



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 110 OF 2011

DAVID MUTISYA MUKUMBI.....PLAINTIFF

VERSUS

KENNEDY WAINAINA NJENGA.....1ST DEFENDANT

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

COMMISSIONER OF LANDS.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

Introduction

The Plaintiff instituted this suit by way of a Plaint dated 16th March 2011 seeking the following substantive prayers:-

1. A permanent injunction restraining the Defendants whether by themselves, their agents and or servants from alienating, selling, transferring, trespassing or in any other way interfering with the Plaintiff's quiet possession of parcel of land known as LR No. 36/VII/260(original number 36/VII/36/8).
2. A permanent mandatory injunction directed to the Defendants, their servants or agents to forthwith the Plaintiff's [parcel of land L.R No. 36/VII/260(original number 36/VII/36/8).
3. A declaration that any title documents issued to the 1st Defendant are illegal, null and void and that the said title be cancelled.
4. General Damages

The Plaintiff's claim is that at all material times, he was the registered owner and proprietor of LR No. 36/VII/260(original number 36/VII/36/8) situate in Eastleigh, Nairobi (hereinafter referred to as the suit property). Further, that on or about 2nd March 2011, the 1st Defendant proceeded onto the suit property and purported to evict the Plaintiff's tenants who were running a garage on the suit property.

The 1st Defendant filed a statement of defence dated 18th October 2011 where he denied that the Plaintiff

was the registered proprietor of the suit property. The 1st Defendant however, admitted having proceeded into the suit property on 2nd March 2011 where he evicted strangers and trespassers in his capacity as owner of the suit property. The 1st Defendant denied that the persons evicted were the Plaintiff's tenants and stated that he derived his claim of ownership to the suit property as allottee from the 2nd Defendant. It is the 1st Defendant's case that the suit property was transferred to him by way of an indenture of conveyance dated 17th August 2007 and registered on 31st August 2010.

The 2nd Defendant filed a notice of appointment of advocate and a statement of defence dated 23rd March 2011 and 27th October 2011 respectively. The 2nd Defendant denied the Plaintiff's claim and stated that she was the first lessee of the suit property from the government of Kenya. It is the 2nd Defendant's claim that she transferred the suit property to the 1st Defendant through a letter of allotment dated 13th December 1995 and thereafter, issued the 1st Defendant with an indenture of conveyance which was registered in 2010.

The 3rd and 4th Defendants filed a statement of defence dated 29th July 2011 and denied knowledge of the Plaintiff's averments as pleaded in the Plaint. In the alternative, the 3rd and 4th Defendants contended that if the 1st Defendant was issued with a title, the same could only have been done after the necessary statutory requirements were fulfilled.

Parties Evidence

The suit was set for hearing on 29th November 2012 when the 1st Plaintiff (PW1) testified and sought to rely on his witness statement dated 16th March 2011. PW1 stated that he is a business man and that he resides in Machakos. It is the Plaintiff's testimony that he bought the suit property from Mr. Dhana Singh in 1969 and vide a conveyance dated 30th October 1969 a copy of which was filed in his list of documents dated 16th March 2011 the property was conveyed to him. The Plaintiff referred the court to an indenture dated 23rd February 1952 in his list of documents as well as a search dated 4th June 1990 and a certificate of official search issued by the Registrar of Government lands on 10th March 2011. The Plaintiff testified to the court that in 1970, he had taken a loan from Barclays Bank of Kenya Ltd with the suit property as collateral and that after paying the loan, the title was discharged.

It was the Plaintiff's testimony that he has been paying rates to the City Council of Nairobi and reference was made to a demand for payment of rates from the City Council of Nairobi dated 16th April 2007, a rates demand note dated 27th November 2007 as well as cheques number 076040 and 962473 drawn in favour of the city Council of Nairobi all in the plaintiff's bundle of documents were tendered in evidence to illustrate that the plaintiff had paid all dues to the 2nd Defendant.

In further testimony, the Plaintiff stated that in the year 2011, he received information that the 1st Defendant was claiming that the suit property belonged to him which necessitated the filing of this suit in order to establish who the owner was. The Plaintiff sought leave of the court to rely on an affidavit sworn on 29th July 2011 by Mr. George Gachii, a land registrar, which affidavit was filed in the Plaintiff's supplementary list of documents. The Plaintiff urged the court to declare that he was the owner of the suit property while stating that the property is not developed but has been leased out as an open air garage.

In cross examination by Mr. Gachimu, learned Counsel for the 1st Defendant, the Plaintiff stated that he had explained to the court that he bought the suit property in October 1969 and that Mr. Makecha was his advocate. The Plaintiff informed the court that he bought the suit property for Kshs 17,000/- and that the amount was paid through a cheque whose copy the Plaintiff did not have. It is the Plaintiff's testimony that the suit property was sold to him by **Dhana Singh** and that although he was issued with payment receipts by his advocate, he did not have the receipts. Further, the Plaintiff stated that he paid stamp duty at the time of purchasing the suit property and that he did not have any receipts for same.

The Plaintiff averred that after buying the suit property, he fenced and leased it out to some mechanics and that he had been collecting rent from the tenants. It is the Plaintiff's testimony that he did not have any agreements for the tenancies. Further, the Plaintiff reiterated that he was paying rates to the city Council. The Plaintiff attributed his failure to develop the suit property to lack of means to carry out the developments.

While stating that he has known the 1st Defendant for many years, the Plaintiff averred that he learnt that the 1st Defendant was claiming his property in 2011. The Plaintiff stated that he carried out a search on the suit property in 2011 and maintained that there was no variance between the search and the documents he had filed in court. Lastly, the Plaintiff stated that the 1st Defendant had never occupied the suit property or fenced the same and that he wanted to enter the suit property forcibly.

In further cross examination by Ms. Fuchaka, learned Counsel for the 3rd and 4th Defendants, the Plaintiff stated that he sued the 3rd and 4th Defendants respectively as they are the ones who maintain the records for all plots. The Plaintiff closed his case at this juncture.

The 3rd and 4th Defendants called one witness. **George Gichimu Gachi** (DW1) testified that he is currently working in Kisumu as a Lands Registrar. DW1 informed the court that prior to his transfer to Kisumu, he was working at the Nairobi lands registry and was in charge of the central register. DW1 informed the court that sometime in the year 2008, he received a lease from the City Council of Nairobi ref. CC/VAO/468/E/08 dated 5th December 2008. According to DW1, the lease was properly drawn, executed and was in order and further, that the lessee was **Kennedy Wainaina** the 1st Defendant herein.

It was the testimony of DW1 that they opened a register Vol. no. 80/240 Doc no. 2 and he proceeded to register the lease. DW1 stated that after registering the lease, they received a complaint on the registration 36/VI/260 in March 2011 and further, that evidence of 2 persons who had been registered was attached. DW1 informed the court that in the responses, they wanted clarification on the registration of the latest registered owner. DW1 stated that the response was received in August 2011 and further, that the City Council prepared their leases and lodged them for registration. According to DW1, a register had been opened in 1952 following subdivision, and that one of the portions was no. 260 which had been transferred variously.

During cross examination by Mr. Mutua, Learned Counsel for the Plaintiff, DW1 stated that there are 2 persons claiming ownership. It was the testimony of DW1 that the land subdivided and registered in 1952 was the same land that was registered in 2008. Further, DW1 stated that the Council ordinarily carries out investigations before forwarding the leases for registration. In further testimony, DW1 stated that registrations under the Government Lands Act(now repealed) originate from the government and that it was when they carried out investigations that they discovered that the same land had been registered in favour of the Plaintiff.

DW1 averred that they had no inventory of properties owned by the city council and averred that they merely act on the council's instructions when they issue leases. It was the testimony of DW1 that on 8th March 2011, he wrote to the Criminal Investigations Department and confirmed the registration of the 1st Defendant as owner. Further, that he wrote another letter on 23rd March 2011 and clarified that the property was registered to 2 persons.

According to DW1, for the 2nd registration to be valid, the 1st registration should have been surrendered and that in his view, the 1st registration would supersede the 2nd one if it had not been surrendered. DW1 was referred to a conveyance dated 17th August 2007 in the Defendant's bundle of documents and he confirmed that it was the same he registered. This witness reiterated that surrender would need to be registered to enable a fresh lease to be registered. DW1 confirmed that the register did not show that there was surrender and that according to the register, the property was still registered in the name of the Plaintiff.

In further cross examination by Counsel for the 1st Defendant, DW1 stated that the lease he referred to was the indenture of conveyance dated 17th August 2007 which transferred an interest to the 1st Defendant. DW1 reiterated that he was the Registrar of Government Lands and that when the document was submitted, they registered the conveyance since it met all the requirements.

DW1 averred that the document had been submitted with a covering letter dated 5th December 2008 which was signed by Mr. M. N. Ng'ethe for the Town Clerk. Further, DW1 stated that the covering letter covered 4 other properties and that no complaints were received in respect to the other 3 properties. DW1 informed the court that the history of the property is contained in the recital which he had relied on. According to DW1, the indenture of conveyance was authored by the council who would be responsible in case of any error or mistake.

In cross examination by Counsel for the 2nd Defendant, DW1 reiterated that they do not maintain an inventory of the Council's properties and further, that he registered the lease to the 1st Defendant because it complied with the requirements. There was no re-examination and the 3rd and 4th Defendants closed their case.

The 1st Defendant testified as DW2. He stated that he had an interest in the suit property as an owner. He averred that he was allocated the property by the City Council of Nairobi and referred the court to a letter of allotment dated 13th December 1995 in his bundle of documents. DW2 testified that after allocation, he visited the suit property in 1995 and it was vacant. DW1 stated that he complied with the terms of the letter of offer whereof he paid stand premium, annual rent and survey fees and was issued with receipts from the City Council as well as clearance certificates.

DW2 informed the court that approvals were made by the Town Clerk before he made the payments and further, that the City Council issued him with an indenture of conveyance dated 17th April 2007 which was executed by him and the Council. It is the testimony of DW2 that the conveyance was subsequently registered at the Lands office on 31st August 2010. DW2 referred the court to a letter issued to him by the City Council dated 5th December 2008 which showed 4 properties that were to be registered in his name and he averred that the other 3 properties did not have any dispute. Further, DW2 stated that the conveyance at the Lands office was registered without any problems as there was no caveat or encumbrance on the property.

DW2 made reference to a stamp duty declaration, assessment and pay in slip dated 26th August 2010 and stated that he paid stamp duty on the transfer. According to DW2, a search carried out 28th September 2010 confirmed that he had been duly registered as the owner. DW2 averred that he took possession of the suit property and obtained authority from the City Council to fence through a letter dated 28th February 2011.

In further testimony, DW2 informed the court that he subsequently visited the property where he found some mechanics and showed them his ownership documents and that he requested them and they agreed to vacate. According to DW2, the mechanics did not inform him by whose authority they were on the suit property. DW2 averred that the mechanics had not erected any structures and further, that none of them showed him a tenancy agreement, lease or licence from the City Council of Nairobi.

It was the testimony of DW2 that he did not know the Plaintiff and that he first saw the plaintiff when he testified in court. DW2 maintained that he first heard the claim from some policemen who he had hired to guard his property. DW2 averred that in March 2011, some people damaged his property and he reported to Shauri Moyo police station. DW2 referred the court to letters dated 8th March 2011 where the lands registry and the City Council of Nairobi confirmed that he was the registered proprietor. DW1 denied having procured the suit property fraudulently and averred that he was lawfully allocated the suit property.

In cross examination by the Plaintiff's advocate, the DW2 maintained that the property was allocated to

him by the City Council. DW2 confirmed that he did not receive any minutes from the Council relating to the allocation. DW2 stated that he was not given the conveyance referred to in the indenture dated 28th February 1967 by the City Council. DW2 was referred to the conveyance in favour of the Plaintiff and averred that he had no knowledge of it. DW2 stated that he was not aware of a letter by the Registrar dated 23rd March 2011 which confirmed the existence of 2 titles. DW2 maintained that the deed plan which was annexed to the indenture was dated 4th May 2009 and further, DW2 stated that he could not recall the land Registrar saying the deed plan ought not to have been issued without surrender. DW2 informed the court that he made an application to be allocated a plot by the City Council.

In further cross examination by Counsel for the 3rd and 4th Defendants, DW2 confirmed that the indenture from the city council was duly signed by the council. DW2 stated that he did not hire police to guard him when he was fencing the plot.

In re-examination, DW2 reiterated that he made all the payments for the plot and further, that he was not aware of conveyance held by the Plaintiff when he was transacting with the Council. DW2 averred that DW1 did not confirm that he was not the owner of the suit property and further, that the letter of 23rd March 2011 did not state that his title was fraudulent or illegally obtained. According to this witness, it was not necessary for him to trace the title since he had no doubt that the council was the owner of the suit property.

The 2nd Defendant called to witnesses namely Sammy Mabere Karani (DW3) and Joseph M. Kimuhu (DW4) who testified and relied on their witness statements dated 10th November 2011 and 26th August 2013 respectively. DW3 stated that he is the chief surveyor for the 2nd Defendant and has done survey work for approximately 28 years. He averred that his main work was to carry out survey for the county property and further, that he does not engage in private survey. His testimony is that they carried out a survey to confirm the existence of the suit property and applied for deed plans. It was the testimony of DW3 that after carrying out survey and issuance of the deed plan, the matter was referred to the legal department. DW3 produced the deed plan for the suit property as evidence.

During cross examination by the Plaintiff's advocate, DW3 stated that as a surveyor, he could not confirm the authenticity of ownership of a plot and further, that it was the legal department that referred properties for them to survey. While stating that the deed plan was prepared by his office, DW3 informed the court that he did not personally draw it. He confirmed that at the time the deed plan was being prepared, there was no title that had been surrendered. Further, DW3 stated that the survey they did was a re-establishment survey which is done after 30 years. According to this witness, the survey plan was done in 2008 and allotment letters had been issued in 1995. It is the testimony of DW3 that originally, the plots covered by the survey plan were owned by other people and further, that the plots in issue were all surrendered to the council by Mr. Silva as per the memorandum of surrender held in the lands office.

While being referred to a memorandum of registration of transfer dated 17th March 1967, DW3 stated that the council acquired ownership of the properties through a conveyance dated 28th February 1967 which was not available before the court. DW3 maintained that the memorandum of registration was conclusive that the suit property was owned by the Council. He however confirmed that the conveyance dated 30th October 1969 conveyed the land to the Plaintiff. This witness averred that the conveyance was registered in October 1969 and further, that the conveyance to the Plaintiff was from Danah Singh and not from De Souza. DW3 denied that there was a conspiracy to prepare fake documents and further denied negligence on his part in surveying the suit property.

In further cross examination by Counsel for the 1st Defendant, DW2 stated that the plot had been allocated to the 1st Defendant at the time he was carrying out the survey. In addition, DW3 stated that at the time of survey, the allotment had been verified by the Town Clerk's office and the valuation office. DW3 reiterated that the survey was to re-establish an already existing property and further, that he could not verify the authenticity of the ownership documents by the Plaintiff.

It was the evidence of DW3 that he was not the custodian of the title documents of City Council's properties. While stating that he could not recall whether the property was developed at the time of survey, DW3 informed the court that the 1st Defendant was shown the property after survey whereof he took possession. According to DW3, the survey was authorized by the Director of City Planning. This witness denied having known the 1st Defendant prior to the time of survey. DW3 reiterated that there was no conspiracy to give the 1st Defendant what he did not deserve.

In further cross examination by the 3rd and 4th Defendants' advocate, DW3 informed the court that he had worked with the City Council since 1985. According to this witness, the suit property was owned by the City Council at the time of survey.

During re-examination, DW3 stated that he only re-established the property in the normal course of his duties.

Joseph M. Kimuhu (DW4) also testified on behalf of the 2nd Defendant. His testimony was that he works at the City Hall valuation section and further, that he has worked at the valuation section for 36 years. He relied on his witness statement dated 26th August 2013 and stated that the Chief Valuer is the custodian of all Council's assets. He stated that according to their records, the suit property was under the name of the 1st Defendant and reiterated that the 1st Defendant was the registered owner.

During cross examination by the Plaintiff's Counsel, DW4 stated that he was a draftsman and not the Chief Valuer. He averred that he was not aware how the 1st Defendant came to be registered as the owner. Further, DW4 informed the court that they receive records from the lands office confirming ownership and further, that rates demands are generated from their office. DW4 averred that according to records, the suit property was surrendered by the owner, subdivided and allocated to the 1st Defendant. It was the evidence of DW4 that verification is normally carried out before new accounts are opened. While acknowledging knowledge of the city Council having transferred the suit property to the 1st Defendant, DW4 stated that he was not aware of how the property came to be owned by the council. This witness confirmed that he did not have **a copy of the conveyance of the suit property to the City Council.**

DW4 was further cross examined by the advocate for the 1st Defendant where he stated that the 1st Defendant was registered as a rate payer. DW4 denied knowledge of any other rate payer apart from the 1st Defendant. According to this witness, the original owner was the City Council. It was the testimony of DW4 that it is not possible for the same property to have 2 rate accounts in the system and further, that the rate account was in the name of the 1st Defendant.

During cross examination by Counsel for the 3rd and 4th Defendant, DW4 confirmed that the records at City Hall correspond with records held at the lands office. This witness marked the close of the 2nd Defendant's case.

Parties submissions:

Parties were directed to file written submissions and the Plaintiff in submissions dated 25th November 2013 reiterated the facts of the case as well as the testimony of witnesses before the court. Counsel for the Plaintiff referred the court to section 80 of the Land Registration Act and submitted that if the 2nd Defendant did not have a good title, there was no interest capable of being passed to the 1st Defendant. Counsel submitted that the Plaintiff was the lawful registered proprietor of the suit property and urged the court to find that the documents held by the 1st Defendant were fraudulent, null and void. The Plaintiff relied on the case of **Abiero -vs- Thabiti Co. Ltd & anor(2001)KLR 496** where the court held that fraud was a conclusion of the law and further, that where facts alleged in the pleading are such as to create a fraud, it is not necessary to allege a fraudulent intent.

The 1st Defendant in submissions dated 14th January 2014 replicated the acts and evidence and argued

that section 80(2) of the Land Registration Act protects the rights and interests of the 1st Defendant being the registered proprietor of the suit land in possession who had acquired the suit property for valuable consideration without prior knowledge of any omission, fraud or mistake.

Counsel for the 1st Defendant submitted that the 1st Defendant was not a party to fraud or illegality and further, that 1st Defendant did not have any knowledge of any fraud or mistake on the part of the 2nd Defendant and/or the 3rd Defendant in dealing with the suit property before allocation and transfer. The 1st Defendant also relied on the case of **Abiero -vs- Thabiti Co. Ltd & anor(2001)KLR 496** and counsel urged the court to dismiss the prayers sought by the Plaintiff and award damages to the Plaintiff against any party found to have been involved in any fraudulent or illegal action but not the 1st Defendant. In the alternative, Counsel urged the court to find that the 1st Defendant was an innocent purchaser for value without knowledge of the existence of previous registration in favour of the Plaintiff.

The 2nd Defendant filed submissions dated 27th January 2014 and reiterated the evidence adduced in court. It was submitted that the 2nd Defendant has custody of all council land and that in exercise of its duties, it issued allotment of LR No. 36/VII/260 in favour of the 1st Defendant. Counsel for the 2nd Defendant stated that the records kept and maintained by the 2nd Defendant indicate the 1st Defendant as the owner of the property and further, that the rates register reflects the name of the 1st Defendant.

The 3rd and 4th Defendants in submissions dated 3rd January 2014 replicated the evidence tendered and submitted that there is no evidence of collusion on the part of the Defendants to transfer the suit property to the 1st Defendant. It is the 3rd and 4th Defendants submission that the 1st Defendant acquired the property for valuable consideration from the 2nd Defendant. Counsel for the 3rd and 4th Defendants argued that the Plaintiff had failed to prove the fraud alleged. The court was urged to find that the 1st Defendant was allocated the property by the 2nd Defendant for valuable consideration without knowledge of previous claim by the Plaintiff and therefore, that the 1st Defendant was an innocent purchaser for value without any fraud or knowledge of any fraud. The court was also urged to find that each party does bear their own cost.

Analysis of the evidence and determination

I have summarized the evidence and the submissions of the parties in support of their various positions and I now turn to consider the import of the evidence on the issues that stand to be determined. The plaintiff and the 1st Defendant on 5th June, 2012 filed a statement of agreed issues which the 2nd, 3rd and 4th Defendants had not signed. The statement of agreed issues are set out as hereunder:-

1. Who between the plaintiff and the 1st Defendant is the lawful proprietor of the parcel of land known as **L.R. NO. 36/VII/260(org. NO. 36/VIII/36/8)**.
2. Whether the Defendants fraudulently conspired to transfer the parcel of land **L.R. NO. 36/VII/260(org.NO.36/VII/8)** in favour of the 1st Defendant. If so whether the title in favour of the 1st Defendant ought to be cancelled.
3. Whether the 1st Defendant was allocated land parcel **L.R. NO. 36/VII/260** by the 2nd Defendant for a valuable consideration without knowledge of any previous claim by the plaintiff over the same property and therefore the 1st Defendant is an innocent purchaser allottee without any fraud or knowledge of any fraud on his part.
4. Which registration is lawful and/or regular between **Vol. N37 folio 198/3 file 11642 and Vol.N89 Folio 240/1 file NO.26189**.
5. How did the 2nd Defendant acquire interest in **L.R. NO. 36/VII/260(Orig. NO. 36/VII/36/8** and whether such acquisition was regular and/or legal.
6. What orders should be issued in the circumstances and who should bear the costs of the suit.

The court agrees that broadly the foregoing are the issues that the court will be required to decide and to

do so a critical review and analysis of the evidence tendered by the parties is necessary.

The plaintiff testified and produced documentary evidence to show that he was registered as owner of the suit property pursuant to a conveyance dated 30th October 1969 as presentation **NO. 977 in VOL. N. 37 Folio 198/3 file NO. 11642**. This conveyance was from **Dhana Singh** for a consideration of Kshs.17,000/-. The property conveyed to the plaintiff by the said **Dhana Singh** is described in the conveyance as “.....**ALL THAT piece or parcel of land comprising naught decimal three one seven seven (0.3177) an acre or there abouts situated in the City of Nairobi (Eastleigh) in the Nairobi Area known as land Reference Number 36/VII/260(orig. NO. 36/VII/63/8) being the premises comprised in a conveyance dated the fifteenth day of July one thousand nine hundred sixty seven made between JOAO MATHA PLACIDO JOAQUIM LUCINDO DESOUZA VENASCIO SOCRATES DESOUZA TIMOTHIO CARIDADE DESOUZA and MARTINHO LEOPOLDO DESOUZA of the one part and the vendor of the other part and (registered in the government Lands Registry at Nairobi in volume N. 37 Folio 198/2) and more particularly delineated on Land survey plan number 45705 annexed to the indenture dated the twenty third day of February one Thousand nine hundred and fifty two and registered in the Government Lands Registry at Nairobi in Volume N. 37 Folio 198/1 and thereon bordered red.....**”

That conveyance traces the history of the suit property from 1952 when the suit property was gifted by **Plantaleao Assumcao Desouza** to the 4 persons who sold and transferred the suit property to **Dhana Singh** who subsequently sold the property to the plaintiff. The abstract of **folio 198 of Vol. N37** held by the Lands Office and which was produced in evidence by the plaintiff clearly shows all the transactions affecting the suit property and the transactions were as follows:-

- i. **1st Entry was the conveyance dated 23rd February, 1952 from Pantaleao Assumcao Desouza to Jao Matha Placido and 3 others registered on 1/4/1952.**
- ii. **2nd Entry conveyance dated 15th July 1967 to Dhana Singh for Kshs.5000/-.**
- iii. **3rd Entry conveyance dated 30th October 1969 to David Mutisya Makumbi the plaintiff herein for Kshs.17000/- registered on 31/10/1969.**
- iv. **4th Entry memo of equitable mortgage dated 10th April 1970 with Barclays Bank registered on 14/4/1970.**
- v. **5th Entry Memo of Discharge of equitable mortgage dated 2/5/1990 registered on 4/6/1990.**

The certificate of postal search dated 10/3/2011 furnished by the Registrar of Government Lands and which forms part of the plaintiffs documents shows that the plaintiff **DAVID MUTISYA MAKUMBI** is the current registered proprietor of a freehold interest in respect of **L.R. NO. 36/260/VII (Org. NO. 63/8)** and is registered on the register **VOL. N37 Folio 198/3 file 11642** and this registration tallies with the registration of the plaintiff's conveyance dated 30th October 1969 and the registration of the plaintiff's conveyance as entry NO.3.

On the basis of the evidence adduced by the plaintiff and the documentary evidence the plaintiff tendered I am satisfied the plaintiff was on 31st October 1969 registered as the owner and proprietor of **L.R. NO. 36/VII/260(orig.NO. 36/VII/63/8)**. The conveyance to the plaintiff on the face of it was properly executed, stamped and registered and by virtue of the registration as owner the plaintiff became the absolute and indefeasible owner of the suit property.

The 1st Defendant's claim to the suit property is on the basis of an allotment made to him by the 2nd Defendant and the subsequent conveyance from the 2nd Defendant dated 17th August 2007 registered on 31st August 2010 in **VOL N.89 folio 240 file 26189**.

The court has perused and reviewed the indenture of conveyance dated 17th August 2007 pursuant to which the 1st Defendant was registered as owner of the suit property and make the following observations:-

- i. The preamble under (a) refers to a conveyance dated 28th day of February 1967 between Assumpcao De Souza and the Nairobi City Council registered in Vol N2 Folio 288/6 file 7875 pursuant to which the Council became seized of several parcels of land including the suit property. This conveyance was not tendered in evidence by the 2nd Defendant or any of the other parties.
- ii. The preamble under (b) also refers to a conveyance dated 28th February, 1997 made between Plantalea Assumpcao De Souza of the one part and the City Council of Nairobi and the same is confusing as it is unclear what property it refers to and neither is the consideration referred to evident in the conveyance as indicated. There are no details of the registration of this conveyance and neither has a copy of the same been tendered in evidence by the 2nd Defendant or any other of the parties.

The property said to have been conveyed to the 1st Defendant by the 2nd Defendant in the conveyance of 17th August 2007 is described as:-

“ALL THAT piece of land comprising by measurement Naught Decimal Eight Nine four (0.894) acres or thereabouts being land Reference Number 36/VII/20 (Org. Number 63.5) in the City of Nairobi (Eastleigh) in the Nairobi District of the Republic of Kenya of the meridional District South A.37 and is a portion of hereditaments comprised in hereinbefore recited indenture dated twenty Eight day of February one Hundred Sixty seven being more particularly delineated on plan Number 45699 to the said indenture and therein bordered red...”

This property appears to be different from the one registered in the plaintiff's name which has area of 0.3177 of an acre being **land** Reference Number 36/VII/260 (Orig. Number 63/8) and is delineated on survey plan NO. 45705 of 3rd January 1951. Whereas the property conveyed to the 1st Defendant has an area of 0.894 of an acre.

The 2nd Defendant referred to a memorandum of registration of transfer of lands dated 17th March 1967 to support the contention that the suit property was conveyed to the Council by the conveyance dated 28th February 1967 but the instrument of conveyance was stated to be unavailable both at the City Council and at the Lands office. It is unclear whether the reference under the preamble (b) in the conveyance of 17th August 2007 to a conveyance dated 28th February 1997 was inadvertent since the particulars of the registration of this conveyance are not given. Without having the benefit of perusing the instrument of conveyance dated 28th February 1967 and/or the one dated 28th February 1997 recited in the conveyance of 17th August 2007 it is difficult to verify their contents.

However it appears strange that the said **Assumpcao De Souza** could in 1967 and/or 1997 purport to convey the same suit property which he had vide the indenture dated 23rd February 1952 conveyed to **Joao Matha Placido Joaquim Lucindo De Souza & 3 others** and which conveyance was duly registered on 1st April, 1952. The transferees in the 1952 conveyance transferred this same property to **Dhana Singh in 1967** who in turn transferred the property to the plaintiff herein in 1969. In my view the said **Assumpcao De Souza** did not have any proprietary interest in the suit property in 1967 which he could have transferred to the City Council. In 1967 the suit property was registered in the names of **Joao Matha Placido & 3 others** and they were the absolute and indefeasible owners of the suit property pursuant to the provisions of section 23 (1) of the Registration of Titles Act Cap 281 Laws of Kenya (repealed).

It is not disputed that the conveyance of 1952 from **Pantaleao Assumpcao Desouza** to **Joao Matha Placido & 3 others** and the conveyance of 1967 from the latter to **Dhana Singh** and the conveyance of 1969 from **Dhana Singh** to **David Mutisya Makumbi** (the plaintiff) herein were all registered. The Land Registrar **George Gichimu Gachihi** called as DW1 by the 3rd & 4th Defendants confirmed the registration as per the official search issued on 10th March 2011 showing the entries effected on the folio of the relevant volume. The abstract of title shows that at the time the conveyance dated 23rd February

1952 was being registered a new Folio in respect of **Vol. N2 Folio 288/5** was opened being **folio 198** meaning there could not have been a registration in Vol. N2 Folio 288/6 as the title abstract is clearly headed “**Transferred from Vol. N2 folio 288/5**”. Such that the next entry was to be “**folio 198/1**” which was the 1952 conveyance. The indenture of conveyance of 17th August, 2007 shows under preamble (a) that a conveyance dated 28th February 1967 between.....**Assumpcao De Souza** and the **City Council** was registered in **Vol. NO.N2 Folio 288/6 file 7875** when it is apparent that folio 288 was closed at **entry 5** and a new **folio 198** opened whereupon the conveyance of 23rd February 1952 was registered as entry **NO. 1 on folio 198**.

In my view having considered the evidence and the documents tendered in evidence I have come to the conclusion that there indeed was no conveyance dated 28th February 1967 that was executed by **Assumpcao De Souza** in favour of the City Council conveying the suit property or any other property to the Council and that may explain why no copy of such conveyance is available either at the council offices or the Lands office. No abstract of folio 288 was availed in evidence to show who signed entry **NO.6** on the folio. In my view it is probable that persons within the City Council in collusion with persons within the Lands office may have colluded to alienate the suit land on the assumption that the registered owner was unavailable.

It is further my view and holding that even if there was the alleged conveyance of 1967 by which the 2nd Defendant claims the suit property was conveyed to them that conveyance would have been ineffectual since as at that time the said **Assumpcao De Souza** did not have any proprietary interest over the suit property and could not convey any interest as he was not the registered owner of the suit property on 28th February 1967 when the alleged conveyance is said to have been made to the 2nd Defendant. If the said **Assumpcao De Souza** did not have any proprietary which he could have conveyed it follows that no interest on the suit property could pass to the 2nd Defendant and equally the 2nd Defendant did not have any interest which they could have conveyed and passed to the 1st Defendant by the conveyance dated 17th August, 2007.

I am on the basis of the evidence tendered by the parties in the suit and evaluation of the documents satisfied that the plaintiff has established and proved that as at 31st August 2010 when the 1st Defendant was registered as proprietor of the suit property the plaintiff held a valid title to the suit property which was duly registered. The registration of the 1st Defendant as proprietor was in my view unlawful and irregularly obtained as was the purported registration of the City Council of Nairobi as proprietor of the suit property in 1967. It matters not that the 1st Defendant may have been an innocent allottee and purchaser for value from the 2nd Defendant. The 2nd Defendant had nothing to allot or sell as they could not sell that which they never owned.

Whether the 2nd Defendant had an interest in the suit land capable of being transferred.

It has been conceded that by the time the 2nd Defendant was allocating the suit property to the 1st Defendant, the Plaintiff was registered as the owner of the suit property and that the title held by the plaintiff had not been surrendered. The Court of Appeal in **M’Mukanya -vs- Mbijiwe 1984 (KLR) 761** held that the Appellants in that case were not legitimate allottees of the disputed land, because at the time of the purported allocation of that land to them ,the local authority had no such land to allocate, as the same had been leased to the Respondent and which lease had not been determined. In this case, the 2nd Defendant had no land to allocate since the Plaintiff was already a registered proprietor and held title documents to the suit property. There is evidence that the plaintiff as at the time of the institution of this suit was so registered and had paid all dues to the 2nd Defendant.

Which among the titles held by the Plaintiff and the 1st Defendant should prevail?

In my view, even if the two conveyances produced in evidence appear to have been validly issued, the Plaintiff's conveyance should prevail being the first in time. In the case of **Gitwany Investment Limited**

v. Tajmal Limited & 3 Others (2006) e KLR the Hon. Justice Lenaola stated thus:-

“My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in Wreck Motors Enterprises vs Commissioner of Lands, C. A. No. 71/1997 (unreported): ‘.....Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by 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 procedural without fraud save for the mistake, then the first in time must prevail....’ ”

I approve of this holding by the learned Judge and in the instant suit I have no hesitation in holding that the title held by the plaintiff was first in time and the plaintiff being the holder of an absolute and indefeasible title his title could not be defeated by a subsequent title unless his title had been determined by application of due process of the law. To hold otherwise would be to sanction the deprivation of the plaintiff of his property without following due process.

Is the 1st Defendant an innocent purchaser for value without notice?

In my view, the 1st Defendant cannot hide under the cloak of an innocent purchaser for value without notice having admitted in his testimony in court that he did not carry out a historical search on the suit property because he had no doubt the suit property belonged to the 2nd Defendant. For one to claim to be an innocent purchaser, one must exercise reasonable due diligence particularly in regard to properties registered under the repealed Government Lands Act Cap 280 Laws of Kenya where no certificates of title are issued, title to property as relates to GLA titles is evidence by the production of the last conveyance and/or instrument. In the instant case it was incumbent on the 1st Defendant to insist on being furnished with a copy of the instrument that conveyed the suit land to the 2nd Defendant whether it was a surrender or a conveyance. This he did not do and it is no wonder not even the court has had the benefit to verify the contents of this conveyance. However even if the conveyance was available, the situation would not be any different as I have held that, that conveyance would not have passed any interest in the face of the title held by **Dhana Singh** which was subsequently transferred to the plaintiff for valuable consideration.

Before I conclude this judgment I acknowledge that the plaintiff in his plaint sought and prayed for award of general damages but during the trial the plaintiff did not adduce any evidence and or lay any basis to support the claim that he suffered any damages. In the result I took it that the plaintiff abandoned the quest for damages and will not make any consideration and/or findings on this prayer there being no basis upon which I can so do.

In the premises and by reason of all the reasons given above I am satisfied that the plaintiff has proved his case against the Defendants on a balance of probabilities. I accordingly enter judgment against the Defendants jointly and severally and issue orders in the following terms:-

- 1. The plaintiff is hereby declared to be the lawful registered owner of L.R. NO. 36/VII/260 (Original Number 36/VII/63/8).**
- 2. That the title document vide the conveyance dated 17th August 2007 for L.R. NO.36/VII/260(original Number 36/VII/63/8 issued to the 1st Defendant is illegal and null and void and the same is hereby ordered to be cancelled.**
- 3. A permanent injunction be and is hereby issued restraining the Defendants whether by themselves their agents and/or servants from alienating, selling, transferring, trespassing or in any other way, interfering with the plaintiff’s quiet possession of parcel of land known as L.R. NO.36/VII/260 (Original number 36/VII/63/8)**
- 4. The Defendants their agents and servants are directed to vacate and deliver vacant possession of land parcel L.R. NO. 36/VII/260 (Org.NO.36/VII/63/8) to the plaintiff forthwith failing which eviction to issue on application.**

5. Costs of the suit to be assessed and taxed by the taxing master of the court awarded to the plaintiff.

Judgment dated signed and delivered at Nairobi this day ...4thof April.....2014.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. wandati for Mutua.... For the Plaintiff

Mr. Gachimu For the 1st Defendant

MS. Fuchaka.....For 3rd and 4th Defendant.

N/A for 2nd Defendant.