhi House, in Nairobi testified that he has worked in the said registry for five years now. He stated that he had been authorized by the Chief Land Registrar to testify in the suit. He further testified that the suit land is registered under the Registration of Titles Act. He also stated that he perused the said file and did not find a copy of the alleged transfer for the suit land and that the correspondence file did not contain **Consent to transfer** the suit land or a **land rates clearance certificates**. He also testified that for a lawful transfer to be registered, there were crucial

documents which were necessary such as consent to transfer from the Commissioner of Lands, Rates and Land Rent Certificates and Stamp Duty receipts. He testified that the above documents were missing in the present correspondence file and therefore the said registration was suspicious. It was his testimony that when a registered document is presented at the lands Office, the purported document is recorded in an allocation book and day book. He further testified that all Registrable documents are chronologically entered in the allocation book and a day book number is allocated to such a document on a first come, first serve basis. He noted that the two booking numbers for different dates could not chronologically follow each other as the lands office is a busy office with so many registrable documents and therefore the alleged transfer which was book the next day could certainly not have been allocated booking number 1501 after a document that was registered the previous day. To him that was impossible and raised eye brows.

On his defence, the defendant herein testified that in the year 1995, he entered into a sale agreement between himself and the vendors, **Mr. & Mrs King'oo**. The two offered to sell to him **LR. No. 12661/28** which was approximately 2.5 acres which land was between the boundary of **Ongata Rongai and Langata**. It was his testimony that one of the terms of the sale was that the title was under a charge, under the name of **Jamnadas Ruparel**. The charge was to be discharged before the land was transferred to him. It was his testimony that the selling price was **Ksh. 3 Million** and his advocates were **M/s Kembi & Muhia Advocates**. He further testified that after he paid the initial deposit of **Ksh.200,000/-**, there joint advocate paid the debt owed to **Jamnadas Ruparel** and he released the title to the advocate after discharge of charge. He produced the discharge of charge as exhibit in court. He also testified that another condition were for the tarmacking of the drive way before taking possession and the costs of the tarmac was to be met by the vendors. He produced the sale agreement as exhibit in court. Further, that after the title was released to the advocate by **Jamnadas Ruparel** the transfer was effected into his name after payment of the full purchase price. Defendant attested that the transfer document was signed by **Mr. Kioko King'oo** (Deceased) and **Teresia King'oo** (Plaintiff herein) as vendors and witnessed by **Karing'u Advocate**. Later the transfer document was registered on 22nd December, 1995. It was also his testimony that he was later issued with the original certificate of title which he produced and exhibit 3 in court. He also testified that he took possession of the land and visited the King'oos family as soon as the title was given and he even took tea with them. Defendant testified that the clearance certificates were obtained by the vendors. That after the completion for sale, **Ksh.2,000,000/-** was given to the vendors through a bankers cheque vide letter dated 28th February, 1996 addressed to **Mr. King'oo by Kembi & Muhia Advocates**. The balance was retained so that it could be used to repair the road work. He further testified that he got to know about this case when he received a letter from the Commissioner of Lands requesting him to surrender the title to **Mr. Gachigi** so that the Commissioner of Lands could comply with the Court for Order issued in connection to case **No 760 of 2003**. He produced the said letter as exhibit No. 8. Thereafter the Defendant informed his Advocate about the letter from the Commissioner of Lands and his advocate advised him not to release the title deed requested. It was his testimony that he was not a party to **HCCC No. 760 of 2003** and was not aware of the **Consent Order** dated **23rd September, 2010**. It was also his testimony that he was not aware of the vesting order in relation to his parcel of land **No. LR. No. 12661/28**. The **vesting Order** was in connection to the **case ELC No 519/2008**. However, file **No. 519/2008** went missing from the courts registry and that the current file is a reconstructed one and the original file has never been found. Defendant also testified that when he bought the land, he took possession of it, but when he received the letter from the Commissioner of Lands, he visited the land and was barred from entering. He also found a third party constructing on the suit land and he reported the matter to Hardy Police Station. He reiterated that the Plaintiff and her husband sold the suit land to him and he witnessed them signing the sale agreement. He further testified that even after the death of **King'oo Kioko**, he visited their home. He therefore sought damages for illegal occupation of his parcel of land and the costs of the suit.

Dw2 Peter Migwa Karingu, an advocate of the High Court of Kenya testified that between the year **1995 – 1997**, he was in legal practice, and was practicing in the firm of **M/s Kembi & Muhia Advocates** as a partner. He also testified that he did all the transactions related to this case and that he prepared a sale agreement between the Defendant and the Vendors herein. The vendors were **King'oo Kioko** and **Teresia Kamene King'oo**, the plaintiff herein. He drew the sale agreement and witnessed its execution by the parties. It was his further testimony that after the execution of the sale agreement, the

purchaser (Defendant) deposited **Ksh.300,000/-** in their offices. They paid some money to **Jamnadas Ruparel** about **Ksh.150,000/-** towards settlement of a debt owned by **King'oo Kioko**. Then a discharge of charge was drawn and executed. After the discharge, **Mr. Jamnadas Ruparel** released the tile for **LR. No. 126661/28** to the **Advocate. DW 2** testified that he prepared a transfer document and it was executed by the vendors in his presence. Thereafter he submitted both the title and discharge of charge and transfer of registration to the land office and the same were registered against the title. Further, that there were the document accompanying the two documents such as Rent Clearance certificates correct to transfer and rates clearance certificates from the City Council of Nairobi. Thereafter the land was registered in the name of the defendant. It was his testimony that he released **Ksh.2,000,000/-** to the vendors through a Banker's cheque **No. 055385** vide covering letter dated 28th February, 1996 which he produced as exhibits. There was a balance of **Ksh.600,000/-** which was not paid out and there was an issue of Road which was to be constructed by the vendor. However, it was later agreed that the buyer would repair it the repair the rod by utilizing to outstanding balance of **Ksh.600,000/-** enclosed by the letter dated 29th May, 1997. It was his testimony that indeed the plaintiff herein authorized the release of this money to the Defendant through a letter which she signed in the presence of PW 2 dated **14th July, 1997**. Further, he testified that the purchaser took him to the subject property and he verified the site and even took tea in the vendor's house. He was certain that the vendors visited their offices and signed the sale agreement. He also testified that after the plaintiff's husband died, she visited his office and he advised her on how to obtain letters of administration. He testified that the Plaintiff was indeed the one in court and after the release of the money to the defendant for repair of the road, the transaction came to an end.

DW 2 No. 217141 Emmanuel Kenga testified that he is an Assistant Commissioner of Police and a Forensic Document examiner of more than 22 years of experience. He further testified that he has been trained as a document examiner locally and abroad. It was his testimony that on 27th April, 2012, his office received exhibits from the firm of **Muturi Kamande & Co. Advocates**, with instructions to examine some signatures. The question documents were AI and A2 (A sale agreement dated 14th October, 1995 and transfer documents. The other exhibits were (known signatures and **BI – B3** and also known signatures. He was requested to compare and examine the question signatures with the known signatures. He examined signatures on CI which was an identity Card No. 1688289 for **King'oo Kioko** with the questioned signatures on A1 and A2. In the cause of examination, he formed an opinion that the signatures were C1, by the same hands.

He further examined the questioned signatures with the known signatures on **Exhibit B1 –B3**. Again he got similarities. He therefore formed an opinion that the signatures were by the same hand. He testified that he used projectors for the purpose of enlargement and proper observations. DW 2 produced the report as exhibit No. 17 and reiterated that the signatures were from the same authors. It was also his testimony that he does not know Martin Papa as a document examiner . To him, they are only ten document examiners in this country. He further testified that Martin Papa was his student but he did not complete the course and so he is not a qualified document examiner.

The parties herein filed their written submissions which I have carefully examined. The plaintiff submitted that though Defendant alleged that he bought the suit property from the Plaintiff and her deceased husband, the plaintiff refuted the said sale. She further submitted that the Defendant had statutory duty to prove the said allegations as provided by **Section 107(1) of the Evidence Act;** which provides:

“Whoever desires any court to give judgment as to any right and liberty deponent on the existence of facts which he asserts, must prove those facts exists”

Further, plaintiff submitted that the Defendant failed to prove alleged payments to the plaintiff. It was submitted that there was contradictory evidence on how the alleged monies were paid to the plaintiff. It was further submitted that though Defendant alleged that Plaintiff was paid **Ksh.2,000,000/-** using a Banker's cheque, the said Banker's cheque was not produced as evidence. Further, that there was no documentary evidence to corroborate any of the alleged payment. It was therefore the plaintiff's submissions that there was no evidence of consideration having passed from the defendant to the plaintiff

and relied on the **Court of Appeal Case No 97 of 2004, Maingi Mutisya Nzioka Vs Mbuki Kisavi**, where it was held: -

“There was no evidence of any consideration having passed. In short there was no sale...”

It was further submitted that though the Defendant testified that he repaid the money owed to ***Jamnadas Ruparel*** by the vendors, the actual situation is that the Respondent never repaid the said ***Jamnadas Ruparel***. It was submitted that the evidence of the Defendant and DW I was inconsistent on how money was paid to ***Jamnadas Ruparel*** and there was no evidence to prove money was paid to Jamnadas. The Plaintiff further submitted that since Plaintiff and her deceased husband were joint tenants, when the husband died in the year **1996**, his joint tenancy interest in the suit land passed on to the Plaintiff. She relied on the case of **Chelangat Vs Samuel Tiro Rotich & 5 others Eldoret High Court Etc No. 915 of 2012**, where the court held that;

“ a joint tenancy cannot pass under or will intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence”.

It was also submitted that the alleged transfer if any was a nullity abinito for want of statutory consent to transfer. It was submitted that there was no consent to transfer to property obtained by the plaintiff from the Commissioner of lands. Further that the alleged signatures of the Plaintiff and ***King’oo Kioko*** were a forgery as testified by PW2, a ***private forensic document examiner***. Moreover the said registration of transfer was impossible as a document presented on 21st December, 1995 and given day book No. 1500 could not be followed chronologically by a document booked the next day 22nd December, 1995 as day book no. 1501 and evidenced by the discharged of charge and registration of transfer, produced by the Defendant. It was also submitted that the Defendant has never been in possession of suit land as alleged by himself in his evidence that he took possession of the suitland after purchase and therefore Defendant was dishonest on possession. She further submitted that one ***Mark Sang***, bought one acre form the suit property, took possession of it and has constructed on it. She urged the court not to issue an adverse orders against the said Mark Sang who is not a party to this suit. Plaintiff relied on the case of **Matiba V Attorney General (1995 – 1998) IEA 192**.

In the alternative, the plaintiff submitted that she had been in continuous uninterrupted possession of the suit from 1984 to date and therefore acquired the suit land by adverse possession.

The Defendant on his part submitted that, though the Plaintiff alleged that the title to the suit land got lost at the Land’s Office where she had allegedly taken it with the title ***LR. No. 12661/27***, for the process of amalgamation of the two titles, the plaintiff did not produce any documents from the Lands Office to confirm the loss of the title. Further that she did not explain why the Lands Office did not issue her with a duplicate title to the subject land and if indeed the title had been lost in its hands. Though the Plaintiff alleged that she still pays the City Council rates for the subject land, to Defendant admitted that he has never effected change of records at the City Council as there was no legal requirement to this change of name and such payments were not proof of ownership of the suit land. Further, Defendant submitted that PW 2, ***Martin Papa***, was not credible witness and his report should not be believed by the court. That in contrast, DW 2 ***Emmanuel Kenga***, was a qualified document examiner and whose report is therefore credible and should be believed by the court? It was further submitted that PW 5 admitted that the discharge of charge and transfer document were properly presented for registration at the Lands registry. Further that if any document was found missing from the deed file that could not be visited on the Defendant as the files are kept by the Lands registry. Therefore, the witness (PW 5) did not establish any fraud and therefore the plaintiff failed to prove the claims of fraud as forgery and pleaded in the plaint.

It was further submitted that the Defendant has established that he is the owner of the suit land as a purchaser and therefore no restraining orders should issue against him. Further, that the Plaintiff was not entitled to any prayer of adverse possession as the Plaintiff jointly with her husband sold the land to the Defendant at an agreed consideration and the land was lawfully transferred to the Defendant. The plaintiff has now unlawfully continued to occupy and aim on this suit property and her occupation is therefore

trespass which cannot be sanctioned by the court through a claim of adverse possession.

It was also submitted that the evidence of the Defendant and DW I was unshaken and it was evident that the Plaintiff sold the suit property to the defendant as per the sale agreement marked **D exhibit 1** and transferred the same vide the transfer document **D exhibits 3**. Further, that the document examiner **Emmanuel Kenga** testified that indeed the vendor did execute the sale agreement and the transfer and confirmed that the vendors signatures were not forged as alleged by the Plaintiff. There was indeed a transaction between the vendors and the Defendant over the suit land. The Defendant also submitted that indeed the Plaintiff received the agreed purchase price and did transfer document the subject land to the defendant and the Plaintiff is attempting to get it back through the back door. It was further submitted that the Defendant has established his case of ownership of the subject land and a declaration should be made to that effect. The Defendant relied on the decisions in following cases:- **HCCC NO. 337 of 2011 La Nyavu Ardens Ltd Vs Wilson Munguti Mbithi & 2 others and HCCC No. 367 of 2000 Willesden Investment Ltd Vs Kenya Hotel Properties Ltd** . The Defendant therefore urged the Court to dismiss the Plaintiffs case and allow his counter-claim.

The parties further filed separate statements of agreed issues which I have considered. However, this Court is not bound by what the parties have filed as the issues for determination. As was held by Order JSC in **Gokaldas Tanna Vs Rosemary Muyunza & DAPCB, SCCA NO. 12 of 1992 (SCU)**.

“ An agreement on the terms upon finding the issue in the positive judgement should be entered in favour of the plaintiff and upon finding the issue in the negative, judgement should be entered in favour of the Defendants was objectionable on at least two grounds;The first is that by doing so, the parties sought to tie in advance the hands of the learned Judge in his judgement. The parties also appeared to have attempted to oust the functions of the court to arbitrate fairly the dispute between the parties and to come out with decisions that appeared just in the opinion of the court. Thus, parties cannot and should not do so. The second objection is that the agreement would have the effect of asking for a Judgement in favour of one of the other parties whether or not such a Judgements was contrary to the legal provisions”.

I will therefore proceed to paraphrase the said agreed issues based on the pleadings, the evidence in general and the written submissions.

Having now considered the pleadings and the evidence herein, the court finds that the issues for determination are:

- i. ***Did the Plaintiff and her deceased husband sell the suit land LR No. 12661/28 to the Defendant herein for Kshs. 3,000,000/?.***
- ii. ***As the alleged sale agreement and transfer document in favour of the Defendant signed by the Plaintiff and her deceased husband?.***
- iii. ***Did the Defendant pay the purchase price of Kshs. 3,000,000/= for the subject property to the vendors?.***
- iv. ***Who is the lawful owner or proprietor of the suit property now?.***
- v. ***Was there a lawful transfer registered in favour of the Defendant?.***
- vi. ***Who is entitled to the injunctive orders herein?.***
- vii. ***Is the Defendant entitled to the Orders sought in his counter-claim?.***

Having now considered the available evidence and the exhibits thereto and the written submission, I have noted that there are some issues which are not in dispute. There is no doubt that the suit property was initially owned by the Plaintiff herein **Teresial Kamene King’oo** and her deceased husband **King’oo**

Kioko. The Plaintiff in her evidence in court and witness statement alleged that they purchased the four parcels of land from one **Stanley Njindo Matiba** in 1984. The suit land was one of the parcels of land that they did purchase.

There is no doubt that the Plaintiff's husband passed on in the year 1996 after suffering from Hypertension. The plaintiff and her son **PW4** testified in Court on how **King'oo Kioko** suffered from High Blood Pressure and later succumbed to the ailment on 13th August 1996. There is a Death Certificate attached in the bundle of documents which shows that the cause of Death was **Cardio-Pulmonary arrest due to hypertension**.

There is also no doubt that the Plaintiff and her deceased husband had borrowed a loan from one **Jayantikumar Jamnadas Ruparel**. What did not come out clearly is how much the two had borrowed from the said **Jamnadas Ruparel**. However, the Plaintiff and Defendant in their evidence had testified that the **King'oos** was owed some money to **Jamnadas Ruparel**. It is also no in doubt that the **King'oos** used title for **LR No. 12661 /28** (suit land) as security for the loan with **Jamnadas**. There was evidenced that I was charged as registered over the title of the suit land. It was also not in doubt that the said charge was discharged on 21st December, 1995 as evidence by the entries on the certificate of title exhibit. However, the question that needs to be answered is who registered the discharge of charge? Was it **Kembi & Muhia Avdocates** after settling the debts with **Jamnadas** or was it **Jamnadas** himself who later released the original title to the Plaintiff and her late husband? There is also no doubt that some **Vesting Orders** were issued against the title and registered in the year 2009. However, the same were stayed and thus this suit.

It is also evident that the Plaintiff is in possession of the suit property and there was allegation that she has sold one acre from the suit land to one **Mark Sang** who had started a construction on the said portion of land. It is also not in doubt that the Defendant visited the suit land in the year 2010 and was not allowed access by the Plaintiff. The matter was reported to Hardy Police station and the parties were referred to Civil Court.

There is also no doubt that there are two sets of Reports from the document examiners over the same documents but giving contradictory. In the document examine is report by the **Martin E. Papa**, and requested by the Plaintiff Advocate, and which was produced as exhibit No, the examiner found that the signatures therein were inconsistent and were drawn by different hands.

He concluded that the signatures of **Kiong'oo Kioko** and **Teresia Kamene King'oo** were forged signatures as they appeared in sale agreement dated 24th October, 1995 and transfer document dated 19th December, 1995. However, Emmanuel Kenya, a forensic document examiner instructed by the defendant advocate also examined and compared the signatures on the same documents. In his report, he opined that there were similarities on the signatures that he compared and that was an indication that the signatures were from one common origin and therefore made by the same author. To him the signatures on the sale agreement and the transfer documents were signed by both **King'oo Kioko** and **Teresia Kamene Kioko** the plaintiff herein. Therefore the court is confronted by two forensic documents examiners reports over the same documents but which are contradictory. In such a situation where the two reports are contradicting, the court will have to decide whether to rely on the said reports, or any one of them, or reject all of them. In the instant case, I will not rely on any of the reports but on the available evidence. See the case of **C.D Desouza Vs B.R Sharma (1953) 25 KLR 41 at Pg. 42**.

It is not in doubt that the defendant herein holds the title to the parcel of land L.R No. 12661/28 Nairobi which he alleges that he purchased from the King'oos. On the other hand, the plaintiff has denied ever selling the suit land to the defendant. She claims that the sale agreement and transfer document relied on by the defendant are a forgery.

The court will therefore evaluate the available evidence to try and unravel the mystery herein. The starting point therefore will be grounded on the basis that it is trite law that he who alleges must prove. Both the plaintiff and the defendant have alleged some facts. It was upon them to prove the said allegations on a balance of probability.

The starting point herein is that the defendant has certificate of title to this suit land. The plaintiff has possession and has even sold a portion of the suit land to one Mark Sang. **Section 26 (1)** of the **Land Registration Act** provides as follows: -

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

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

Though the Defendant herein hold the **Certificate of title**, the same can be challenged on allegations of fraud, misrepresentation or if the title is acquired unprocedurally. The Plaintiff herein is thus challenging the Defendant’s certificate of title. She needed to prove existence of any of the above conditions.

As it is trite law that he who alleges must prove and the Plaintiff has claimed that the Defendant acquired the certificate of title fraudulently, she had a duty to call evidence and prove that allegation. The Defendant also had a duty to call evidence and prove that he acquired the suit land lawfully.

In trying to determine the issues framed by the Court, I will rely on the evidence adduced herein by all the witnesses and the exhibits attached thereto.

The first issue herein is whether the plaintiff and her deceased husband sold the suit land to the Defendant herein. The Defendant alleged that he bought the suit land in October 1995 from the Plaintiff and her husband. He alleged that they entered into a sale agreement dated 24th October, 1995 which was signed by both vendors. The said agreement was produced in Court as exhibit. Further that a transfer was signed by the said vendors in the presence of their joint advocates, **Mr Karingu**. The Plaintiff denied that allegation and submitted that the signatures on the two documents were forgery. Plaintiffs called the evidence of document examiner and so did the Defendant. The two documents examiners gave conflicting evidence, and has been held variously by the Courts, it is trite law that opinions of experts are just opinions and are not binding. The court is at liberty to accept or reject evidence of experts depending on the facts and circumstances of the case before it (See **Amosam builders developers Ltd Vs Betty Ngendo Gachie & 2 Others Nakuru Civil Appeal No. 193 of 2001**).Where the Court held that

“ There is no doubt that the witnesses called by both sides as experts were each qualified on their respective fields. That notwithstanding as a general rule, evidence by experts being opinion evidence is not binding on the Court. The Court has to consider it along with other evidence and form its own opinion on the matter in issue. The Court is at liberty to accept or reject evidence of experts depending on the facts and circumstances of the case before it, over examination of the same documents;

Similarly in this case, there is a conflict of opinion by the experts called by both sides, and **I** will therefore not be bound by their opinion and I reject their evidence. I will therefore consider the other evidence adduced and form my own conclusion. What was admitted by both parties is that the suit land was charged to **Jamnadas** for a loan granted to the **Kingoo’s** by the said **Jamnadas Ruparel**. The Plaintiff alleged that her husband paid the whole debt and **Jamnadas** discharged the title and gave the title document to Plaintiff and her husband. The Defendant and his witness **Mr Karing’u Advocate** alleged that **Mr Karing’u** is the one who prepared the discharge of charge document and presented it to the land’s office on 21st December, 1995. Indeed the said documents show that it was drawn by **Kerubi & Muhia Advocate**.**Mr Karing’u** testified that he was a partner in the firm of **Kembi & Muhia Advocates**.

The Plaintiff alleged that the said discharge was prepared by **Jamnadas Ruparel**. However the

document itself shows it was drawn by **Kembi & Muhia Advocates**. It is trite law that he who alleges must prove. There was no evidence from lands office to confirm that the **discharge of charge** was presented by **Jamnadas Ruparel** and not **Kembi & Muhia Advocates**. It is therefore more probable that the discharge for charge was presented **by Kembi & Muhia Advocates** after being prepared **by DW2, Mr Karing'u Advocates**. The said witness had testified that he prepared discharge of charge so that he could register the transfer. He also testified that before he prepared a discharge of charge, Defendant had to clear the debt owed by the **Kingoo's to Jamnadas Ruparel**. I find that the documents on records clearly shows that there was a transfer to the Defendant and I find that the Plaintiff herein and her husband sold the land to the Defendant in the year 1995.

The second issue for determination is whether the said sale agreement and transfer documents were signed by the Plaintiff and her deceased husband. As I stated earlier, I have chosen to reject the experts opinion. However the Plaintiff alleged that her husband was suffering from mild stroke in the year 1995 and could not signed the documents in issue. However, the documents produced in Court were only discharge summary and death certificate. There was no Medical evidence produced to show that Kingoo Kioko suffered from mild stroke which made him unable to write with no evidence to the contrary the Court do believe that the said documents were signed by the vendors as alleged by the Defendant.

The third issue, did the DW the Defendant pay the purchase price of **Kshs.3000,000/=**? To the vendors. There was evidence adduced that after the sale agreement was executed, Defendant paid 10% of the purchase price. Further the said amount was used to pay **Jamnadas Ruparel** and **Jamnadas** thereafter executed a discharge of charge. The Plaintiff denied that her husband nor herself ever received the purchase price. I have seen the letter dated 28th February, 1996 addressed to King'oo Kioko which was forwarding a **Bankers Cheque No. 055385** being proceed for sale of LR **No. 12661/28**. There was no evidence produced to show that Bankers Cheque **No. 055385** did not exist and that the **Kingoo's** were not the beneficiaries. As it is now, the advocate who allegedly acted for both parties forwarded the Bankers cheque to the vendors. Further, it was stated that the balance was to be used to repair the access road leading to the suit plot. There are two letters dated 29th may 1997 and 14th July 1997 which deals with the same issues. It is the Court's findings that indeed the Plaintiff, the Defendant and Mr.Karingu Advocate deliberated for long on the issue of repair of access road through correspondences. I find and hold that the purchase price was indeed paid to the vendors.

The next issue for determination is :- who is the lawful proprietor of the suitland?. There is no doubt that the Defendant is the one holding certificate of title. There was no evidence from the lands office to confirm that the said certificate was not genuine. Section 26 of the Land Registration Act states that such certificate of title is **prima facie evidence** that the holder is the absolute and indefeasible owner .The same can only be challenged if it was acquired through fraud or misrepresentation. There is no evidence that there was such fraud or misrepresentation. This evidence could have been adduced by officials from the lands office who were in office as at 1995 when the certificate was allegedly registered. The fact that the Deed file is missing at the Land Registry is not sufficient to sustain a claim of fraud. The Defendant herein does not work in the lands office. The Court finds that the Defendant is the lawful proprietor of the suit land.

Was there a lawful transfer?. The fact that there is an entry in the certificate of title shows that a transfer was registered. Though PW4 alleged that there was no consent to transfer from the Commissioner of lands , the Deed file was missing and the court cannot rule out with certainty that as at 22nd December, 1995 , there was no consent from the Commissioner of lands or the other statutory documents . The lands office is the custodian of the said documents and their shortcomings should not and cannot be visited on any party who does not work in the said registry. It is probable that the said consent and other statutory documents are in the Deed and correspondence files which are missing at the lands Office. That possibility cannot be ruled and without any evidence to the contrary given by a witness from the lands office. The Court therefore finds and holds that there was indeed a lawful transfer.

The Court was also to answer to the questions as to who is entitled to injunctive orders herein. Having found that the Defendant indeed purchased the suit land and having found that he is the lawful registered owner, then the Court finds that he is entitled to enjoy all the rights of a proprietor as provided

by sections 24 and 25 of the land Registration Act such rights includes access and occupation to such property. The Defendant herein does not have that access now as the Plaintiff has occupation. Sections 24(a) and 25(1) of Land Registration Act reads as follows:

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

25(1)“The rights of a proprietor, whether acquired on first registration 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 the privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject”.

The Defendant having been denied his rights as provided by sections 24 and 25 of Land Registration Act is entitled to protection from this Court. The Defendant is therefore entitled to injunctive orders as prayed in the counter claim.

On the last issue of whether the Defendant is entitled to orders he has sought in the counter claim, the Court finds that he is indeed entitled to the Orders sought therein. There is evidence that plaintiff has been in possession of the suit land. The Defendant has been denied use and occupation of this suit land. He is therefore entitled to damages for trespass. Accordingly, the Court awards the Defendant damages for trespass in the tune of **Ksh.3, 000,000/=**.

The Plaintiff has claimed that she is entitled to ownership by adverse possession. However, the Court finds that she is not entitled to a claim of adverse possession. A vendor cannot fail to give vacant possession and thereafter claim for ownership of the same land through adverse possession. The Court accordingly dismisses the said claim of ownership by adverse possession as alleged by the Plaintiff.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has failed to prove her case on a balance of probability and consequently her claim against the Defendant is dismissed with costs to the Defendant. However, on the other hand, the Defendant has been able to prove his counter claim on a balance of probability and he is entitled to the Orders sought.

From the foregoing, the Court enters Judgment as follows.

- a. **The Plaintiff’s claim herein is dismissed entirely with costs to the Defendant.**
- b. **The Court allows the Defendants Counter-Claim entirely.**
- c. **The Defendant is entitled to damages for trespass in the tune of Ksh.3,000,000/= together with costs for the entire suit.**

It is so ordered

28 days Right of Appeal

Dated, Signed and delivered this 13th day of March 2015.

L. GACHERU

JUDGE

In the Presence of:-

..... for Plaintiff

.....for Defendant

Kamau: Court Clerk

L. GACHERU

JUDGE

Court:

Judgment read in open Court in the presence of the above Advocates

L. GACHERU

JUDGE