



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 72 OF 2004

FATUMA ALI OMAR 1ST PLAINTIFF

NADYA ALI OMAR 2ND PLAINTIFF

VERSUS

OMAR ALI OMAR 1ST DEFENDANT

SALEH ABOUD ABDALLA 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

JUDGMENT

INTRODUCTION

1.The Plaintiffs as registered proprietors in respective share of 1/3 and 2/3 of the suit property Mombasa/Block XLIV/7 sued their brother the 1st defendant for allegedly having fraudulently with the collusion of the 3rd Defendant's representative the Lands Registrar, Mombasa transferred the said property to the 2nd Defendant, upon an ex parte judgment against their mother Afiya Said Mbarak in SRMCC NO. 868 of 2003, which ex parte judgment was subsequently set aside and the suit dismissed upon an application by the said Afiya Said Mbarak.

2.In his defence, the 1st Defendant claimed that the suit property was originally his and that he had registered it in the name of their deceased mother upon trust for his children but who then sold the property to his siblings, and asserted the validity of the title to the property issued to him by the Land Registrar as directed by the Order of Court of 8th September 2003 in the Senior Resident Magistrate's Court case aforesaid.

3.The 2nd defendant claimed to be an innocent purchaser for value without notice of the plaintiffs' interest, which was not endorsed on the land register, and the 3rd Defendant defended his action in registering the 1st defendant as the proprietor of the suit property relying on the Court order of 8th August 2003 in the Senior Resident Magistrate's Court case aforesaid.

4.The original court file in this matter had at some point of its litigation been misplaced and on 20th June 2007 upon an application by Counsel for the 2nd Defendant by Notice of Motion dated 13th

June 2007 the Court by consent of the parties made an order for re-construction of a skeleton file. The original file was however subsequently recovered and the Court had its benefit at the time of preparation of the judgment. However, the proceedings on the hearing of the suit were carried out in the reconstructed file. The court also had the benefit of the original court file in the related proceedings before the Resident Magistrate's Court SRMCC NO. 868 of 2003 **Omar Ali Omar v. Afiya Said Mubarak**, which was produced as PEX. No. 1.

THE PLEADINGS

5. By their Amended Plaintiff dated 15th October 2004, the plaintiff sought the following ORDERS:

- a. A permanent Injunction, restraining the 1st and or 2nd defendant by himself, his agents and or servants from transferring, leasing, charging, alienation or in any way whatsoever and howsoever dealing with the suit property namely, **MOMBASA/BLOCK XLIV/7**.
- b. A Declaration that the registration of the 1st Defendant as well as 2nd Defendant as owner of the suit property **MOMBASA/BLOCK XLIV/7** was irregular and unlawful and that the title issued to the Defendant be canceled.
- c. The Register be corrected by cancelling the names of the 2nd Defendant as the owner of the suit property **MOMBASA/BLOCK XLIV/7** and replace the same with the Plaintiff's names in the shares of 1/3 and 2/3, respectively.
- d. Entry Nos. 15, 16, 17, 18 and 19 in the Register be cancelled.
- e. General damages.
- f. Costs of this suit plus interest thereon.
- g. Such other and further relief as this Honourable Court will deem fit and just.

6. The Plaintiffs' prayers were founded on their claim based on fraud and collusion [Plaint refers to connivance] of the defendants set out in paragraphs 3-12 thereof, as follows:

"AMENDED PLAINT

3. At all material times, the plaintiffs were the registered proprietors of the property known as Mombasa/Block XLIV/7 (hereinafter "the Suit Property").
4. In or about 2003, the 1st defendant filed a suit in the Senior Resident Magistrate's Court to, wit, **SRMCC. No. 868 of 2003 OMAR ALI OMAR -VS- AFIYA SAID MBARAK** whereby he obtained an ex-parte Judgment against the defendant in the said suit.
5. In pursuance thereof, the Court in the said suit made an ex-parte Order directing the defendant therein to give vacant possession to the 1st defendant herein and directed the Lands Registrar Mombasa to issue a new title for the sit property to the 1st defendant.
6. The defendant in the said suit applied and had the said ex-parte Judgment set aside and the entire suit dismissed. In pursuance thereof, the plaintiffs sought to register the said decree at the Mombasa District Lands Registry.

6A. Despite as aforesaid, the 1st and 3rd defendants, in order to defeat the plaintiffs interest connived with each other and proceeded to fraudulently do the following: -

- a. the 3rd defendant registered the 1st defendant as the owner of the suit property before recalling the plaintiffs title Deed and/or the expiry of the thirty (30) days gazette Notice contrary to law;
- b. before the publication of the Gazette Notice No. 8532, the 2nd defendant issued a new title on the 22/10/03;
- c. the 3rd defendant made entries in the Register that the title deed was being issued in January, 7 2004 whilst the title document had been issued to the 1st defendant in October, 2003.

7. In pursuance thereof, the 1st defendant purported to enter into an agreement for the sale of the suit property with the 2nd defendant well knowing that he is not the owner thereof and fraudulently attempted to dispose of the suit property to the 2nd defendant.
8. The plaintiffs aver that the defendants have been fraudulent in their dealing with the plaintiffs in

relation to the suit property.

PARTICULARS OF FRAUD

- a. The 1st defendant purporting to enter into a Sale Agreement for the sale of the suit property well knowing he has no title thereto;
 - b. the 1st defendant sending prospective purchasers to view the property with a view to sell the property to them;
 - c. entering or intending to transfer the suit property to third parties 2nd defendant;
 - d. making unlawful entries on the register on 5th January, 2004;
 - e. purporting to transfer and register the suit property to the 2nd defendant without the payment of stamp duty or valuation of the property;
 - f. making wrongful entries in the register, to wit, Nos. 17, 18 and 19;
 - g. demanding that the plaintiff's tenants do pay rent to the 2nd;
 - h. backdating the entry Nos. 17, 18 and 19 in (f) above to January, 2004;
 - i. hiding and/or destroying documents relating to the purported transfer of the suit property from the 1st defendant to the 2nd defendant;
 - j. the 2nd defendant allowing his name to be entered in the register as the proprietor of the suit property;
 - k. refusing to make entries and or register all or any transactions presented for, by and/or on behalf of the plaintiff.
9. Upon discovery that the 1st defendant was purporting to sell the said property to the 2nd defendant the plaintiff obtained a prohibitory order barring the 2nd defendant from effecting the transfer between the 1st ad 2nd defendant but the 3rd defendant refused, neglected and/or failed to register the said order without any reason whatsoever.
10. Unless restrained by an order of this Honourable Court, the defendant will proceed to finalise the sale of the suit property to a third party whereby the plaintiff will suffer irreparable loss and damage.
11. The plaintiffs state that the defendants aforesaid actions have prejudiced the plaintiffs ownership and quiet possession of the suit property resulting to irreparable losses.
12. The plaintiffs state that the proceedings in SRMCC. No. 868 of 2003 aforesaid wee unlawful and a nullity.”

THE DEFENCES

7. In his Further Amended Written Statement of Defence filed on 27th October 2004, the 1st Defendant denied that the Plaintiffs were then the registered proprietors of the suit property entitled and therefore to the reliefs sought and asserted scrupulous compliance with the law in issuance of the title to him, as set out his case at paragraphs 7-11 as follows:

“1ST DEFENDANT'S FURTHER AMENDED WRITTEN STATEMENT OF DEFENCE

7. In further reference to paragraphs 4 and 5 of the Amended Plaintiff, the First defendant properly obtained the title on Plot No. MOMBASA/BLOCK XLIV/7 having been issued the same by the Land Registrar, Mombasa as directed by the order of the court issued on 8th September 2003.
8. The first defendant was properly issued with a title by the Land Registrar, Mombasa on 5th January 2003 after a valid application for registration had been made on 9th September 2003 and accepted by the Mombasa Lands Office and thereafter following a publication of a Gazette Notice No. 8532 dated 5th December 2003 by the Land Registrar inviting any valid objections against the issuance of title to the first defendant within 30 days, the third defendant was therefore entitled to issue the title deed as per the court order as was done on 5th January 2004 to the first defendant after the expiry of the said 30 days' notice.
9. The first defendant further denies the particulars of fraud as set out in paragraph 6A of the Amended Plaintiff and specifically denies that the title was issued before the expiry of the 30 day

period and further denies that the title was issued to the first defendant on 22nd October 2003 but the same was issued on 5th January 2004 and puts the plaintiffs to the strict proof thereof.

10. The first defendant denies having entered into any agreement of sale of the suit property to the second defendant fraudulently as alleged in paragraph 7 of the Amended Plaintiff but the first defendant further avers that he is the registered owner of the suit property and entitled to utilize the same as he deems fit.
11. The first defendant denies the particulars of fraud as set out in paragraph 8 (a) – (d) of the Amended Plaintiff and avers that all the correct and requisite legal procedures were followed in the registration of the property in the first defendant's name (s) who was at liberty to transfer the same to anybody else including the second defendant.
12. The first defendant denies paragraphs 9, 10, 11, 12 and 13 of the Amended Plaintiff and further states that the plaintiffs have not suffered any prejudice as they are not the registered owners of the suit property and have no locus standi to sustain any claims whatsoever against the first defendant who is not responsible by law to issue Title Deeds under Cap 300 Laws of Kenya”

8. For the 2nd Defendant, the defence of an innocent purchaser for value without notice was set up in Paragraphs 5-9 of the 2nd Defendant’s Written Statement of Defence dated the 24th November 2014, as follows:

“2ND DEFENDANT'S WRITTEN STATEMENT OF DEFENCE

5. *The 2nd defendant further states that the purchase/sale transaction of Land Parcel No. Mombasa/Block XLIV/7 and the transfer of the same from the 1st defendant was proper and regular in that: -*
 - a. *The property known as Mombasa/Block XLIV/7 was at all material times to the purchase/sale transaction and transfer registered in the name of the 1st defendant.*
 - b. *At all material times to the transaction and transfer, there was no caution, Prohibiting Order and/or any other encumbrance whatsoever registered against the title to the said property.*
 - c. *The 2nd defendant duly paid the requisite stamp duty on the proper value of the property*
6. *In the alternative and without prejudice to paragraphs 4 and 5 hereof, the 2nd defendant avers that in purchasing the property known as Mombasa/Block XLIV/7, he did so as an innocent purchaser for value without notice and as such was not under an obligation to inquire into the origin of 1st defendant's title to the said property.*
7. *Further to paragraph 6 hereof, the 2nd defendant avers that he has acquired good title to the property as an innocent third party and his title cannot be defeated by any dispute between the plaintiffs and the 1st defendant and/or 3rd defendant.*
8. *The 2nd defendant denies paragraph 9 of the Amended Plaintiff and puts the plaintiffs to strict proof thereof. The 2nd defendant specifically denies that the plaintiffs obtained and/or served him with any Prohibitory Order barring him from purchasing and/or proceeding to have the property herein transferred to his name and the plaintiffs are put to strict proof thereof.*
9. *The 2nd defendant denies paragraph 10 and 11 of the Plaintiff and puts the plaintiffs to strict proof of the contents thereof. The 2nd defendant specifically denies that the plaintiffs have any ownership rights and/or proprietary interest in the suit premises and puts the plaintiffs to strict proof thereof.”*

9. The 3rd Defendant filed a Defence dated 7th March 2005 in which she defended her action of registering the 1st defendant as having been done pursuant to court order of 8th September 2004 in the and denied any collusion in refusal or neglect to register an order of the court in the matter, as follows:

“3RD DEFENDANT'S AMENDED DEFENCE

2. *The 3rd defendant admits that the plaintiffs were at one time the registered owners of the suit property, until the Court order of 8.9.03.*

The 3rd defendant admits paragraphs 4 and 5 of the amended plaintiff and states further that he registered the defendants based on a Court order as stated in paragraph 2 above.

3. *The 3rd defendant admits paragraphs 4 and 5 of the amended plaintiff and states further that he registered the defendants based on a Court order as stated in paragraph 2 above.*
4. *The 3rd defendant denies knowledge of the averments contained in paragraph 6 of the amended plaintiff*
5. *On paragraph 6A of the amended plaintiff, the 3rd defendant states that she recalled the previous title through gazette notice No. 8532 dated 5th December 2003 and only issued a title on 5th January 2004 after the expiry of 30 days as provided for by law. The 3rd defendant states further that the alleged title of 22.10.03 has never been issued as it is not reflected in the green card of the sit property.*
6. *The 3rd defendant is a stranger to the averment, contained in paragraph 7 and 8 of the amended plaintiff and, adds further that no fraud has been alleged against the 3rd defendant.*
7. *The 3rd defendant denies that she has ever refused neglected and/or failed to register a court order or at all, and puts the plaintiffs to strict proof thereof.*
8. *The 3rd defendant denies that the plaintiffs have suffered any loss and puts them to strict proof thereof.*
9. *On paragraph 12 of the amended plaintiff, the 3rd defendant states that she has no knowledge as to whether the said proceedings were a nullity, and put the plaintiffs to strict proof thereof.”*

Joinder of Issue

10. The Plaintiffs filed a Reply to the Further Amended Written Statement of Defence of the 1st Defendant dated 29th October 2004 where they expressly joined issue on the Further Amended Defence and asserted that the 1st defendant was not the registered owner of the suit property and therefore had no right or power to deal with the same as alleged in the Further Amended Defence or at all. In terms of former Order VI rule 10 (1) of the Civil Procedure Rules, then applicable, [now Order 2 rule 12 of the Civil Procedure Rules, 2010] there was a joinder of issue on each of the other parties' Defences. The Plaintiffs are, accordingly, deemed to have denied the contents of the respective Defences of the Defendants.

HEARING

11. By an order of the Court (Maraga, J. as he then was) made an order that “*until this suit is heard and determined the second defendant is hereby prohibited from disposing of the property in any way.*” The full hearing of the suit then commenced before Ibrahim J. (as he then was) on 28 September 2010 with the second witness for the Plaintiff having testified on the 8th April 2011 when the said Judge last dealt with the matter. The matter came up for further hearing before this judge on 28th and 29th November 2011 when the second witness for the plaintiff was cross-examined and the Defence called the 1st defendant as a witness. On 22nd May 2012, the matter came up again for the hearing of testimony of the 2nd defendant and upon closure of the case for the 2nd defendant, the hearing was adjourned to allow then Counsel for 3rd Defendant, Mr. Kamau to call his witness, the Land Registrar, Mombasa for whom summons were prayed. The matter was subsequently adjourned severally leading to 18th February 2013 when, upon the temporary transfer of this judge to Kisii to deal with election petitions, the further hearing of the suit was adjourned to wait his return.

12. The matter then came up before me again on 9th July 2014 when it was adjourned to the 15th July 2014 to permit the 3rd defendant to call its witness. On the 15th July 2014, despite opportunity granted to the 3rd defendant to present evidence in the full trial of the case, no witnesses were called for the 3rd defendant, its Counsel Miss Namahya, informed the Court that –

“I have not been able to secure the attendance of the Land Registrar despite verbal and

written notices to the officer, Mr. Wanjohi the current Land Registrar. The previous Registrar Mary Kaai has left the Civil Service. I pray to close the 3rd Defendant's case."

The matter was then adjourned for parties to file submissions.

THE EVIDENCE

13.The summary of the evidence of the witnesses is as follows.

14.PW1, WINNIE MAGANGA, an Executive Assistant attached to the Chief Magistrate's Court, Mombasa, in charge of keeping records of the Court produced the court file on SRMCCC NO. 868 of 2003 *Omar Ali Omar v. Afiya Said Mohamed* and testified that –

"Date of last order was on 10th December 2003. There was a default Judgment. Ex Parte judgment dated 28th May 2003. It was set aside. Suit was dismissed."

15.PW2, FATUMA ALI OMAR, the 1st Plaintiff testified that she had bought the suit property from one Zarina but had it registered in the names of her brothers - the 1st defendant and the deceased Salim Ali Omar on account of their being male and taking the place of their deceased father. The property was then transferred from the 1st defendant and Salim to their mother, Afiya Said Mbarak. She then obtained the mother's written permission to put up a second flat on the second floor of the building which originally had two shops on the ground floor and one flat on the first floor. She used ksh.724,000/- to put up the second flat and she produced an agreement with the contractor and a receipt for the payment of ksh.600.000/- to Baisi & Bamusa Contractors on 20th October 1990. The mother later transferred 1/3 interest in the property to the witness remaining with 2/3 which she then sold to the 2nd Plaintiff and their younger brother Mohamedali Omar and a title was issued in their three names. Later on when Mohamedali got a job in Qatar, he sold his share to the 2nd Plaintiff by transfer dated 17th September 1999, whereupon a new title deed in the names of the Plaintiffs was issued.

16.Later some people came to view the house and said that it was on sale. Upon inquiries and search on the property by their counsel, it was discovered that their brother the 1st defendant had in a suit against their mother SRMCCC NO. 868 of 2003 obtained an ex parte judgment and court order directing the mother to transfer the suit property to him. The judgment had been later set aside and the suit dismissed. However, by fraud and collusion between the 1st and the 2nd Defendants and the Land Registrar, Mary Kaai, the suit property had been registered and title issued to 1st defendant on 22nd October 2003, and subsequently transferred to the 2nd defendant on 7th January 2004, despite their holding the original title and no request for surrender having been made to them. She maintained that the registration of the suit property into the name of the 1st defendant and the subsequent transfer to the 2nd defendant was hastily done with the agreement for sale, the Transfer and issuance of title being done on the same day the 7th January 2004, and involving numerous irregularities, among them, that the Transfer was not drawn by an Advocate, that they had not been required to surrender their title and there was no evidence of payment of stamp duty for the transaction. The property was also sold at an undervalue of Ksh.1,500,000/- pursuant to the fraud, while a valuation commissioned by her brother Mohamedali established the value at Ksh.5,000,00/-.

17.On cross-examination by Mr. Khatib, Counsel for the 1st Defendant, PW2 said:

"I bought the property in 1982. The land is situated near the land of my brothers. I got it registered in their names because they were my elder brothers. I am the one who paid the money first my husband gave the money to me. My husband is alive. He gave me the money but I did not get the land registered in my name or his name or in our children's names."

Later, I bought 1/3 share from my mother in 1994. My mother got registered as a proprietor from Omar and Salim in 1985. Zarine rented the property to Omar and Salim for Ksh.200,000/-. I refer to PEx. 2 Transfer from Omar and Salim to my mother. There was no consideration for the transfer. I bought 1/3 share in 1994 but my mother gave me permission to build on the property. I had to seek permission from my mother because she was the registered proprietor. When Omar and Salim transferred to my mother they consulted me. I paid Ksh.300,000/- for the 1/3 share to my mother. I have bought the property on two occasions. It is not true that I did not buy the land in the beginning from Zarina. If my mother said that she gave the property to Omar and Salim as a gift and I did not buy the property she lied (witness is shown affidavit of 22/9/03 in SRMCCC 868/03 Pex 1). The contents of the affidavit are untrue. It is true that I bought the property from my mother. I am not aware that Omar was ill at some point. I recall however that he had an accident after I had already bought the property. He was not ill between 1982 – 1985. I am the one who lived with my mother. Omar lived alone. The property in dispute was rented out in 1982-1985. Omar used to take rent for his use as he wished. He never gave me my portion. We evicted tenants. The property - The shops on the ground floor and one flat on the first floor. Omar used to take the rent. It was built on the same year in 1990. I built the second floor and I lived there. My mother used to take the rent. From 1982-1990, it was Omar who took the rent. No one put up a house after that. I put up the 2nd Floor. The 2nd Plaintiff bought 1/3 share from mother and 1/3 from my brother. I am certain that my mother was paid Ksh.600,000/- by the 2nd plaintiff. The property is now occupied by the 2nd plaintiff and we share rent on the shops at the ground floor. The first defendant did not buy the property from the original owner Zarina. Salim is my younger brother. It is not true that I was the two brothers' representative before because they were older than me. It is true that the 1st Defendant had 3 wives but he was never ill. He however transferred the land to my mother as a gift. My mother died on 28/11/2003. My brother gave the property to our mother. Omar however continued to receive rent until 1990. He received rent for 5-6 years. It is not true that I have lied to court. The house was bought in 1982. It was transferred in 1985. I was married in 1980. Omar received rent until the property was registered in my mother's name. It is not true that I have lied."

18.PW3, NADYA ALI OMAR, the 2nd plaintiff who said she was too young at the time and could not remember when the property was registered in her name, testified that the property had been transferred to her and Mohamedali after they bought it from their mother in 1997. In October 2003, she said, there was a title to the property issued in the name of the 1st defendant after which some people came seeking to buy the house whereupon they referred the matter to the their advocates. And later filed the present proceedings. She said she had lived on the property before she got married and she had collected rent from the shops since 1997 when the property was transferred to her. Upon cross-examination by the Counsel for the 1st Defendant she asserted that it was Fatuma the 1st Plaintiff and not Omar the 1st Defendant who bought the property, explaining that it was registered in the names of the brothers because in Islamic religion "our brothers are heirs. She said in further cross-examination:

"Fatuma was married. The husband has a greater right to be registered. The 1st defendant inherited our father's property at the hotel. Our father died in 1979. Omar was the personal representative of our deceased father and he did not distribute the estate. Omar had 3 wives. At first in 1982 the first defendant was married to only 1 wife. I was 11 years old. I do not know what led to the registration of the 1st defendant as the proprietor. Omar had an accident after the property was bought. It was in 1985. It is not true that he transferred the property after his accident when he was very ill.. In 1994, Fatuma bought 1/3 share. She asked my mother to build on the house. She was permitted to build the 2nd floor. She therefore became entitled to 1/3 of the property. She did not pay for the 1/3 share. She only built the 2nd floor of the property. Mohamed and I paid Ksh.300,000/- each for our share. I got transfer documents and I signed. I do not recall the advocate. I was registered proprietor of Mohamed's share in 1999 for a sum of

ksh.300,000/- . Our mother's statement in the Magistrate's Court that the property was transferred to her by the 1st defendant as a gift in PEx. No. 1 as affidavit of 22/10/2003 is partially true. I have not produced any documents to show that I paid for the property. My brother also paid for the property but I cannot produce any documents indicating the payment. I moved into the house in 1997 and I started taking rent. Before I do not recall when I started taking rent. The 1st defendant was receiving rent before we took over. The 1st defendant did not take rent from the suit property at all. ”

Like PW2, PW3 did not know the 2nd Defendant and they had sued him because he was the registered proprietor of the suit property in a transaction that they believed was fraudulent.

19.PW4, WYCLIFFE JORGESEN GIDA MUHOKO, a practicing Surveyor and member of Institute of Surveyors who had been instructed by Mohamed Ali Omar, parties' younger brother, testified that he had valued the property – a three storied structure with 2 shops on the ground floor and one flat on other floors each - at ksh.5,000,000/- comprising of ksh.1,000,000/- as the value of the land and the balance of Ksh.4,000,000/- for the building, and that he had searched the property and established that it was registered in the name of Saleh About Abdalla..

20.DW1, Omari Ali Omar, the 1st defendant, testified as follows:

“I am Omari Ali Omar. I reside at Stadium area of Mombasa. I used to operate a hotel. The plaintiffs are my sisters. My mother was Afiya Said Mbarak and my father Ali Omar. We are six children in the family in the order Omar, Fatuma, Salim, Monuira, Nadya, Mohamed. I have heard my sisters testify before the court. It is not true that I defrauded them. The property was mine. I worked in Saudi Arabia for one year, when I came in 1980 and started operating the hotel business. The hotel was on a rented premises. My father agreed on condition that I pay the debts of Kshs.45,000/=. I paid the debts of the hotel and I got the hotel. There is an agreement for that purpose. I bought the property in 1982 from one Zarina. I have a copy of a transfer DMFI. It is dated 1.7.1982. I bought the property for Kshs.200,000/=. I was working so this was my savings. I wish to rely on a statement of accounts from Barclays Bank for the period January 1981 – November 1982....

On 1.7.1982, I withdrew Kshs.50,000/=. On 3.7.1982 I withdrew Kshs.73,000/=. The balance I received on loan was Kshs.100,000/= from Al Ashuri. We then went to the advocates Anjarwalla to make the transfer. It is not true that Fatuma paid the purchase price. The person who granted me the loan Al Ashuri is alive. Fatuma is a witness to the loan from Al Ashuri. I married in 1973. I got the 2nd wife in 1984. I got unwell and I trusted our mother more than my wives and the children. I gave the property to our mother. I said I gave it to her as a trustee for my wives and children. The transfer is plaintiff exhibit No. 2 dated 16.9.1985. I transferred to my mother as a gift on natural love and affection. The plaintiff wanted to put up a house on the plot and our mother refused. I also refused. I have a plan showing the 1990 construction by the 1st plaintiff. [Plan is marked DMF 3]. I did not want co-ownership of my plot. I had after the transfer left the rental for my mother to maintain herself. My mother advised to leave the 1st plaintiff to proceed with the construction. The construction cost about 700,000/=. The plaintiff has taken rent from the property. In 1991 I placed a caveat on property. I have letter dated 7.2.1991 by the Land registrar Mombasa addressed to my mother conveying a restriction on the property [DMFI 4]. My mother informed the plaintiffs. I later filed a case at the chief Kadhi's Court. I learnt in 2000 that the plaintiffs had obtained title of the property. I did a search at the Lands office and confirmed the transfers. It showed that the 1st plaintiff had purported bought the 1/3 share at Kshs.300,000/=. Nadya for 1/3 share for 200,000/= and Mohamed for Kshs.200,000/=. The plaintiffs had tried to get elders to persuade me to give the shares to them. It is not true that Nadya had obtained a donation to buy her share as she did not get enough money from his work. In 2003, I came

to court to sue my mother over the property. She was served and she failed to attend. I got a judgment which I enforced by registration of the decree and had the property registered proprietor. I sued my mother because she is the one who I had given to hold on trust and not to sell to the plaintiffs. My mother stated in her affidavit that I had given her the property with full rights. I confirm that I gave my mother the property as a trustee during my ill-health. I am aware that the plaintiffs were requested to attend the Registrar. I refer to a letter dated 18.9.2003 from the Ministry of Lands and Settlement. Replied by District Land Registrar (DMFI 5). It was addressed to the 2 plaintiffs to attend the Registrar to surrender their titles within 21 days. They did not surrender the titles. The Registrar therefore cancelled their titles. There is no evidence that I committed any fraud. I came to court and after due process the court entered judgment in my favour. The plaintiffs are only telling untruth. The 1st plaintiff noted that she lives on the property while the 2nd plaintiff confirmed it is occupied by tenant. I pray that the plaintiffs' case be dismissed with costs to me. That is all."

21. On Cross-examination by Mr. Omwenga for Plaintiffs, DW1 said:

I reside at Tononoka. I have rented a house. I do not have a house in Mombasa I have endorsement on my passport to show that I was working in Saudi Arabia. DMFI – the transfer of 1982 was from Nairobi to myself and my mother whom I gave out of my volition. I later transferred to my mother on 16.9.1985. On the transfer of July 1982, it shows that the transfer was in consideration of Kshs.200,000/=. On the 1.7.1982 my bank statements indicates that I withdrew Kshs.50,000/= because I could not withdraw the full amount together. I married my second wife in 1984. I trusted my mother and I transferred the property on 16.9.1985 PExh. No. 2. The transfer did not say I had transferred as a trustee only that I had gifted it to her on love and affection. The transfer is signed by my brother Salim and myself. In 1990, the 1st plaintiff requested to put up the 2nd floor. Our mother consulted me and I declined. The letter of authority by my mother PExh. No. 3 may have been obtained by compassion as my mother. My mother did not consult me. My sister the first plaintiff paid Kshs.724,000/= to the contractors who put up the 2nd floor. Since 1982, it was my mother who received rent. Initially Fatuma lived on 1st floor. They lived with her husband. She did not pay rent. She later moved out and let out the property. I learnt of the transfer in 2000. I do not know the value of the property at that date. I filed the case in 2003 against my mother. In 2000, the property was registered in the names of Fatuma, Nadya, and Mohamed. The plaintiffs said that they obtained a title deed on 22.9.1999. Mohamed had sold his share to Nadya. The registered owners were in 2000 Fatuma and Nadya. I did not sue them. My mother was not the registered proprietor at the time. I obtained my court order on 8.9.2003 PExh. No. 9 at p. 30. The terms of the order was that my mother gives the property to me. I presented the order to the Registrar who gave me on 22.9.2003 PExh. No. 10. It was mistakenly given. I returned it and got another title deed. I do not recall the titles. The Registrar put a Kenya Gazette – PExh. no. 9 AT 33. Kenya Gazette of 5.12.2003 was rectified on 11.12.2003. I was asked to wait for 30 days to obtain a title. I got my title deed on 5.1.2004. On 7.1.2004, I sold to the 2nd defendant. The plaintiffs were indicated to have bought the property for Kshs.700,000/= although they indicated Kshs.600,000/=. I do not know what the value of the property. I did not hear the value or state the value of Kshs.5 million. I sold to the 2nd defendant at 1.5 million. It is the purchaser who paid the stamp duty. I am not aware of an order restraining the Registrar from giving a title to me. I am not aware that the case was eventually dismissed. I was not called to surrender any title. I have a rate agreement for the sale to the 2nd defendant. It is dated 7.1.2004. The transfer was also registered on the same date. It was registered by Mary Ekai who was the Registrar, Mombasa. The agreement was drawn by myself. It is witnessed by elders in the presence of an Advocate Ananada. I do not recall the amount I received from the sale. Sorry. I thought the question was in respect of payment to the advocate. I received Kshs.1.5. Million from the purchaser as I stated earlier. The purchaser has not taken possession. I have also not taken any rent on the house. I have not asked for rent of

the property. I have not sued the plaintiffs over the registration of the property.”

22.DW2, SWALEH ABOUD ABDALLA, the 2nd Defendant, who testified that he was a business man who lived at Kongowea, Mombasa and sold cereals, had purchased the suit property on 7th January 2004 for Ksh.1,500,000/- after selling on 22/11/2002 a house at Kongowea for Ksh.150,000/- to raise part of the purchase price, and gave the agreement for sale dated 7th January 2014 and a Transfer of the same date allegedly witnessed by Ananda Advocate, which was duly signed and registered by the Land registrar, the 3rd Defendant. He denied that he had tried to defraud the plaintiff stating that he did not know that there was a dispute between the vendor (the 1st Defendant) and his sister, and that he had conducted a Search on the property. He said that he learnt of the plaintiff's claim when he sought to recover rent on the premises, whereupon he unsuccessfully tried to recover the purchase price from the vendor. He said that he also tried to sell the property but plaintiff's then counsel by a letter of 30th June 2004 wrote to the purchaser and asked him not to buy the property.

23.Upon cross-examination by Mr. Omwenga, counsel for the Plaintiffs, DW2 said:

“I entered into the sale agreement on 7/1/2004. The agreement is not shown to have been drawn by an advocate. I do not have the search which I said I did on the parcel. I went to the house and saw the house. I did not get into the house. I have never gone into the house because of the Court order. The agreement does not show how I paid the money. I paid the money in cash. At paragraph 2 of the agreement the vendor accepts receipt but it does not show whether I paid in cash or by cheque. The transfer is dated 7/1/2004 same date of the agreement. The title deed is also dated 7/1/2004. Everything was done on the same date. The transfer shows I paid Ksh.1,500,000/- for the property. I do not have a receipt on the payment or the stamp duty for the transaction. I also do not have the receipt for the registration of the title. I do not have the application for registration of the transfer. I paid Ksh.3000/- The registration was done by Mr. Ananda Advocate. I do not recall how much I paid for stamp duty. It is not true that I did not pay the stamp duty. I do not have a receipt from Mr. Ananda Advocate for the payment of the stamp duty. I did not do a valuation before the purchase. I later did a valuation on the property but I do not have the report with me. It was valued by the government valuer at Ksh.1,500,000/-. The government valuer went to the house and assessed the building. I do not know when he went to value the property. I do not recall the date but I have the valuation at home. I got the title on 7/1/2004 - Exhibit 2DWex 4. Letters were done by my agents. The vendor did not write to the tenants asking them to pay rent to me or to my agents. The letters by my agents are dated May 2004. It shows I took 4 months before I sought rent. 2DWex5 letter from Timamy & Co Advocates, I have not sought to have the Court assist me to recover rent or the house or refund of purchase price. I came to court and obtained an order to remove the caretaker on the building but I do not have the documents. I have not sought any order in this suit but I believe the court will do justice. I have not written to Omar to refund the money but I have asked him orally to refund the money. It is not true that I did not pay for the property. On 7/1/2004 I did not withdraw the money from the Bank, I paid from my business receipts. Before this date I did not know there was a case before the court. I do not recall whether a witness claimed to have used 700,000/- in construction on the property. If there is any

error, I do not know who occasioned it. It is not true that I sought to defraud the property in collusion with the owner and the registrar. The valuer who testified gave a value of Ksh.5,000,000/-. The owner can sell the property at any price that he wills. It is not true that I knew there were disputes on the property.”

24.The Replying affidavit of Land Registrar Mary Kaai upon which Counsel for the 3rd

respondent sought to rely deposed to, principally, denying that she was informed of the subsequent order of the Magistrate's Court and maintaining that she had in execution of the order followed the provisions of the Register Land Act. At paragraph 8 thereof, the deponent states significantly that:

“That after realizing that the property MSA/BLOCK XLIV/7 had been transferred from Safiya Said Mbarak to the 1st and 2nd [plaintiffs] the 1st Defendant sued his mother in the Senior resident Magistrate's Court at Mombasa in Civil Suit NO. 868 of 2003 for repossession of the property. The ex parte judgment was delivered on 21st August 2003 and the Court ordered that the 1st defendant be given the possession of his property MSA/BLOCK XLIV/7 and consequently the 1st Plaintiff and 2nd Plaintiff who were registered owners by then, ordered to surrender the title to this office for cancellation and issuance of another title deed in the name of the 1st defendant who was then the plaintiff in the above mentioned case.”

As shown in the extract of the court order below, the court ordered the defendant in the magistrate's case, that is Safiya Said Mbarak and not the Plaintiffs herein, to surrender the title.

25. However, as this was the full hearing of the suit on the basis of *viva voce* evidence, the affidavit on which the deponent had been cross-examined could not lawfully be used without leave of court in terms of Order 19 Rule 1 of the Civil Procedure Rules, 2010 which provides as follows:

“19.1. Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:

Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

2.(1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.”

No leave was sought in terms of Order 19 rule 1 or 2 of the Civil Procedure Rules.

SUBMISSIONS

26. When matter came up for submissions on the 11th November 2014, Miss Namahya, Counsel for the 3rd Defendant informed the court that they did not wish to file submissions and only sought to rely on the affidavit of Mary Kaai of 7th March 2005. Counsel for other parties – Mr. Omwenga for the Plaintiff, Mr. Khatib for the 1st Defendant and Mr. Matheka for the 2nd defendant – had filed respective submissions and judgment was reserved.

ISSUES FOR DETERMINATION

27. The parties presented by express filing and through their submissions several issues for determination. In my view having considered these issues and the pleadings and evidence in the suit, there are four primary issues for determination in this suit, as follows:

- h. ***Whether the plaintiffs as registered proprietors were entitled to the rights of the absolute owner under then applicable Registered Land Act.***

- i. ***Whether the 1st Defendant fraudulently obtained the registration of the suit property in his name.***
- j. ***Whether the subsequent transfer of the suit property to the 2nd Defendant was tainted with fraud and therefore null and void.***
- k. ***Whether the order for rectification of the register to reinstate the plaintiffs as the registered proprietor and the ancillary reliefs sought in the Amended Complaint will be granted.***

28. The issue as to who owned the suit property before the registration in the name of the 1st Defendant did not arise as there were no declarations sought by the plaintiffs in that regard and the defendants did not raise any counterclaim therefor. The court proceeds from the position, which is admitted by the 1st defendant, that the plaintiffs were the registered proprietors of the suit property. The 1st Defendant did not counter-claim, as he could have, for a declaration, and any consequent relief, that he was the owner of the suit property which was, according to him transferred by his mother to his sibling plaintiffs.

DETERMINATION

The Law

The rights of a registered proprietor

29. The rights of a registered proprietor under section 143 (2) the Registered Lands Act, just like under section 23 (1) of the Registration of Titles Act (both Acts repealed by the Land Registration Act, 2012) are indefeasible save for fraud or misrepresentation that the registered proprietor is shown to be party. The 2012 Act consolidates the provisions of section 143 and 23 of the former Act in one section 26 of the new Act. Section 26 (1) of the Land Registration Act 2012 which provides as follows:

“26. Certificate of title to be held as conclusive evidence of proprietorship

(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.”

30. As I noted in Mombasa HC JR No. 36 of 2012, ***Republic v. The Land Registrar, Taita Taveta District And Anor.*** “the Court must therefore uphold the Rule of Law with regard to the applicant’s rights, as a registered proprietor, under sections 27 and 28 of the Registered Land Act as then applicable to the suit property (now section 25 of the Land Registration Act, 2012), until fraud shall have been established...” See ***Dr. Joseph arap Ngók v. Moiwo Ole Keiuwa and 4 Ors.*** (2014) eKLR with regard to the indefeasibility of an RTA title.

PROOF OF FRAUD

Burden of Proof

31. The burden of proof in any particular case is determined by the relevant provisions of the

Evidence Act. Under section 107 and 108 of the Evidence Act, the burden of proof with regard to the fraud is on the plaintiffs as the persons who have sued the defendants alleging fraud and who would lose if no evidence was taken in the case. Sections 107 and 108 are in terms as follows:

107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

32. However, section 109 of the Evidence Act also imposes a burden of proof on any party who makes an allegation of fact, as follows:

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

33. In addition, in matters which are within the peculiar knowledge of a party in civil proceedings, the burden of proof lies with that person to prove the fact within his special knowledge. Section 112 of the Evidence Act provides as follows:

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

Standard of proof

34. Fraud is required to be proved to a standard of proof higher than the preponderance of evidence or balance of probabilities in civil cases. What does this mean? As I observed in Kisii HC Civil Appeal No. 129 of 2010, ***Securicor Security Services v. Janet Achieng***, with regard to fraud cases:

*“While discussing an issue of standard of proof in cases of fraud in the modern locus classicus on the matter, the House of Lords decision in **H (Minors), Re (1996) A.C 563**, Lord Nicholls admirably illuminates the operations of the test of balance of probabilities as follows:*

*“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind the factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. **Fraud is usually less likely than negligence.** Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his underage stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.*

Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken

into account when weighting the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be evidence that it did occur before, on the balance of probability, its occurrence will be established.

[Emphasis added]

35. See also **James Muthuri Mungania v. Margaret Karema** (2014) eKLR citing the statement of Law, JA. **Gudka v. Dodhia** Civil Appeal No. 21 of 1980 that “*allegations of fraud must strictly be proved more than on a mere balance of probabilities.*”

36. Accordingly, in cases of fraud more cogent evidence is required to find an act fraudulent. The question in this case, therefore, is whether the actions of the 1st defendant, the Land Registrar and the 2nd Defendant in the transactions culminating in the registration of the 2nd Defendant as the registered proprietor of the suit property were *bona fide* or such as to lead the court to find that the existence of fraud is more likely than not.

OBEDIENCE OF ORDERS OF COURT

37. The Land Registrar was bound to give effect to the order; it was not open to her to say that the order was not registrable. If the order was defective in form or substance, the Land registrar ought to have sought its review and in the meantime obey it. Orders of the Court must be obeyed until they are discharged. As Romer, L.J. in **Hadkinson v. Hadkinson**, [1952] 2 All E.R. 567 at 569 said:

*'It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. LORD COTTENHAM, L.C., said in **Chuck v. Cremer** (1846) 1 Coop temp Cott 338 at 342, 47 ER 884 at 885): “A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid - whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be disobeyed.” Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court is in contempt and may be punished by committal or attachment or otherwise.'*

38. Moreover, as observed by Ojwang’ Ag. J. (as he then was) in **B v Attorney General** [2004] 1 KLR 431, at 452, “*the Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people....*”

AVAILABLE RELIEFS

39. The reliefs that the court may grant in this case are only those that the parties have sought in their pleadings. In discussing the principle with regard to Order 53 applications, the Court of Appeal in **Emfil Limited v. The Registrar of Titles Mombasa**, Mombasa Civil Appeal No. 312 of 2012 [2014] eKLR said:

“*While we appreciate Article 159 of the Constitution and the need to apply*

*substantive justice, that Article provides no justification for a court to ignore a specific procedure provided by law and **deliberately chosen by a litigant, nor does it allow a court to bend backwards to accommodate persons who have deliberately failed to protect or assert their interest.** Thus the Court was bound to apply the specific provisions of Order 53 of the Civil Procedure Rules. Rule 4 of the Order provides that the relief granted in judicial review proceedings can only be the relief sought in the statutory statement filed under Rule 2 of the same Order, and **in this case neither was compulsory acquisition nor compensation for compulsory acquisition was a relief sought by the applicant.**”*

FINDINGS OF LAW AND FACT

40.It would appear that the 1st plaintiff did not buy the suit parcel of land from its original owner Zarina as no documents of sale were produced. Indeed, it is the 1st Defendant who produced a transfer to him and his brother Salim and evidence of bank withdrawals towards the alleged payment of purchase price. The Plaintiffs also did not show any documents for the payment of their shares from the mother and, in respect of the 2nd Plaintiff of her second 1/3 from the brother Mohamedali.

41.However, the question whether it was the plaintiffs who bought the suit property from its original owner or from the mother or whether it was the 1st defendant who bought the suit property was not presented for determination as it was not pleaded and no relief in that regard was claimed the 1st defendant having failed to raise a Counter-claim. The Plaintiffs case in the Amended Plaint was that as registered proprietors their interest in the suit property had been defeated by the fraudulent registration into the name of the 1st Defendant and the subsequent transfer to the 2nd defendant. The defendant's defence to the suit was merely that he did not defraud the plaintiffs as the registration in his name was made regularly by the Land registrar upon following the necessary procedures after obtaining a court order for the transfer by his mother to him. That question may, as I say below, become the subject of proceedings in that behalf, and so this Court will not make any concluded findings in that regard.

42.The Court will commence its determination from the point where as agreed by the main contestants, the mother Afiya Said Mbarak was registered proprietor of the suit property upon transfer from the 1st defendant and the deceased brother Salim, whether as a gift as the mother claimed in the affidavit in the Magistrate's Court case or upon trust for the 1st defendant's wives and children due to his ill health as claimed by the 1st defendant.

43.There was no evidence of any trust document and the land register did not show that the transfer was made subject to a trust. The 1st defendant did not produce any documentary evidence of his ill-health that prompted him to transfer the property to the mother. In the circumstances, the court must accept the 1st defendant transferred the suit property to the mother as a gift in consideration of 'natural love and affection' as stated in the Transfer of 16th September 1985. If the transfer was upon trust for the 1st defendant's wives and children, what was to become of the interest of his co-owner brother Salim Omar Garwan who also signed the transfer?

44.It would appear that the 1st defendant was not happy with the mother's decision to allow the 1st plaintiff to put up a flat on the property and he placed a caveat on the property. Later the mother transferred the suit property to the plaintiffs and the brother Mohamed, either for valuable consideration as contended by the plaintiffs or without pay as contended by the 1st Defendant. The Plaintiffs did not adduce any documentary evidence of the alleged payments for the purchase of their shares, save for the 1st Plaintiff's expenditure of 724,000/- for the construction of the second floor on the suit property which the 1st defendant admitted in his testimony that the 1st plaintiff's construction costs at about 700,000/-.

45. The 1st defendant admitted in evidence that he learnt of the registration of the plaintiffs as registered proprietors in 2000 and upon searches at the Lands Office confirmed the transfers showing that the 1st Plaintiff had purportedly bought the 1/3 share at Ksh.300,000/-, Nadya for 200,000/- and Mohamed for Ksh. 200,000/-, whereupon he sued his mother as he had given her to hold as trustee due to his ill health and not to sell to the plaintiffs.

46. As stated above in the absence of a specific pleading and claim for relief by way of a counter-claim, the court is not entitled to investigate and make any findings as to the purchase or otherwise of the plaintiffs' shares in the suit property. As framed the Plaintiff's suit pleads a cause of action as registered proprietors and the 1st defendant [and other defendants] has responded only by denial of the fraud alleged by the plaintiffs, without alleging in the pleadings any fraudulent registration of the plaintiffs and seeking relief therefor, giving the suit its narrow parameters.

47. Accordingly, the court proceeds from the position that the plaintiffs are the registered proprietor of the suit property as shown in their Title deed dated 22nd September 1999 (entries nos. 13 and 14 on the land register), prior to the registration of the 1st defendant in purported execution of orders of the magistrate's court in SRMCCC No. 868 of 2003.

48. The Senior Resident Magistrate's Court in SRMCC NO. 868 of 2003 by its judgment of 21st August 2003 gave judgment to the 1st defendant as follows:

JUDGMENT

There is an interlocutory judgment in this suit. This was entered on 21.3.03.

The Plaintiff is dated 6th March 2003. The prayers sought are housed in paragraph 8 of the plaint. The plaintiff told the court that he had given his house the subject matter to his mother (Def) to hold in trust for his children. However, he found that she had sold the house to his siblings. He now wants to get back his house. He produced several documents as exhibits.

The evidence of the plaintiff is uncontroverted. From the documents the plaintiff used to co-own the land with another allottee on equal shares.

On a balance of probability, the plaintiff has proved his case. I enter judgment in the reasons of paragraph 8 (a) and (b) of the plaintiff with costs. Orders accordingly.

Read, dated and signed this 21st day of August 2003 in the open court at Mombasa.

K. MUNEENI

RM

49. The formal decree extracted on the 8th September 2003 ordered as follows:

ORDERS

- a. *The defendant shall give up possession and forego all her claims on the house on Plot No. MOMBASA/BLOCK XLIV/7.*
- b. *The defendant shall therefore, surrender the title of the aforesaid plot to the Lands office Mombasa for cancellation.*
- c. *The Registrar of Titles Mombasa shall issue another title in the name of the plaintiff on payment of the necessary fees, if any.*

d. ***The defendant or her agents shall be evicted from the suit premise to allow the plaintiff to take re-possession of the house on Plot No. MOMBASA BLOCK XLIV/7.***

50. It is clear from the order of stay of execution dated 22nd October 2003 in the said magistrate's Court case in terms that 'there be a stay of execution of the orders made on the 20th August 2003 pending hearing and determination of the Chamber Summons application dated 21st October on the 3rd of November 2003' was received by the 3rd defendant Land Registrar and endorsed on 23rd October 2003. The endorsement on the application for registration thereof shown with the minute **"Rejected: the said order is not registrable"** and signed on 24/2/2004 does not explain failure to act on the order which was received on the 23rd October 2003. It was a contempt of court to proceed with the execution of the court order of 20th August 2003 when the land registrar had been served with the stay order of 23rd October 2003, which had not been discharged by a subsequent order.

51. Indeed, by its subsequent order of 10th December 2003 upon hearing inter partes on the 17th November 2003, the court set aside the ex parte judgment of 20th August 2003 and dismissed the suit as incompetent.

52. The suit was incompetent ab initio having been brought against the mother Afiya Said Mbarak without joining the plaintiffs who were the registered proprietors when it was conceded that the mother had transferred the suit property to the plaintiffs.

53. From the documents produced by the parties before the court, the chronology of events leading to the registration of the suit property in the name of the 2nd Defendant were as follows:

- a. Decree of 20th August 2003, issued on 8th September 2003 in SRMCCC No. 868 of 2003;
- b. Entry No. 16 on the Land register - Order of the Court issued on 8th September 2003 registered against the Title on 10th September 2003.
- c. Letter dated 18th September 2003 by 3rd Defendant to the plaintiffs giving them 21 days to surrender the title.
- d. On 23rd October 2003, the Order of 22nd October 2003 staying execution of the Decree in (a) above is shown to have been received by the 3rd defendant.
- e. Gazette No. 8532 of 5th December 2003, citing failure of efforts to secure surrender of the title registered in the names of Plaintiffs giving 30 days Notice of intention to dispense with the production of the title in the absence of valid objection.
- f. Entry No. 17 on the Land register – Land Title Issued to the 1st defendant vide Gazette No 8532 of 5th December 2003.
- g. Transfer to Saleh Aboud Abdalla on 7th January 2003 for Ksh.1,500,000/-
- h. Registration of Transfer to Saleh Aboud Abdallah on 7th January 2003 and issuance of title on the same date.

54. The transfer to the 2nd defendant which is produced as part of the 3rd defendant's list of documents dated 21st April 2009, while containing a minute for assessment of stamp duty for 3000 pounds has no stamps on it indicating payment of the stamp duty and when asked to produce receipts in court the DW2, the 2nd Defendant was unable to do so. The DW1Ex 2 being the transfer of 7th January 2004 is clearly a different document and the court is unable to find, in the absence of payment receipt therefor, that the stamp duty for the transaction was paid.

55. These events below are evidence of the fraudulent nature of the transaction towards the registration of the 1st defendant as the proprietor of the suit property, and subsequent transfer to the 2nd defendant:

1. Disobedience of court of 22nd October 2003 staying the execution of the decree for the registration

of the suit property in the name of the 1st defendant.

10. The order was for the defendant mother Safiya Said Mbarak to surrender the title to the Land registrar. The land registrar from the records in the register knew the title was in the names of the plaintiffs. The Land registrar on discovering the inconsistency between the terms of the order for registration of the 1st defendant, in that the order required the defendant Safiya Said Mbarak to surrender the title whilst the title was then registered in the names of others persons should have required the 1st defendant applicant to get a clarification or rectification from the court before proceeding to issue any directions for the surrender of the title to the plaintiffs and subsequently gazetting the notice of intention to issue a new title.
11. The fact that no stamp duty was shown to have been paid for the transaction for the transfer of the 7th January 2004 to the 2nd defendant for which the 2nd defendant as the person with its special knowledge had a burden of proof under section 112 of the Evidence Act.
12. I do not find that the suit property was sold at such an under value at Ksh. 1,500,000/- for ksh. 5,000,000/- as to be evidence of fraud. Freedom of contract and parties circumstances may dictate a concessionary price, and the price herein was not so low as to indicate fraudulent disposal. But the fact that the 2nd defendant could not demonstrate how he paid the money for the purchase of the suit property supports the finding on fraudulent dealing.

56. The court has no hesitation in the light of the above facts in finding that the serious allegation of fraud against the defendants has been proved to a consideration much higher than the ordinary preponderance of evidence under the balance of probabilities. The 2nd defendant has no claim to bona fide purchaser for value without notice in view of his failure to show payment of stamp duty for the transfer transaction, payment and mode of payment of the purchase price, both which are matters within his special knowledge for purposes of the section 112 burden of proof, and the hasty manner of his alleged purchase in having the agreement for sale, the transfer and the registration and issuance of his title on the same day, the 7th January 2004 only a day after the registration of the suit property in the name of his vendor the 1st Defendant. There was also evidence that he did not visit the suit property prior to his purchase to which he only answered that he had gone to see the property but there were tenant in occupation, which is more the reason he should have sought to know the basis of their possession of the suit property. In addition he accepted that he had not sought to collect any rent from the occupants of the suit property. What kind of a registered owner of property does that?

57. Moreover, the principle of *nemo dat quod non habet*, that a person cannot pass a better title than he himself has applies to deny the 2nd Defendant a good title. The 1st defendant did not obtain a good title to the suit property in a registration process tainted with irregularity and fraud, and so also the 2nd defendant could not receive a good title to the property.

58. I venture to think that the 1st defendant may, if so advised by counsel, and subject to limitation of actions, file suit against the personal representative(s) of the deceased mother and the plaintiffs as the registered proprietors for the recovery of the suit property, which he claims the mother unlawfully granted to the plaintiffs.

59. The plaintiffs' claim for damages was not established and no evidence was led as to the loss that they have suffered by the actions of the defendants. They are in possession of the suit property and an inquiry as to damages may have been relevant if they had been deprived the enjoyment of the property during the pendency of the suit or if the court decreed the property to the defendants.

CONCLUSION

60. The Court makes a finding that as registered proprietors the plaintiffs had an absolute indefeasible title to the property which could only be challenged on the grounds of fraud and misrepresentation to which they were shown to be party in terms of section 143 (2) of the

Registered Land Act [now section 26 of the Land Registration Act, 2012]. As the 1st defendant did not plead fraud against the plaintiffs' and or counter-claim for any relief in that regard, the court does not make a finding whether the plaintiffs validly purchased their interest in the suit property. However, the court finds that the process for the registration of the suit property into the name of the 1st Defendant and subsequent transfer to the 2nd Defendant were tainted by fraud and the 1st defendant therefore did not obtain a good title to the suit property which he could pass to the 2nd defendant by the purported transfer. Accordingly, the plaintiffs are entitled as registered proprietors to the enjoyment of their proprietary rights over the suit property and in protection of such rights are entitled to the reliefs for the restoration of their names as the proprietors of the suit property and for injunction to restrain any interference with enjoyment of such rights.

ORDERS

61. Accordingly, for the reasons set out above, the court enters judgment for the Plaintiffs against the Defendants as prayed in the Amended Plaint dated 15th October 2004, save the prayer of damages, which was not established, with costs to be paid by the Defendants to the Plaintiffs.

DATED AND DELIVERED THIS 27TH DAY OF APRIL, 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

No appearance for the Plaintiffs

Mr. Mohamed for the 1st Defendant

Mr. Tolo for Musinga & Co. for the 2nd Defendant

No appearance for the 3rd Defendant

Ms. Linda Court Assistant.