



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
ELC CASE NO 567 OF 2008

DARELLE LIMITED PLAINTIFF.....PLAINTIFF

VERSUS

ASL LIMITED.....1ST DEFENDANT

JOHNSTONE KIPLIMO CHEMOS.....2ND DEFENDANT

Consolidated with

ELC 24 OF 2008

ASL LIMITEDPLAINTIFF

VERSUS

JOHNSTONE KIPLIMO CHEMOS.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

JUDGEMENT

There are two suits herein which were consolidated vide the Court Order dated *13th November 2009*. The first claim is *ELC No. 24 of 2008*, by *ASL Ltd* who filed a suit against *Johnstone Kiplimo Chemos* and *Attorney General* and sought for the following orders:-

i. A declaration that the Plaintiff (ASL Ltd) is the lawful owner of all that property known as land Reference No. 209/11151, Upper Hill Nairobi.

ii. An injunction to restrain the 1st Defendant by himself, his servants or agents from entering or remaining upon, disposing, alienating, encumbering, charging, interfering, transferring and or in any other way whatsoever dealing with all that property known as Land Reference No. 209/11151, Upper Hill Nairobi.

iii. Mesne profits

iv. Damages for trespass

v. Costs of the suit on full indemnity basis.

vi. Any other and further relief as the court may seem just and expedient to grant.

Simultaneously , to the filing of the suit , the Plaintiff (***ASL Ltd***) filed a Chamber Summon application seeking for injunctive Orders against the 1st Defendant (***Chemos***) seeking to restrain him from disposing off, alienating ,charging, transferring and/or in any other manner dealing with the suit property, ***LR 209/11151*** . Subsequently, on ***8th May 2008***, the Court issued an Injunctive Order which was entered by Consent of Advocates for both Plaintiff(***ASL Ltd***) and Defendant (***Chemos***) restraining the 1st Defendant from disposing off, alienating, charging, transferring and or in any manner dealing with the suit land ***LR 209/11151***, pending the hearing and determination of this suit. Therefore this injunction Order is still in force as the matter is now being determined.

The second claim is ***ELC No. 567 of 2008*** which was filed on ***9th November 2008*** by ***Darelle Ltd*** against ***ASL Ltd*** and ***Johnstone Kiplimo Chemos*** and it sought for the following Orders:-

a. A declaration that the Plaintiff (Darelle Ltd) is the lawful owner of all that property known as LR No. 209/11151 as the bona fide purchaser for value without Notice.

b. A permanent injunction restraining the 1st Defendant (ASL Ltd) its servants, and or agents from entering , disposing of, alienating , encumbering or in any way whatsoever from dealing with all that property known as LR No. 209/11151.

c. In the alternative, the Court do make an order that the 2nd Defendant makes an immediate refund to the plaintiff, the sum of Kshs 60,000,000/= being the purchase price of LR No. 209/11151.

d. General damages

e. Costs of the suit

f. Interests on (c) (d) & (e) above.

On ***25th April 2012***, ***Darelle Ltd*** filed a cross claim against the Attorney General (Registrar of Titles). This was on the basis that prior to entering the sale agreement dated ***13th June 2008***, between itself and ***Johnston Kiplimo Chemos*** , in respect to the purchase of the suit property , its advocate had conducted a search at the Land's Office which confirmed that ***Johnstone Kiplimo Chemos*** was the registered proprietor of the suit land and there were no encumbrances on the title of the suit land and reliance was placed on the said search. ***Darelle Ltd*** therefore prayed that in event that the claims by ***ASL Ltd*** is upheld; then;

a. Judgement be entered in its favour against the Registrar of titles in the sum of Kshs62,000,000/= together with interest thereon at Courts rate from the date of filing this suit to payment in full.

b. That the Registrar of Titles do indemnify Darelle Ltd against any order of costs that might be made against it in these proceedings.

c. That costs of and occasioned by this cross claim be borne by the Registrar of titles .

d. Such other and /or further relief as this court may deem fit and proper to grant.

The two claimants herein ***ASL Ltd and Darelle Ltd*** have each a title over the parcel of land known as ***LR No.209/11151*** situated in the Upper Hill area of Nairobi (suit property) Therefore, each of the claimant is claiming to be the rightful proprietor of the suit property premised on the fact that each hold a Certificate of title over the suit property and since the two certificates were issued by the Lands office.

Given that the issue herein is over the same suit property, the two matters were consolidated by the Court on **13th January 2009**. Thereafter, the suit commenced for hearing on **23rd April 2012** before **Kimondo J.** The Counsels on record agreed to proceed in the following manner:-

- i. **ASL LTD****Plaintiff**
- ii. **Darelle Ltd****1st Defendant**
- iii. **Attorney General****2nd Defendant**
- iv. **Johnstone Kiplimo Chemos****3rd Defendant**

In that respect therefore, the Plaintiff, ASL Ltd called four witnesses to support its case.

PW1 George Gichimu Gachihi Registrar of Titles in the Ministry of lands adopted his statement dated **17th February, 2012** as his evidence. He testified that he has worked in the **Ministry of Lands** since **1993** and at the time material to this case, he was in charge of Central Registry in Nairobi. In his testimony he laid out the process that is followed in the issuance of title over land. He stated that the process is commenced with an application for allocation of a parcel of land. The application is to the Commissioner of Lands who upon receipt of the application, inquires on the status of the land. He particularly inquires whether the land is available for allocation. If available, the Commissioner directs Lands administrative officer to issue a letter of allotment by way of an **offer**. That the letter of allotment describes the parcel of land, the stand premium, the rent payable and the survey fees to be paid. Then a survey is carried out by a licensed surveyor and a Deed Plan is drawn and registered by the Director of Survey. Thereafter the Director of Survey forwards the Deed Plan to the Commissioner of Lands. A Grant is thereafter prepared and conditions typed thereon. The Deed Plan is stitched to the Grant and the Commissioner executes the Grant by order of the President. Further that the above process is handled by the Commissioner using a **Correspondence File**. The Commissioner forwards the Grant to the Principal Registrar of Titles, who directs the same to be registered and a file called **Deed File** is opened. After the issuance of the Grant, all transactions are done on the **Deed File**, which is kept in the strong room. Further that any subsequent registration of transaction is done on the copy of the Grant in the **Deed File** and on the Original Grant. Therefore the current status of the Grant can only be ascertained from the **Deed File**.

It was his evidence that a perusal of allotment letter attached to the Grant by **Darelle Ltd** did not contain the 30 days period within which to pay the stand premium and that was unusual. He further testified that upon perusal of **ASL Ltd** Certificate of title, **IR No. 47029 over LR No. 209/11151**, he noted the signatures therein by **Mrs Okungu, Mrs Gicheha** and **Mr Lubulelah** were genuine signatures as he was familiar with them. He further confirmed that he signed the Postal Search executed on **4th April 2008**. It was his further testimony that upon perusal of **Darelle Ltd's Certificate of Title**, he noted that the Grant was initially issued to **Benjamin Kiprop sawe Kositany** but the signature of the Commissioner of Lands, **Wilson Gachanja** was different from his usual signature. He also testified that he was familiar with **Gachanja's signature**. Further that the signature of **Mrs. Okungu**, as the Principal Registrar of Titles was also different from her usual signatures and he was also familiar with **Mrs Okungu's** signature.

He also denied ever signing the Deed of Variation dated **27th June 2008**. He therefore testified that the signature appended to that document was not his signature. Further that such special condition could only be varied by the Commissioner of Lands .

He further testified that such a variation is usually carried out by way of preparation of an endorsement document varying the conditions and not by registering an entry on the title. It was his further testimony that he did not sign a transfer to **Darelle Ltd**, for a consideration of **Kshs.60, 000,000/=** which was registered on **11th July 2008** and purportedly signed by him. He therefore denied that the signature in the said document was his. PW1 also stated that **ASL Ltd** carried a postal search and he confirmed signing the said Postal Search. He also stated that Lands registry does not issue letters to individuals to confirm ownership of property as is the case with letter dated **30th November, 2007**, filed by **Darelle Ltd**. He finally stated that the Chief Land Registrar's Ruling confirmed that ASL Ltd is the lawful proprietor of the suit property and he also confirmed that indeed **ASL Ltd**, was the current owner of the suit property.

PW2: Joseph Wang'ombe Kamuyu also a Registrar of Titles told the Court that he joined the Ministry in the year **2006**. He also identified his Witness Statement dated **17th February 2012** and adopted it as part of his evidence. In his Statement, he laid out his duties as including registration of various documents such as **Transfers, Charges, Leases, Issuance of Official Search and any other Official Duty**. He further stated that he looked at the signature on the searches page 13 of Darelle Ltd's bundle of documents filed on **27th January 2010**, and he disputed that the same was his signature. He denied ever signing that document and further stated that neither the signature nor the stamp impression therein was his. It was therefore his testimony that he did not issue or sign the said search as alleged, and that the said search was a forgery.

PW3: Kertik Shirishbhai Patel, told the Court that he is the Financial Controller for **ASL Ltd**. He also adopted his witness statement dated 9th February 2013 as part of his evidence. He testified that the property in issue is **LR No.209/11151**, which they purchased from Post Bank Credit in the year 2005. He further testified that **ASL Ltd** paid **Kshs.23,000,000/=** as purchase price and after the conveyance process, they were issued with a title for the suit property and they continued to pay land rates and rent. Thereafter **ASL Ltd** sought for change of user of the suit property which approval was granted on **10th July 2007**. They also got permission to fence the suit property with a chain link.

Thereafter towards the end of **July 2007**, ASL Ltd learnt that the suit plot was being shown to one of their customer so that he could buy it. The person offering the plot for sale was one **Johnstone Kiplimo Chemos**, the 3rd Defendant. **Mr Chemos** purported to hold a title document to the suit property. It was his testimony that **ASL Ltd** lodged a complaint through a letter dated **30th July 2007**, to the Chief Land Registrar. Upon receipt of the complaint, that the Chief Land Registrar summoned all the parties interested in the suit to appear before her on **13th September 2007** while carrying their documents of ownership. The Chief Land Registrar conducted a hearing on **15th and 23rd October 2007** in the presence of the parties, Mr Chemos, ASL representatives, **Caleb** and **Dorothy Kositany** who were all laying claim to the suit property. Thereafter the Chief Land Registrar delivered a Ruling on **23rd October 2007** and confirmed that only the title held by ASL was genuine.

It was his further testimony that despite the Ruling, ASL Ltd discovered that **Mr Chemos** had applied to the City Council of Nairobi for change of user in respect of the suit property. In response, ASL Ltd published an advert in the **Daily Nation Newspaper**, warning the public not to deal with the suit property. In response thereto, **Mr Chemos** published an advert too in the Daily Newspaper and stated that he was the registered proprietor of the suit property and not ASL Ltd.

Further on **31st October 2007**, ASL Ltd received an inquiry from an interested purchaser's advocates **M/s Kamotho, Maiyo & Mbatia Advocates** as to the true proprietor of the suit property. In response, ASL Ltd forwarded all the documents showing that ASL Ltd was the registered proprietor of the suit property. PW3 further stated that due to the activities by **Mr Chemos**, ASL Ltd filed **ELC No.24 of 2008** and also sought for an injunction to restrain the said **Mr Chemos** from disposing or interfering with the suit property pending the hearing and determination of the suit. The Interim Order of Injunction that was issued on **1st February 2008**, was confirmed on **8th May, 2008** and **Mr Chemos** was restrained from **disposing, alienating, transferring or in any other manner dealing with the suit property** pending the hearing and determination of the suit.

However, by a letter dated **15th September 2008**, **Darelle Ltd** through its Advocates **M/s Mohammed Muigai Advocates**, wrote to **ASL Ltd** and averred that **Darelle Ltd** was the registered proprietor of the suit property and demanded that **ASL Ltd**, surrenders the certificate of Title in its possession and thereafter vacate the suit property. It was therefore clear that the transfer and registration to **Darelle Ltd**, was done during the pendency of the Injunction Orders confirmed on **8th May 2008**. It was his testimony that subsequently **Darelle Ltd**, filed proceedings in **ELC No. 567 of 2008**, in which they sued **ASL Ltd** and **Johnston Kiplimo Chemos** as Defendants and sought for a declaration that it was the lawful owner of the suit property. He also stated that even though the Registrar of Titles had found that **Mr Chemos'** certificate of title was a forgery, he still went ahead and purported to transfer the suit property to **Darelle**

Ltd and therefore that transfer was of no consequence. PW3 therefore urged the Court to declare that ASL Ltd is the lawful owner of the suit property. He also asked the Court to cancel the Certificate of Title issued to **Mr Chemos** and the subsequent transfer to Darelle Ltd plus costs of the suit.

PW4 NO.230925 Chief Inspector Jacob Odour attached to **Forensic Document Examination Centre** and Deputy Head of that sector told the Court that he examined documents relating to this matter and he prepared a report . That he examined the statement **of Joseph Kamuyu, George Gachihi and Aryn Mousa**. He stated that after examination he found that the disputed signatures were written in different styles. He prepared the report and produced the same as exhibit in Court.

On behalf of 1st Defendant two witnesses were called to support its case .

DW1 Aryn Mousa stated that he is a partner in the Law Firm of **Anjarwalla & Khanna Advocates**. He further testified that he specializes in Corporate Commercial Law. He also relied on his witness statement fully. It was his further evidence that his client **Imaran Ltd** wanted to buy property from one **Kiplimo Chemos** . DW1 met the seller, **Chemos** and his lawyer **Paury Rawal** . He was provided with several documents to confirm that **Chemos** was the proprietor of the suit land. He was also provided with the documents for root title analysis showing that one **Benjamin Kositany** was the first to be issued with the Certificate of Title. He informed the Court that he was provided with the copy of the title documents, the search conducted by **Chemos** , ID Card for **Chemos** and a letter of allotment . He further stated that the documents had various stamps and signatures. It was his testimony that he also conducted his own search. From his search, the property was owned by **Johnstone Chemos** and it was consistent with the search provided to him by **Chemos**. That having received the documents from **Chemos** and the search, they prepared a draft sale agreement and sent it to **Mr Chemos** lawyer **Paury Rawal** . The parties then proceeded to sign the sale agreement and a cheque of **Kshs.6,000,000/=** was drawn being 10% deposit of the purchase price. They did the title investigations and also engaged a surveyor to do due diligence and provided them with a copy of the report. Then **Paury Rawal Advocate** provided them with all the documents and the transactions were completed. They also prepared documents that caused variation to the title document. He produced the Deed of Variation as exhibit in Court. They received the completion documents and they proceeded to issue a bank guarantee of the balance of the purchase price. After the registration, a further search on the property was conducted and the purchaser (**Darelle Ltd**) was reflected as the registered owner. He produced the application for search as exhibit in Court. Finally, the full purchase price was paid and the transaction was concluded.

DW2 : Antipus Nyanjwa told the Court that he is an instructor as Forensic Science at **CID Training School, Nairobi**. He told the Court that prior to that, he was a Document Examiner. It was his evidence that on **22nd November, 2012**, he was served with a court order dated **8th November, 2012** directing him to collect some Specimen Signatures from various officials of the Ministry of Lands. He was ordered to examine and compare their disputed signatures on a Deed of variation dated **27th June 2008** and transfer dated **4th July 2008**. He complied with the Court Order and filed a report. He produced the report as exhibit in Court. In his report, he found that the signatures that were in dispute were heavily disguised and they lacked consistency for general resemblances. He further testified that when he looked at other individual characteristics in the said signatures like characters, *formation, pen pressure, speed, characters spacing, baseline alignment, T-buzz and ink distribution in the characters* , he formed an opinion that they belonged to the authors of the specimen signatures but they were heavily disguised . He produced the report as exhibit in Court.

The 2nd Defendant on its part called three witnesses to support its case. **2DW1 No. 230925 Chief Inspector Jacob Mogeni Odour** testified that he is a Forensic document examiner based at the CID Headquarters. He further testified that certain documents were submitted to him for examination. That he received eight documents and he examined them. He told the Court that he analyzed the signatures and he did not find any similarities. He examined the signatures and he did not find any similarities with signatures of **Enock Otвори**, and **Elizabeth Nyambura Gicheha** . The signatures on the disputed documents were by different authors. Further, the signatures of **Fredrick Lubullelah** were different from the signatures on the disputed documents.

However, the specimen signature of **George Gichimu Gachihi** and signature on the disputed document were similar. They were made by the same author. He produced the report as exhibit in court.

2DW2: Enock Ogeto Otwori told the Court that he is based at Embu office as a Principal Lands Officer. That in the year **2007–2010**, he was based at Ardhi House, Nairobi. He was in the Administration Office and was approving Leases, and Consents for transfers. He denied that he ever authorized the letter dated **30th November 2007**. He told the Court that he did not sign the said letter and therefore the letter was not authored by him.

2DW3 Elmad Ouma Apunda told the Court that he works with KRA Domestic Taxes Department. It was his evidence that the letter dated **2nd October 2012** emanated from their office. That **Johnstone Kiplimo Chemos** applied for a Pin Number in the year 2006 and he was issued the same on 4th November 2006 as **PIN NO. A003561936P**. His date of birth was given as **1978, ID No. 21680477**. He produced the report by **Alice Etole** as exhibit in Court. He further testified that it was not possible for KRA to issue two different Pin Certificates.

DW4: Elizabeth Gicheha, the Registrar of Trade Unions told the Court that she previously worked as a Deputy Chief Land Registrar. She relied on her recorded statement. She testified that having looked at the copy of titles in favour of Darelle Ltd, she confirmed that the signatures purportedly made on **13th December 1991** and **21st October 1992** were not made by her. She denied ever signing the said documents. It was her testimony that the signatures appearing against entries **No.2 and 3** on the documents at page 27 and 81 of Darelle's bundle of documents dated **21st May 2012** were a forgery. She further confirmed that she signed the entries dated **13th December 1991** and **21st December 1992** appearing on page 4 of the Plaintiffs bundle of documents. She also told the Court that the Deed of Variation was not a document from the Lands office and the same was not registrable. Further that change to special conditions are done by the Commissioner of Land by way of endorsement and not registration of a Deed of Variation.

After the close of the both the Plaintiff's and the Defence case, the parties put in their Written Submissions.

Iseme Kamau & Maemo Advocates filed their Submissions on **6th October, 2014** and a further submission on **14th November 2014**. **Oraro & Co. Advocates** for the 1st Defendant also filed their Submissions on **29th October 2014**, Supplementary Submissions on **5th December 2014** and further supplementary submissions on **17th November, 2014**.

On its part the office of the Attorney General, though **Motari Matunda State Counsel** filed its submissions on **8th October 2014** and further submissions on **17th November 2014**.

On their submissions, the Plaintiff submitted that **Mr Chemos**, who transferred the Land to **Darelle Ltd** on **11th July 2008**, had no capacity to do so as an injunction had been issued on **8th May 2008**, restraining him as 1st Defendant from **disposing, encumbering, charging, transferring and/or in any other manner dealing** with the suit property pending the hearing and determination of **ELC 24 of 2008**. It was further submitted that any act or transaction undertaken or entered into in defiance of a court order is invalid and confers no legal rights. Therefore during the subsistence of the injunction, **Mr Chemos** could not transfer any Legal or other right in respect of the suit property either to **Darelle Ltd** or any other party. Plaintiff relied on the case of **Koinange Investment and Development Ltd Vs Nairobi City Council & 3 Others Civil Appeal No. 535 of 2006** and also **Judicial Service Commission Vs Speaker of National Assembly & Another Petition No.518 of 2013**.

Further that by virtue of the doctrine of **lis pendens**, **Mr Chemos** lacked capacity to pass and or transfer any interests in respect of the suit property to **Darelle Ltd or anyone else**.

Plaintiff further also submitted that Mr Chemos/Darelle titles, were not genuine as the Chief Land

Registrar had made a Ruling on **15th November 2007** and stated that **ASL Ltd** title was genuine title in respect of the suit property and that the title held by **Mr Chemos** did not emanate from the Lands office. Further that the above position was supported by the witnesses who testified in court from the Lands office among them **PW1, and 2DW4**. Therefore the documents relied by Darelle Ltd were discredited and denied by the persons who allegedly issued them. It was submitted that only ASL Ltd title was issued by the Land's Office and therefore the certificate of title held by Darelle Ltd was not genuine title and did not confer any legal right capable of protection by this Court.

Further, it was submitted that ASL Ltd was the only lawful proprietor of the suit property as it produced evidence on the various steps, it conducted in the transaction leading to its registration as the proprietor of the suit property. Also the validity of ASL Ltd title was confirmed by the Registrar's Ruling of **15th November 2007** and testimonies of **PW1 and 2DW4**. It was further submitted that the title held by Darelle Ltd was a forgery and therefore the same was not genuine. The Plaintiff relied on the case of **Elizabeth Kamene Ndolo Vs George Matata Ndolo Civil Appeal No. 128 of 1995.**

Plaintiff further submitted that since its title was registered earlier than that of Darelle Ltd, it should take precedence and the court should therefore uphold registration in favour of **ASL Ltd** and cancel the one in favour of Darelle Ltd. In this regard, the Plaintiff relied on the case of **Wreck Motors Enterprises Vs The Commissioner of Land's and others, Civil Appeal No. 71 of 1997,** where the Court held that:-

“where there are two competing titles, the one registered earlier is the one that takes priority”

The Plaintiff urged the court to hold that ASL Ltd was the lawful proprietor of the suit property and its registration should be upheld. They also urged the court to cancel the title held by Darelle Ltd as it was irregularly issued and thus a nullity. In support of that submission the Plaintiff relied on the case of **Sisters of Notre Dame Vs the AG & Others , Petition No. 151 of 2012.**

The Plaintiff also submitted that it has proved its case on balance of probabilities and the Court should find for them and order the 1st and 3rd Defendants to pay costs of the suit.

On their submissions, 1st Defendant submitted that Darelle's acquisition of the suit property was a classic text book conveyancing transaction. That the property was purchased pursuant to a Sale Agreement ***between Imaran Ltd and Johnstone Kiplimo Chemos*** for ***Kshs.60,000,000/=*** who was the registered proprietor. Later ***Imaran Ltd*** appointed ***Darelle Ltd*** as its nominee and transfer dated ***4th July 2008*** was executed. It was further submitted that transfer in favour of ***Darelle Ltd*** was registered on ***11th July 2008,*** upon payment of all the requisite fees including stamp duty in the sum of ***Kshs. 2,400,000/=.*** Subsequently, ***ASL Ltd*** put an advertisement in the press and ***Darelle Ltd*** learnt that ***ASL Ltd*** was claiming ownership of the said property.

It was further submitted that indeed Plaintiff filed ***ELC No. 24 of 2008*** on ***30th January 2008*** and simultaneously filed an interlocutory application for injunctive relief against ***Chemos***. On ***8th May 2008,*** an injunction order was issued restraining ***Chemos*** from dealing with the said property. It was the 1st Defendants submissions that such Order was never served upon ***Darelle Ltd*** nor ever registered against the title of the suit property, whether as an inhibition or otherwise. Further, the 1st Defendant discredited the evidence of the prosecution witnesses. It was also submitted that the Deed File showed that the suit property belonged to ***ASL Ltd*** because the reconstructed Deed File's documents were only supplied by ***ASL Ltd***. It was further submitted that in the RTA (now repealed) there was no provision for reconstruction of the Deed File as done in this case. 1st Defendant relied on the case of ***Kent Coast Railway Company Vs London Chatham and Dove Railway Company (1868) III LJ CH and Credit Suisse Vs Allerdale Borough Council(1997) (1) B 306,*** where it was held that anything built upon a nullity is equally a nullity and cannot stand.

1st Defendant further submitted that though PW1 submitted that the Lands Registry does not issue to private individuals letters confirming the ownership of Land such as the letter dated 9th addressed to M/s

Paury Rawal advocates, ASL Ltd produced a letter dated **22nd January 2009**, addressed to their advocates who are also not a public body. It was also submitted that the hearing by the Chief Land's Registrar which culminated in the Ruling of 15th November 2008, was a nullity and had no legal basis. On this point, 1st Defendant relied on the case of **Isaack Gathangu Wanjohi & Another Vs The AG & Another, Petition No. 154 of 2011.** It was their submission that **Section 65(1) (b) of RTA** does not authorize a hearing and rendering a ruling but is wholly investigatory. Further that ASL Ltd had not submitted development plans as per conditions 2 of the Grant.

Further 1st Defendant relied on **Section 23(1) of the RTA** (now repealed) and submitted that since evidence is clear that Darelle Ltd purchased the land from **Chemos**, who was the duly registered proprietor, then by virtue of **Section 23** of RTA, Darelle Ltd is the absolute and indefeasible owner of the suit land. It mattered not whether **Chemos** was himself implicated in any fraud, the purchaser of such land upon transfer became the indefeasible proprietor. The 1st Defendant herein relied on the case of **Gibbs Vs Messe (1891 Ac 248).**

Therefore, it was submitted that Darelle was the rightful proprietor of the suit property and entitled to relief sought in its Plaintiff.

Mr J Motari Matunda, the Litigation Counsel for the Attorney General filed his submissions on behalf of the 2nd Defendant. He submitted that witnesses from the Land's Office testified that the documents relied on by the 2nd Defendant never emanated from the 2nd Defendant's office and hence the claim by the 1st Defendant must fail. It was submitted that since **Chemos** was a minor in **1992** and could not own property on his own name, the claim by Darelle Ltd was a nullity **ab-nitio**.

That though the 1st Defendant filed a **Notice** of cross claim, against the 2nd Defendant, the 1st Defendant did not issue a **thirty (30) days'** Notice, prior to filing the Notice of cross claim. There was therefore no valid proceedings against the government. It was further submitted that **Darelle Ltd** did not offer any evidence to support its claim in the cross claim. 2nd Defendant relied on the case of **Douglas Odhiambo Apel; Vs Telkom Kenya Ltd Civil Appeal No. 115 of 2006 and Kenya Power & Lighting Co.Ltd Vs Henry Wafula Masibaya Civil Appeal No.20/2001.** 2nd Defendant submitted that 1st Defendant did not produce any evidence to confirm that he paid the Stamp Duty. For the above reasons, the 1st Defendant could only claim refund of the purchase price from **Mr Chemos**, the 3rd Defendant. The search dated **17th July 2008** purportedly issued by **Joseph Kamuyu** was denied by the purported author and further the witnesses from the land's office denied making entries that were visible in Darelle's Documents. It was therefore submitted that there was no Official Search carried out by the 1st Defendant to ascertain proprietorship of the suit land. There was no stamp duty paid to enable completion of the transfer to the 1st Defendant as no receipt was produced, 3rd Defendant was a minor and could not own property in his name in **1992** and the entries in 1st Defendant's title were forgeries and therefore 1st Defendant did not obtain good title. Therefore, the 2nd Defendant submitted that the suit property **LR No.209/11151** belongs to **ASL Ltd** and the Court was urged to find for the Plaintiff and dismiss the 1st Defendant claim, cross claim with costs.

The parties filed their separate statement of agreed issues which I have duly considered. However, the Court is not entirely bound by what the parties have filed as the issues for determination. By the Order of JSC in **Gokaldas Tanne Vs Rosemary Muyunza & DAPC D SCCA No.12 of 1992 (SCU)**, it was held that :-

“ 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 Defendant was objectionable on the 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 judgement was contrary to the legal provisions.”

Being persuaded by the above position. I will therefore proceed and paraphrase the issues for determination based on the pleadings, the evidence in general and the Written Submissions.

Having now considered the pleadings and the evidence on record, the Court finds that the issue for determination are:-

- i. ***Who was allotted the suit property initially?***
- ii. ***Did the officers from the Lands office sign the documents produced in Court by ASL Ltd and/or Darelle Ltd?***
- iii. ***Was there a lawful transfer for the suit property registered either in favour of ASL Ltd or Darelle Ltd.***
- iv. ***Who was the lawful registered proprietor of the suit property?***
- v. ***Can the Court herein cancel any of the two certificates of titles?***
- vi. ***Who is entitled to the injunctive Orders herein?***
- vii. ***Is the 1st Defendant, Darelle Ltd entitled to the cross claim against the 2nd Defendant and/or Registrar of Titles.***
- viii. ***Who is entitled to costs of the suit.***

From the available evidence, and the exhibits thereto and the written submissions, the Court finds that there are some undisputed facts.

There is no doubt that both the Plaintiff herein ***ASL Ltd***, and the 1st Defendant ***Darelle Ltd*** hold title to the suit property which is situated in Upper Hill area, Nairobi. Both of them claim to be the lawful proprietors of the suit property. There is also no doubt that ***ASL LTD*** was registered as the proprietor of the suit property or ***5th April 2006***, having purchased the property from Post Bank Credit Ltd, who had granted financial facility to ***SOY Developer LTD***, and the said property was used as security for the charge entered. From the documents produced in Court by ***ASL LTD***, there is also no doubt that the Grant held by ***ASL LTD*** showed that the suit property was initially allotted to ***SOY Developer LTD*** on ***20th April 1989***.

There is also no doubt that after ***ASL Ltd***, purchased the suit property from Post Bank Credit, one ***Johnstone Kiplimo Chemos*** also claimed the suit property. This claim was made in the year 2007 and the said ***Johnstone Kiplimo Chemos*** had attempted to sell the suit property to several people including ***Galana oil Kenya Ltd***, who were represented by ***Kamotho, Maiyo & Mbatia Advocates***, which Law Firm had written to ***ASL Ltd*** on ***31st October 2007*** inquiring on who was indeed the true owner of the suit property..

Further, there is no doubt that due to the claim by ***Johnstone Kiplimo Chemos*** that he also owned the suit property and that he indeed had a certificate of title, the Advocates for ***ASL LTD*** lodged a complaint to the Chief Land Registrar who summoned the parties claiming interest over the suit property. After carrying out an inquiry, the Chief Land Registrar issued a Ruling on ***15th November, 2007*** and held that the suit property belonged to ***ASL LTD*** and that documents held by ***Johnstone Kiplimo Chemos*** did not emanate from the Land's office.

There is also no doubt that the Plaintiff herein ASL Ltd moved to Court on 30th **January 2008**, and filed **ELC NO 24 of 2008**. It is evident that the ASL LTD (Plaintiff) obtained **Injunctive orders** restraining the 1st Defendant (**Johnstone Kiplimo Chemos**) from dealing with the suit property or transferring the same. The said injunctive Order was confirmed by the Court by consent of the Advocates for the parties on **8th May 2008**. The above Order was to remain in force pending the hearing and determination of **ELC No 24 of 2008**.

There is no doubt that despite the Court Order, Mr Chemos proceeded and entered into a sale agreement with one Imaran Ltd which culminated in the suit property being registered in the name of Darelle Ltd, a nominee of Imaran Ltd . It is therefore not in doubt that the suit property was transferred and registered to Darelle Ltd for a consideration of **60,000,000/=** on 11th July 2008, during the pendency of the Court order which had been confirmed on 8th May 2008.

It is also evident that after the said transfer, Darelle Ltd filed **ELC No. 567 of 2008** against **ASL LTD** and **Johnstone Kiplimo Chemos**, on 9th November, 2008 and sought for a declaration that it is the lawful owner of the suit property **LR No. 209/11151** as the bonafide purchaser for value without Notice.

What is also not in doubt is that the Plaintiff herein ASL LTD is in possession of the suit property and has fenced it. However the Plaintiff has not used and/or developed the said property as an injunction was issued against the Plaintiff in **ELC No. 567 of 2008**. Further by consent of the Advocates entered on **11th March 2009** the Plaintiff was restrained from transferring or parting with possession of the suit property pending the hearing of this matter. The two suits were consolidated on **13th January 2009**.

From the available evidence, there is no doubt that the witnesses from the Lands Office have confirmed that the Grant issued to ASL LTD was a genuine Grant emanating from the Lands office whereas the Grant issued to Darelle Ltd was a forged Grant. However that fact was vehemently opposed by the 1st Defendant- Darelle Ltd.

It was not in doubt that the Document examiner's report by **Jacob M Odour**, confirmed that the signatures on the Grant issued to ASL LTD were genuine signatures of the lands officials named in the stated documents. He however found that the signatures on the Grant issued to Darelle Ltd were not signatures of the Land's Officials named in the said documents. It was his findings that those signatures were forgeries.

There is also no doubt that the report by **Antipus Nyanjwa**, the Document examiner appointed by Darelle Ltd also confirmed that the signatures on the Grant issued to Darelle Ltd were highly disguised though he opined that they could have been made by the officers named in the said document. However that opinion was highly disputed by the Plaintiff and 2nd Defendant herein.

It is also evident that the 3rd Defendant herein **Johnstone Kiplimo Chemos** filed his Defence and failed to take part in this proceedings. The Court therefore did not have the benefit of his evidence or his side of the story.

From the available evidence, the disputed facts are; who is the lawful proprietor of the suit property, did the Land Registrars and other officials from the Land's office sign the documents produced by Darelle Ltd, did Chemos transfer the suit property with the knowledge that there existed a Court Order barring such dealing and is the 1st Defendant entitled to its claim in the cross –claim against the 2nd Defendant?.

As I have already stated, both Plaintiff and 1st Defendant have certificate of titles to the suit property. They hinge their claim on **Section 26(1)** of the Land Registration Act which provides that:-

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.

- 2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.***

Though each of the party herein hold a certificate of title, such Certificate of title can be challenged on ***allegations of fraud, misrepresentation*** or if the title is acquired ***unprocedurally***. The Plaintiff and 1st Defendant are each challenging the other Certificate of title.

It is trite Law that he who alleges must prove and so each of the claimant herein had a duty to call evidence and prove its case on a ***balance of probability***. This is a Statutory duty as provided by ***Section 107(1) of the Evidence Act*** which states that:-

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

I will now turn to the issues framed by the Court and in determining them I will wholly rely on the evidence adduced in Court by all the witnesses, the exhibits attached thereto, the Written Submissions, relevant provisions of Law and the cited authorities.

On the first issue of who was indeed the initial allottee of the suit property between ***Soy Developers Ltd*** and/or ***Benjamin Kiprof Sawe Kostany***, the Court will rely on the evidence adduced by the witnesses and the exhibits produced in Court. In the bundle of documents produced in Court by ASL LTD on page ***107 -110***, it is evident that a Grant was issued to ***Soy Developers Ltd*** from ***1st April 1989*** for a period of ***99 years***. The said Grant was signed by the then Commissioner of Lands ***Wilson Gachanja*** in the presence of Registrar of Title who PW1 stated was one ***Mr Murage***. According to PW1, the signatures on the Grant produced by ASL Ltd were genuine signatures for ***Mr Wilson Gachanja*** and ***Mr Murage***. There was also evidence that ***Soy Developers Ltd*** charged the suit property to Post Bank Credit ltd on ***21st October 1992*** and entry was entered in the Grant as entry ***No. 3***. PW1 testified that the signature therein was for one ***Elizabeth Nyambura Gicheha***, a Land Registrar. ***Elizabeth Nyambura Gicheha*** was ***2 DW4***, and she testified in Court and confirmed that she indeed signed entry No.3 on the Grant produced by ***ASL LTD***.

From document No.28 of the Plaintiffs bundle of documents, it is evident that Soy Developers Ltd charged the suit land to Post Bank Credit Ltd on ***25th September 1992***. It is also evident from document ***No.71***, being a letter to ***Soy Developers Ltd*** that the Law Firm of ***Kimani & Michuki Advocates*** issued a Statutory Notice of Intention to sale by Public Auction, in exercise of its Power of Sale on behalf of Post Bank Credit Ltd (in liquidation). The chargor, owed ***Post Bank Credit Ltd Kshs 16,044,637,167.90/=***. The said Notice of Chargees ***Intention to exercise its statutory power of sale*** is dated ***2nd March 2004***. Subsequently, the plaintiff herein purchased the suit property and the same was registered in its name on ***5th April 2006*** as evident from entry ***No.5*** on the Grant. PW1 and PW2 confirmed that the signature on the said entry was for ***Fredrick Lubulelah***, who was a Land Registrar. The officials from the Lands Office further testified that indeed this suit property was initially allotted to Soy Developers Ltd and the Ruling by the Chief Land Registrar attested to that.

On the other hand, the 1st Defendant by its documents produced in Court alleged that this suit property

was initially allotted to **Benjamin Kiprop Kositany**, through the letter of allotment dated **4th April 1989** and later through a Grant dated **21st April 1989** alleged signed by **Wilson Gachanja**, the Commissioner of lands in the presence of Registrar of Titles. PW1, PW2 and 2DW4 testified that the signatures on the Grant did not belong to **Wilson Gachanja or Mr Murage**, the Registrar of Titles. These documents, the letter of allotment and the Grant were introduced in evidence by **DW1, Aryn Mousa, for Darelle Ltd.**

However, the Plaintiff's and 2nd Defendant's Counsels objected to production of these documents by DW1. The Court upheld the said objection and 1st Defendant never called a witness to produce the said documents in Court. Indeed, these documents have not been produced as exhibits in Court. Since the witnesses from the Lands office disputed that the letter of allotment and Grant emanated from the Lands Office, 1st Defendant ought to have called evidence to rebut those allegations and support its claim. That was not done. The evidence now on record which is tested is that the suit property was initially allotted to Soy Developers Ltd and that evidence is supported by exhibits produced in Court.

As it is trite law that he who alleges must prove, 1st Defendant who had alleged that the suit property was initially allotted to **Benjamin Kiprop Kositany** ought to have called evidence to support that allegation. Plaintiff herein **ASL Ltd** did call witnesses to confirm that indeed the suit property had been allotted to Soy Developers Ltd and that the signatures on the Grant signed on **21st April 1989** were indeed for **Wilson Gachanja** and one **Murage**, the Registrar of Titles. There is also documentary evidence that Soy Developers Ltd later charged the suit property to Post Bank Credit Ltd, who in turn sold the same to **ASL LTD** in exercise of its Statutory Power of Sale. **2DW4** confirmed that she signed entries No.2,3 and 4 on the Grant held by **ASL LTD** herein. **ASL LTD** has therefore called evidence to prove its allegation. From the above analysis of the evidence, the Court will not hesitate to hold that the **LR No.209/11151** (suit property) was initially allotted to Soy Developers Ltd on **1st April 1989** but not to **Benjamin Kiprop Kositany** as alleged by the 1st Defendant.

The second issue for determination is whether the Land Registrars or officers from the Land's Office signed the documents produced in Court by either **ASL Ltd** and or **Darelle Ltd**. In answering this issue, the Court will rely on the evidence of **PW1 George Gichimu Gachuhi, PW2 Joseph Odour** a Document Examiner, **DW2, Antipus Nyanjwa**, a Document Examiner, **2DW2, Enock Ogeto Otwor** and **2DW4 Elizabeth Gicheha**.

The documents in issue are the two Grants, one held by **ASL LTD** and the other by **Darelle Ltd** and the letter from the Ministry of Lands allegedly signed by **E Otwor**, for Commissioner of Land's issued to **Paury Rawal Advocate**, confirming that from the records held by the Ministry, the Land in question belonged to **Johnstone Kiplimo Chemos**.

PW1 testified in Court and alleged that the signatures on the Grant produced by ASL LTD were genuine signatures by the persons who are alleged to have signed them. He testified that the **signatures** by the Commissioner of Lands, **Wilson Gachanja** was his genuine signature and also the signature of the Registrar of Titles, **Mr Murage** was also a genuine signature. It was his evidence that he had worked with the officers above named and he was familiar with their signatures. He also confirmed that the signatures in entries No 2,3 & 4 in the Grant held by **ASL LTD** were for **Elizabeth Gicheha** and were genuine signatures. **M/s Elizabeth Gicheha** testified that she indeed signed the Grant held by **ASL LTD** on entries No.2,3 and 4. The evidence of the two witnesses was further supported by the evidence of the document examiner PW4, Jacob Odour.

However, PW1, PW2 and 2DW4 denied that they ever signed the Grant held by **Darelle Ltd**. **PW2, Joseph Kamuyu** told the Court that he did not sign the search in respect of **Darelle Ltd** title dated **17th July 2008**. The document examiners PW4 and DW2 confirmed that the said signature of **Joseph Kamuyu** on the search dated **17th July 2008** was a forgery. I have also looked at the three sets of Grant produced by **Darelle Ltd**. The entries on the said copies of Grant are of different fonts and a casual look from a layman's eye would show that they are made by different hands. The three copies of the Grant are not same copies from one initial Grant. It therefore means that **Darelle Ltd** had three different sets of copies

of Grant for the same suit land. That raises doubt as to the genuineness of the Grant held by **Darelle Ltd** and gives credit to the evidence of the officers from the Lands Office that they never signed for the entries on **Darelle Ltd's** Grant.

Further, **2 DW2 Enock Ogeto Otwor**i testified that he did not author the letter dated **30th November 2007** and he did not sign the same. His evidence was supported by the document examiner. **2DW1 Jacob Mogeni Odouri** who told the Court that he examined the signature on the letter dated **30th November 2007** alleged signed by **E.Otwori** and he found no similarities with the known signatures of the said **E.Otwori- 2DW2**.

Further from the Ruling of the **Chief Land's Registrar** issued on **15th November 2007**, she held that that the documents held by **Darelle Ltd** did not emanate from the lands office. The Report from the document examiner called by **Darelle Ltd** confirmed that the search dated **17th July 2008** was a forgery and **PW1** denied registering the transfer to **Darelle Ltd**. From the above analysis, I will concur with the submissions made by the Plaintiff herein and 2nd Defendant that the evidence of the makers of documents carries a lot of weight. I will also be guided by the findings in the case of **Elizabeth Kamene Ndolo Vs George Mutata Ndolo . Civil Appeal No.128 of 1995** (cited by Plaintiff) where the Court held that, where the owner of a signature had given evidence on his/her signatures, that evidence required no corroboration. It was further held that:-

“ the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial Court to decide whether or not it believes the report and give reasons for its decisions”.

The witnesses herein gave evidence that they signed the entries on the Grant held by **ASL LTD** but denied signing the entries on the Grant held by **Darelle Ltd**. That evidence was supported by document examiner in their reports. I find no reason to doubt the evidence of the officials from the lands office and the Document Examiners' report. The Court being guided by the available evidence therefore finds that the Grant held by **ASL LTD** has entries that were attested and entered and signed by the officials from the lands office specifically **PW1,PW2 and 2DW4**. I will therefore proceed to hold so.

However, it is evident that the grant held by **Darelle Ltd** has entries that were not attested, entered, or signed by the officers from the Land's office. The court will find and hold that these documents therefore did not emanate from the Lands office as was held by the **Chief Land's Registrar** in her Ruling dated **15th November 2007**.

The 3rd issue for determination is whether there was a lawful transfer of the suit property registered either in favour of **ASL LTD** and or **Darelle Ltd**.

The Court has considered the available evidence as adduced by the witnesses and the exhibits produced therein. It was the evidence of **PW3 Kartik Shirishbhai Patel**, that in **April 2005**, **ASL LTD** was looking for a plot to buy. Then TR consult gave them information that Post Bank Credit Ltd (in liquidation) was selling a plot (through D.P.F) . They got interested and started the process of negotiations. Post Bank Credit Ltd agreed to sell the suit property to **ASL LTD for Kshs.23,000,000/=**. Thereafter, **ASL LTD** instructed their advocates **Iseme,Kamau & Maema Advocates** to start the conveyance process. From the documents produced by the Plaintiff, it is evident that indeed, **ASL LTD** purchased the suit property from Post Bank Credit Ltd by entering into a sale agreement and paying the 10% deposit of the purchase price. After the conveyancing process was completed, the suit property was finally registered in the name of **ASL LTD** on **5th April 2006**. The said transfer was entered as entry **No.5** and as **presentation No 146. F Labulellah** , the Land Registrar signed the said entry . **PW1** and **Pw2** confirmed that indeed **Mr Fredrick Lubulellah** signed for the transfer on **5th April 2006** and that the signature appearing on the Grant was indeed for the said **Fredrick Lubulellah** . **PW1** Further confirmed that he certified the search by **ASL LTD** on **4th April 2008** and signed the same. **PW1** confirmed that the entry **No.5** signed by **Fredrick Lubulellah** was a genuine entry and so the transfer was a genuine transfer and entry. It was the further evidence of **PW1** that he looked at the Deed File and concluded that **ASL LTD** was the registered

proprietor and so the transfer of the suit property to ASL LTD was genuine one. PW1 further based his conclusion on the Ruling of the Chief Land's Registrar that the documents held by ASL LTD were the genuine documents.

However, on the transfer to Darelle Ltd dated **11th July 2008**, the same was allegedly endorsed by G G Gachuhi -PW1 . PW1 in his testimony had denied ever signing the said Grant. PW1 had first testified that prior to the suit being transferred to Darelle Ltd , a Deed of Variation had been entered on the Grant as entry No.4 and he was supposed to have signed for it. However, PW1 denied ever signing the said Deed of Variation. He further testified that Deed of variations are not registered in the manner prescribed in the said Grant. He clarified that it was only the Commissioner of Lands who had authority to vary the special conditions, and not the Registrar. Further that such variation is done through an endorsement to be registered by the Registrar which becomes part of the Grant.

To him, it was not possible for entry of variation of deed and transfer to be done on the same day. PW1 therefore denied that he endorsed the transfer to Darelle Ltd on 11th July 2008. It was his evidence that his signature appearing on Darelle Ltd Grant was a forgery as the same was not his signature. The Document Examiner , PW4 Jacob Odour also testified that the signature on Darelle Ltd Grant, entry No.5 showing that the same was signed for by G G Gachuhi was a forgery , because when he compared G G Gachuhi's known signatures with the disputed signature on entry No.5 , of Darelle's Grant he found them different . Further, Mr Antipus Nyanjwa , the document examiner instructed by the 1st Defendant also opined that the signatures on Darelle Ltd Grant, entry No.5 allegedly by G G Gichuhi were heavily disguised and lacked consistency and general resemblance.

I have also considered the Chief Registrar's Ruling issued on **15th November 2007** in connection to the Certificate of title held by ASL LTD and Darelle Ltd and it was her findings that the certificate of title held by Darelle ltd did not emanate from Lands office. There was no evidence to the contrary and this Court therefore finds and holds that the transfer to Darelle Ltd was not endorsed by the officers from the lands Office.

Further, this transfer to Darelle Ltd was allegedly effected on 11th July 2008. At this time, there was a pending Order of injunction issued by the Court restraining one **Johnstone Kiplimo Chemos** from transferring the suit property. The said transfer was done in contravention of the Court Order and as was held in the case of **Koinange Investment & Development Ltd Vs Nairobi City Council & 3 Others, Civil Appeal No. 535 of 2006.** Such a transfer was **unlawful, null and void and of no effect whatsoever.**

Considering the above analysis of the evidence and the exhibits thereto, the Court finds that the transfer to **Darelle Ltd** is doubtful as it did not emanate from the Lands office and therefore the same is not lawful. However; the transfer to ASL LTD was endorsed by Fredrick Lubulellah, a Land Registrar and the court finds that the said transfer is lawful and genuine.

The Court will now proceed to determine who is the lawful registered proprietor of the suit property. Evidence has been adduced by PW3, on how ASL LTD purchased the suit property from Post Bank Credit Ltd, in the year 2006. ASL Ltd got registered as proprietor to the suit land on **5th April 2006**. **DW1, Aryn Mousa** also testified that the Law Firm of **Anjarwalla & Khanna Advocates** were instructed by **Imaran Ltd** to draw a sale agreement for purchase of the suit property from one **Johnstone Kiplimo Chemos** by the said **Imaran Ltd** . It was his further evidence that the suit property was purchased for **Kshs.60, 000,000/=** and after the completion of the purchase process , the suit property was registered in the name of **Darelle Ltd** who were nominee of **Imaran Ltd** . However, DW1 did not produce the documents in support of the said transaction as the Court upheld the preliminary objection raised by the Plaintiff's advocate. 1st Defendant did not call a witness to produce the documents that had been objected to. However, there is no doubt that **Darelle Ltd** holds a certificate of title. The same was registered on **11th July 2008**. Both **PW3** and **DW1** took the Court through the process of the transaction that led to the suit land being registered in the names of **ASL LTD** and/or Darelle Ltd. The question now that this Court should determine is who is the lawful registered proprietor.

From the available evidence, the witnesses from the lands office had endorsed the registration to **ASL LTD** and have confirmed that ASL LTD certificate of title was the lawful one. The Chief Land Registrar indeed in her Ruling did hold that **ASL LTD** was the lawful proprietor of the suit property. Mr Amoko , Advocate for the 1st Defendant took issue with the said Ruling and submitted that the Chief Land's Registrar went beyond her mandate when she carried out an investigation and later rendered a Ruling endorsing **ASL LTD** as the lawful registered proprietor of the suit land. He quoted **Section 65(1) (b) which provideshe may summon the proprietor or other person to appear and give information or explanation respecting the land or the instruments affecting the title thereto**".

However ASL LTD submitted that section 65(1) (a) of RTA on the power of the Registrar to call documents was not applicable as there was no pending registration. The said Section provides as follow.

" He may require the proprietor of, or any other person interested in land in respect of which a transfer ,transmission or other dealing is about to be registered to produce any grant, certificate of title ,charge,lease ,will or other instrument in his possession or within his control relating to the land".

The Court has considered the provisions of Section 65(1) (b) of RTA ((now repealed) and finds that indeed the Registrar had the power to conduct investigations , for the purpose of confirming authenticity of documents and entries, cancelling entries and correction of instruments . The Chief Land Registrar, summoned the parties herein after receipt of a complaint. She issued a Ruling and the Ruling was not appealed against. This Court would find no reason to fault the said Ruling as submitted by Counsel for 1st Defendant.

It is evident that ASL Ltd got registered as the proprietor of the suit property on **5th April 2006**. This registration has been endorsed by the witnesses from the Lands office. It is also evident that Darelle Ltd was registered as a proprietor of the suit property on **11th July 2008**. It is also on record that ASL LTD filed suit **No ELC 24 of 2008** in January 2008. They obtained injunctive orders which Orders restrained **Johnstone Kiplimo Chemos** from selling, transferring, alienating, or dealing with the suit property herein. The said orders were confirmed by consent on 8th April 2008 and issued on **8th May 2008**. It is also evident that Darelle Ltd bought the suit property from Kiplimo Chemos who had been restrained by the Court from transferring the suit property or dealing with it in any manner whatsoever. **Johnstone Kiplimo Chemos** therefore sold the suit property to 1st Defendant in contravention of the Court Order. It is trite law that any act or transaction carried out in contravention of a court order is invalid and confers no legal rights. During the pendency of the Court injunction, **Kiplimo Chemos** could not transfer any legal right in respect of the suit property to any party . I will again rely on the case cited by the Plaintiff's advocate on his submissions ; **Koinange Investment & Development Ltd Vs Nairobi City Council & 3 Others (Supra)** where it was held that:-

" the sale by auction that followed thereafter was in contravention of the Court Order . Accordingly, it follows and so I hold that the sale of the suit property by auction on the 17th October 2006 was unlawful , null and void and of no effect whatsoever".

The 1st Defendant Advocate submitted that the 1st Defendant was not aware of the Court Order at the time of the purchase as the same had not been registered on the title. However it was evident that Darelle Ltd's Grant was alleged not to have emanated from the lands office and if that was the case, the order in force was not expected to have been endorsed on the said Grant. Further by the time the Injunction Order was issued Darelle Ltd was not in the picture but Mr Chemos , who sold the suit property was aware of the Injunction. The transaction by Chemos was in contravention of the Court Order and though Darelle ltd could not have been aware of the injunction order that did not make the transaction by Chemos valid. In the **Koinages case** (above referred) the Court further held:-

" There is no evidence that it was aware of the order stopping the sale....Be that is it may, as I have found the auction sale of the suit property to have been unlawful and in contravention of the court order, the 3rd interested party could not and did not acquire a good title over the suit property".

Therefore it is evident that even if a party is unaware of the existence of a court order , that cannot validate an illegal transaction done in contravention of a Court Order.

Further, since there was a suit pending in Court the **doctrine of lis pendens** was applicable and **Kiplimo Chemos** had no capacity to transfer any interest in respect to the suit property to Darelle Ltd or any other party. I will refer to Section 52 of the Transfer of property Act 1882, which provides that:-

“ During the active prosecution in any Court of a contentious suit or proceedings in which any right to immoveable property is directly and specifically in question , the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any decree or order which may be made therein except under the authority of the court and on such terms as it may impose”.

There is no doubt that at the time of the transaction between **Mr Chemos** and **Darelle Ltd** there was a suit in Court, **ELC 24 of 2008** and an Injunction Order was in force and therefore no party could transfer or deal with the suit property as the matter proceeded in Court.

The doctrine of lis- pendens was well explained in the case of **Festus Oganda Vs Hans Million (Civil Appeal No.100 of 2007)** (as cited by the Plaintiff).

“ The doctrine of lis pendens is meant to maintain the status quo over the property which is the subject matter of a pending suit until the final determination of the suit or until the suit is in any other manner terminated the transfer was obviously intended to defeat the outcome of the appeal. The transfer was a nullity and we so declare. Consequently we order the cancellation of the transfer of the suit property”.

Having considered the two certificates of title, it is evident that the certificate of title held by ASL Ltd was the first in time. It was registered on **5th April 2006**. The transfer in favour to Darelle Ltd was registered on **11th July 2008** during the pendency of Injunction Order. It is trite law that when there are two competing titles, the first in time will prevail. This was the findings in the case of **Wreck Motors Enterprises vs. the Commissioner of Lands and others Civil Appeal No. 71 of 1997**, where the court held that:

“where there are no competing title the one registered earlier is the one that takes priority.”

The above position was similarly held in the case of **Gitwany Investment Ltd & 3 Others vs. HCC No. 1114 of 2002**, where the court also held that;

“.....the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of lands issues two titles in respect of the same parcel of land then if both are apparently and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail.”

Taking into account the above holdings and assuming that the title held by Darelle Ltd was issued regularly and procedurally, but since ASL Ltd certificate of title was first in time, then it prevails and takes priority.

Having now analyzed the available evidence, the exhibits in support and the written submissions, the court finds and holds that though both ASL Ltd and **Darelle Ltd** are holding competing titles, it is evident that ASL Ltd is the lawful registered proprietor of the suit property. The court consequently holds that ASL Ltd is the lawful registered proprietor of the suit property and its ownership takes priority.

I will now turn to the issue of whether this court can cancel any of the two certificates of titles. It is now evident that the court has at this point held that the lawful certificate of title herein is the one held by ASL Ltd. **Section 26(1) of the Land Registration Act which is similar to Section 23 of RTA (now repealed)** provides that a certificate of title issued by the Registrar is a prima facie evidence that the person holding

it is the absolute and indefeasible owner. However, such title can be challenged if it is acquired unprocedurally, through misrepresentation or through corrupt means. The certificate of title held by **Darelle Ltd** has been found not to have emanated from Land's office. That certificate was therefore obtained unprocedurally and the same can be challenged. The court finds that a certificate of title that is obtained unprocedurally, illegally or through fraud cannot be held to be absolute and indefensible. Since it is evident that the certificate of title held by Darelle Ltd was acquired unprocedurally, it would be unequitable to retain the same. As was held in the case of **Macharia Mwangi Maina & 87 others Vs. Davidson Mwangi Kagiri Civil Appeal No. 6, 26 & 27 of 2011**

“This is a court of law and of equity; equity shall suffer no wrong without a remedy. No man shall benefit from his own wrong doings and equity detest unjust enrichment.... “

The 3rd Defendant herein transferred the suit property to **Darelle Ltd** when he had no capacity to do so as there was a court order restraining any dealings with the suit property. Therefore **Darelle Ltd** did not acquire a good title. This court consequently will not hesitate to cancel the certificate of title held by **Darelle Ltd**. The Court herein proceeds and cancels the certificate of title held by Darelle Ltd. However, the court upholds the certificate of title held by **ASL Ltd** as the genuine title and proceeds to hold and find that **ASL Ltd** is the absolute and indefensible owner of the suit property.

On the issue of who is entitled to injunctive Order, the court has already held that Ash Ltd is the absolute and indefeasible owner of the suit property. As the Absolute and indefeasible owner, ASL Ltd is entitled to protection by this court and **Section 24(a) and 25(1) of the Land Registration Act** provides that as an absolute owner as the Plaintiff is entitled to all rights and privileges belonging thereto. These Sections provides as follows;-

“24. Subject to this Act—(a)

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

“Rights of a proprietor.

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

Having found that the Plaintiff is the absolute and indefeasible owner of the suit property then it is proper to hold and finds that the Plaintiff herein, lead **ASL Ltd**, is the one entitled to permanent Injunctive Orders as sought in their claim.

The 1st defendant filed a cross-claim against the 2nd defendant. It is evident that the cross-claim is against a Government body. There is no evidence that 1st Defendant issued a **30 days'** Notice prior to filing of the instant cross claim. Without evidence of such **Notice**, then 1st defendant was in contravention of the provision of **Section 13 of the Government Proceedings Act**.

1st Defendant alleged that it was entitled to the cross claim because prior to entering into the sale agreement, it conducted a search at the Lands office which confirmed that **Johnstone Kiplimo Chemos** was the proprietor of the suit property. It further paid stamp duty and further the Deed of Variation and transfers were effected and Darelle Ltd become the registered owner. However there was evidence that the documents relied on by **Darelle Ltd** did not emanate from the lands office. The said documents were also not produced as exhibit in Court. Though Darelle Ltd stated that they relied on the letter dated 30th November 2007 alleged signed by **E. Odwori** confirming the suit land was owned by **Johnstone Kiplimo**

Chemos; 2DW2 gave evidence and denied ever issuing the said letter and that evidence was also confirmed by the Document Examiners. It is also not in doubt that **Darelle Ltd** purchased the suit property in July 2008. There is no evidence that they carried a search prior to that purchase and registration. The letter dated 30th November 2007, was not to Darelle Ltd but to one **Pauri Rawal Advocate** for **Johnstone Kiplimo Chemos**. Failure to carry their own independent search in the year 2008 prior to purchase of the suit property **Darelle Ltd** cannot claim to have done due diligence to warrant indemnity from the 2nd Defendant. **Darelle Ltd** also submitted that they paid a stamp duty of **Kshs 2,400,000**. Its submitted by Advocate for the 2nd Defendant, Stamp Duty is a special damages which needed to be specifically proven.

There was no receipt or a Bank slip produced by Darelle Ltd to show that they indeed paid **Kshs 2,400,000/=** to the Commissioner of Domestic Taxes. The 1st Defendant has therefore not proven that through the action of the 2nd Defendant, it went ahead and completed the transaction in issue. **2DW4, Elizabeth Gicheha** denied ever making entries 2,3 & 4 on the Grant held by Darelle Ltd. PW1 also denied endorsing the transfer to Darelle Ltd on 11th July 2008 and PW2 signing the search on the search held by **Darelle Ltd** dated 17th April 2008.

It is also quite evident that ASL LTD had put an advertisement in the Newspaper bringing to the attention of the public that it was the absolute owner of the suit property. If Darelle Ltd had carried due diligence, they should have sought from the Chief Land's Registrar who was indeed the genuine owner of the suit property. By the time **Darelle Ltd** purchased the suit property in July 2008, Chief Lands Registrar had already issued her Ruling on 15th November 2007 declaring that ASL LTD certificate of title as the genuine one.

Having now found and held that **Darelle Ltd** cannot successful seek for indemnity from the 2nd Defendant, the Court finds that the only option availability for **Darelle Ltd** is to seek for refund of the purchase price from **Johnstone Kiplimo Chemos**. This scenario was even envisaged by the parties in the sale agreement between **Johnstone Kiplimo Chemos** and **Darelle Ltd** and clause 15 of the sale agreement dated 13th June 2008 made provision for remedies available to **Darelle Ltd** if it found out the transaction was void by operation of law or court order. Such remedies included damages and refund of the purchase price.

The Court after analyzing the available evidence finds that the 1st Defendant is not entitled to the Orders sought in the cross claim against the 2nd Defendant. It is however entitled to refund of the purchase price by the 3rd Defendant, **Johnstone Kiplimo Chemos**.

Finally, the Court is to determine is who is entitled to costs. It is trite law that costs normally follow the event. The court has found and held that the suit property herein belongs to ASL LTD. There was a Court ruling barring 3rd Defendant from selling and transferring the suit property. However the said 3rd Defendant ignored the Court order and sold the suit land to Darelle Ltd.

Further, Darelle Ltd was made aware on 19th September 2008 that the suit property belonged to **ASL LTD**. Darelle Ltd did not seek remedy from **Johnstone Kiplimo Chemos** as provided by clause 15 of the Sale Agreement.

However, Darelle Ltd proceeded and filed a suit **No 567 of 2008** being aware of the circumstances of the case. There was an **ELC No 24 of 2008**, a Ruling by a Chief Land's Registrar and an injunction Order. The Court finds that Darelle Ltd is therefore liable to pay costs.

Having now considered the evidence in totality, the Court finds that the plaintiff herein **ASL LTD** has been able to prove on a balance of probability that the suit property belongs to it. However, the 1st Defendant, **Darelle Ltd** has failed to prove its case against **ASL LTD** on a balance of probability. For the above reasons, the Court finds that the case as filed by ASL LTD is merited and the same is bound to succeed. The Court further finds that the case No. 567 of 2008 as filed by **Darelle Ltd** is not merited. The

same is dismissed entirely with costs to the Plaintiff and 2nd Defendant.

The Plaintiff herein ASL LTD purchased the suit property in the year 2006. It obtained approval for change of use from the City Council of Nairobi in the year 2008. The Plaintiff has not developed the suit property and PW3 alleged that it has been servicing a huge loan. The Court finds that the plaintiff is entitled to *mesne profits*. Taking into account all aspects, the Court finds that plaintiff is entitled to Mesne profits of **Kshs.5000, 000/=** .

On damages for trespass, there is no evidence that the 1st Defendant has entered into the suit property. The Court noted that on 11th March 2009, a consent order was entered to the effect that the Plaintiff remains in possession but was restrained from alienating or transferring the suit property. The Court finds that Plaintiff is not entitled to award of damages for trespass.

From the foregoing, the Court enters judgement for the Plaintiff as follows:-

- a. ***The Court allows the Plaintiffs claim in ELC No 24 of 2008 in terms of prayers No (a),(b),(c), (d) mesne profits of 5000,000/= plus costs of the suit to be met by the 1st and 3rd Defendant's respectively.***
- b. ***The Court further dismisses the claim by first Defendant in ELC No.567 of 2008 entirely with costs to the Plaintiff and 2nd Defendant respectively.***

It is so ordered

Dated, signed, and delivered this 29th day of May 2015.

28 days Right of Appeal.

L. GACHERU

JUDGE

In the presence of M/s Odari holding brief for Mr Kamau for Plaintiff

M/s Ouma holding brief Mr Amoko 1st Defendant

Mr Motari for 2nd Defendant

None attendance for 3rd Defendant

Hilda : Court Clerk

Court:

Judgement read in open Court in the presence of the above advocates and absence of 3rd Defendant.

28 days Right of Appeal.

L.GACHERU

JUDGE