



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO.999 OF 2001

MARY WANJIRU NJUGUNA.....1ST PLAINTIFF

SARAH KEMUMA OSIEMO.....2ND PLAINTIFF

VERSUS

THE REGISTRAR OF LANDS

THROUGH THE ATTORNEY GENERAL1ST DEFENDANT

JOSEPH MURIITHI NJERU.....2ND DEFENDANT

JUDGMENT

1. By a plaint dated 18th June 2001, the plaintiffs' Mary Wanjiru Njuguna and Sarah Kemuma Osiemo are seeking judgment against the 1st and 2nd defendants jointly and severally for;
 - a. a declaration that the registration of the 2nd Defendant herein as lessee to the property known as LR NBI/UMOJA/BLOCK 109/268/346 was illegal for fraud and void abinito,
 - b. an order directing the 1st Defendant herein the Land Registrar to cancel the registration of the 2nd defendant as lessee to the property and in its place have registered the 1st plaintiff or the 2nd plaintiff as the convenience may necessitate.
 - c. a permanent injunction restraining the 2nd defendant whether himself or through his agents and servants from interfering with the 2nd plaintiff's peaceful occupation of the property LR NBI/UMOJA/BLOCK 109/268/346.
 - d. That cost of the suit be borne by the defendant's jointly.

The plaintiffs in their plaint particularises fraud on the defendant's part at paragraph 15 (a) to (g);

- a. Recalling the lease certificate from the 1st plaintiff on alleged technical grounds that needed corrections and transferring the same to the 2nd defendant,
- b. By the 1st defendant registering the 2nd defendant as lease to the property without any transfer from the 1st plaintiff herein.
- c. By the 1st defendant registering the 2nd defendant as lease to the property without a lease approved and signed by the clerk and Mayor to the City Council as the lessors.
- d. By the 2nd defendant accepting to take the lease to the subject property knowing well that this interest therein if any had been extinguished by the court decree.
- e. By the defendants conspiring to stealing the property from the 1st plaintiff.

- f. If by the defendants conspiring to clandestinely remove a caution placed on the property by the 2nd plaintiff.
 - g. By the 2nd defendant taking a loan using the property as security and failing to make repayment.
2. The 1st defendant in his defence filed in court on 28th June 2005 denies the contents of the plaint as a whole and put the plaintiffs to strict proof. He also averred that this suit is bad in law for contravening the provisions of section 13A of the government Proceedings Act Cap 40 Laws of Kenya.
 3. The 2nd defendant filed defence on the 3rd August 2001. This defence was amended and an amended defence was filed on the 21st February 2013. He states in his amended defence that the 1st defendant has been improperly been sued in contravention of the Government proceedings Act Cap 40 Laws of Kenya. He denies that the 1st plaintiff was the owner of the suit property and avers that he is the 1st registered proprietor of the lease of the suit land and registration was done on 11th of February 1998.
 4. At paragraphs 11 (a) to (e) and 13 (a) and (b) the 2nd defendant particularises, particulars of irregularity, misrepresentation and fraud as follows;
 - a. The 1st defendant (Njuguna Njoroge) in HCCC No. 4539 of 1994 purported to consent to conveyance and registration of the suit premises after title had passed to the 2nd defendant and therefore he lacked capacity to enter into such consent.
 - b. The plaintiff and 1st defendant (Njuguna Njoroge) in HCCC No. 4539 of 1994 being, by all appearances happily married colluded to sue each other & transfer the suit property to the plaintiff & her first son Njoroge Njuguna without consent of the lessee who, like the son, were not parties of the suit.
 - c. The 1st defendant (Njuguna Njoroge) in HCCC No. 4539 of 1994 purported to enter consent with the 2nd defendant who had not appeared for the refund of purchase price of the suit property.
 - d. The purported decree was not signed by any of the sitting deputy registrar's.
 - e. The court file cannot be traced since the date of the alleged decree.

Particulars of fraud

- a. Obtaining a false affidavit from her husband purporting to transfer his lease to her.
- b. Causing the registration of a lease for the suit property in Block C which has only 225 parcels while the head lease for Block D under which the suit property falls had not been registered.

The 2nd defendant denies the particulars of fraud as particularised by the plaintiffs. The 2nd defendant has a counterclaim for loss and damage by way of loss of rent, mesne profits, depreciation of the suit premises & denial of the opportunity to develop the same & increase the rental income & the value of the suit premises. He also seeks special damage for accrued rent to date of Kshs.2, 644,000/-. He seeks judgment entered against the plaintiffs jointly & severally on his counter claim for:-

- a. A declaration that the 2nd defendant is the rightful & lawful lessee of all that parcel of land known as Title No. Nairobi/Umoja Block 109/268/346 & all developments thereon.
- b. An order for the plaintiffs to deliver vacant possession of Title No. Nairobi/Umoja Block 109/268/346 to the 2nd defendant failing which the 2nd defendant be at liberty to evict the occupants thereof with the assistance of the officer in charge of police Division, Buru Buru.
- c. Special damages of Kshs.2,644.000/-
- d. General damages including mesne profits up to the date of delivery of vacant possession or

- eviction.
- e. Costs and Interest.
5. The plaintiff's case is as follows; Njuguna Njoroge the husband of the 1st plaintiff entered into a tenant purchase scheme with Nairobi City Council to purchased suit property Umoja 1 estate house No. D84 around 1974-1975 as family property. He was given vacant possession in 1975 and stayed there with his family. On the 4th December 1992 he signed an agreement with the 2nd defendant Joseph Muriithi Njeru who was to purchase the property at Kshs. 530,000/-. According to Njuguna Njoroge the 2nd defendant paid him Ksh.140,000/- and he was to be given a motor vehicle valued at Kshs. 230,000/- , the balance of kshs.160,000/- was to be paid after all the transfer documents were signed and the 2nd defendant was to take possession after signing the agreement. That the terms of these agreements were not fulfilled and they continued to stay in the premises. That after Njuguna signed the agreement the 1st plaintiff discovered that he had sold the property. She moved to court and filed HCCC No. 4539/94 where she was the plaintiff, Njuguna was the 1st defendant and Joseph Muriithi Njeru was the 2nd defendant. Joseph Njeru did not enter appearance in the said suit and subsequently they entered the consent orders as follows;
- i. That the second defendant having failed to enter appears and/or file defence after due service the plaintiff and 1st defendant consent that the suit premises namely P1 No. Umoja 1 House D84 or its referral subsequent title to be and is hereby conveyed to and registered in favour the plaintiff and her first son Njoroge Njuguna to be in trust on their behalf and all the other children of plaintiff's family.
 - ii. That the first defendants do refund to the second defendant all monies received as purchase price.
 - iii. That the costs of this suit agreed at kshs.30, 000/- to the plaintiff.
6. Njuguna Njoroge testified that he refunded Kshs. 200,000/- the money paid by the 2nd defendant to the lawyer Mr. Njeru who did not give him a receipt. Subsequently they advertised the property for sale in the Daily Nation of 21st of March 1997 and the house was bought by the 2nd plaintiff Sarah Kemuma Osiemo and her husband for Kshs.1,000,000/-. The sale agreement was drawn on 25th March 1997. According to Njuguna Njoroge at this time the house was in the name of his wife Mary Wanjiru Njuguna. That after the Court decree in the suit 1st plaintiff had filed City Council dully transferred the property to the 1st plaintiff's name. Mr. Alfred Osiemo testified that he visited the office of M/s Musyoka Annan Advocates where he saw a lease in the name of the 1st plaintiff which he signed by then he had visited the premises. A transfer of this was signed on the 30th of July by the 2nd plaintiff and the 2nd plaintiff moved into the premises at the end of March 1997. Three months later the 2nd defendant accompanied by other persons went to the house to enforce an eviction order against Njuguna. That at the intervention of a neighbour an agreement was signed between the 2nd plaintiff's husband Mr. Osiemo and the 2nd defendant. According to the 2nd plaintiff and her husband they have been in possession since then.
7. Njuguna Njoroge testified that after the lease was issued to the 1st plaintiff the District Land Registrar wrote to them stating that the title was wrong and requested the 1st plaintiff to surrender the title for cancellation. They decline to surrender the title. After the land registrar listened to the evidence they decided to cancel the 1st defendant's name the land registrar cancelled the lease his wife had been given. As this went on Joseph Njeru proceeded to the Rent Tribunal on the basis that they were not paying him rent and the tribunal ordered they be evicted, however they were never evicted. They vacated the house in 1997.
8. The plaintiff produced a bundle of documents to support the evidence.
9. The defence called 4 witnesses. Dw1 was Mr. Musyoka Annan, Dw2 was Peter Kihio a land Registrar, and Dw3 was Joseph Muriithi Njeru the 2nd defendant. Dw4 was Patrick Wachira Mambo and Dw5 was Peter Njeru Mugo. Dw6 was Antony Njoroge Gicheha.
10. The 2nd defendant (**Dw2**) testified that he met Njuguna in 1992 and Njuguna offered to sell to him his house in Umoja 1 D84 at kshs. 530,000/-. They had an agreement. He was to sell a vehicle to Njuguna for Kshs. 230,000/- the balance was to be paid over a period of six months. Njuguna took

possession of the vehicle. They prepared an assignment and thereafter the transaction was prepared by city council at their meeting of 2nd March 1993. The transaction has never been reversed. Njuguna asked him to stay on as he was constructing a house at Kutus and they agreed he would be a tenant paying rent of KShs. 2000/- per month. That he completed paying the balance of the purchase price. At the end of six months he asked Njuguna to vacate and between 1992 and 1997 they were in court as he tried to get Njuguna to vacate the house as he wanted to move in. Being a protected tenant he went to the Rent Restriction Tribunal to obtain an eviction order and he got one. He learnt that Njuguna had leased the property to a tenant whom he evicted on the 22nd of July 1997. He put 2 of his employees and guards at the premises. Later he met Mr. Osiemo and his brother who told him that they had bought the property from Mary Wanjiru Njuguna. His title by then was being processed in the office on Mr, Musyoka Annan. That Osiemo also claimed they had a title. He had the original agreement. He also reported the matter to the police and Njuguna and the 1st plaintiff were arrested. In 1993 the 1st plaintiff took him and Njuguna to court in civil suit no. 5913 of 1993 but the suit was later withdrawn in 2001. On the 26/7/97 the Osiemo's forced their way back into the property. Thereafter he perused the matter through Mr. Musyoka Annan and City council. He got to know from Mr. Annan's office that the buyer had brought in documents and a decree to transfer the property from Mary Njuguna to the buyer. He had never been served with the said pleadings in HCCC 4539 of 1994. He came to court to confirm the order and the said court file was not found. The decree was not used to process the 1st plaintiff's title. According to the 2nd defendant the 1st plaintiff was very aware of the sale D84 to him. That property no. Nairobi Block/109/1/346 is nonexistent and a creation of the 1st plaintiff and her husband, that there are no minutes that Njuguna transferred the property to his wife. Later he went to the lands office and had his title registered as Nairobi Block 109/1/346. He used the legal process to remove the caution the 1st plaintiff had placed on the property. That he has a valuation that his loss is estimated at KShs. 2,068,000/=.

11. **DW1** Mr. Musyoka Annan testified that he was to prepare and register instrument of title in the form of leases for the property known as Umoja estate in Nairobi and is familiar with house No D84. That the instruments of the title were processed in his office. That in February 1997 Mr Njuguna and his wife Mary went to his office and requested him to prepare instruments of title to the property known as D84. Mr Njuguna produced a letter of allocation from City Council together with their identity cards and requested the title be in the wife's name. Documents were prepared in his office but inadvertently the documents were sent to City Council with the documents for block C whose head title had come out as Nairobi/Block 109/1 and the property known as D84 was mistakenly given a number as Nairobi/Block 109/1/346. At this time the head title to Block D had not been issued by the Commissioner of Lands. In June 1987 Joseph Njeru the second defendant went to his office and sought registration of the property D84. When he called for the file of Mr Njeru he realised that another file on the same property had been opened and therefore decided to verify the real owner. He informed Njeru who insisted that he had bought the property from Mr Njuguna. He checked with the conveyancing department and one Mr Irungu confirmed to him that Mr Njuguna had transferred the property to Mr Njiru during the period between 1992-1993 and that assignment had been approved by Nairobi City Council and recorded in the minutes for the month of March 1993. On 29th July 1997 in furtherance of the inquiry he received a letter from the City Council of Nairobi to cease any action on the property D84 as apparently there was litigation going on between Mr Njeru and Mr Njuguna. In August 1997 he received information that the property had been registered in the name of Mary Wanjiru Njuguna. He immediately rushed to City Council lands department and ascertained that indeed the property had been registered as such. Later he sought advice from Mr Kiriago the land registrar who advised him to write and see a cancellation of the title of Mary Wanjiru. They were summoned through a Notice dated 5th September 1997 to appear before the district land registrar so that both sides could be heard. The Notice was for the hearing of the title. After the hearing the lease that was issued to the 1st Plaintiff was cancelled and the new title was issued in the name of Joseph Muriithi Njeru title No Nairobi /Umoja/Block 109/268/346.
12. Peter Kihiro (**DW3**) a land registrar testified that they received a letter from Mr Musyoka Annan challenging the validity of the title and they summoned Mary Wanjiru to their office to show cause why their title should not be cancelled. She did not appear but sent an advocate. The

outcome was that the title had no legal basis as it was registered against the head title lease of Block C while it was Block D. There has been no objection to their ruling. The title was being called for cancellation because it was registered against the head title. Mr Musyoka was later advised to prepare documents and present them in the proper head lease as per the ruling. The head lease number for Block D was 109/268 followed by the parcel number and Block C was Block 109/1 followed by the parcel number.

13. Patrick Wachira Mambo (**DW4**) recalled that on 26th July 1997 he witnessed an agreement between Alfred Osiemo and Joseph Njeru concerning a dispute over house number D84 in Umoja estate. By then he was the chairman of Umoja 1 Residence association D zone. At that time none were resident in the house. The agreement led to him retaining the keys to the house but he does not know how the office was opened later.

14. Peter Njeru Mugo (**DW5**) former Chief Magistrate and Deputy Registrar now practising advocate testified that part of his work as a deputy registrar was to sign decrees. That the signature in the decree of HCCC No 4539/1994 is not his signature thus the signature on the document is forged.

15. Anthony Njoroge Gicheha (**DW6**) a valuer by profession. He testified that he was instructed by the second defendant to prepare projected rent estimates for a residential property at Umoja 1 House D84. He did so on the 14th April 2009 the period he considered was 1996 December 2009 and the total amount he arrived at was Kshs 2,068,000/-, estimates to December 2012 is Kshs 2,644,000/- **SUBMISSIONS**

16. The plaintiffs discussed four issues in their submissions as follows:-

- i. Did the 1st plaintiff hold the legal right to the property.
- ii. Was the reality of the court order recognised by the 2nd defendant
- iii. Was the cancellation of the 1st Plaintiff's certificate of lease lawful
- iv. What was cancelled
- v. Are the plaintiffs entitled to the prayers sought.
- vi. Notice and Limitation, are they applicable.
- vii. Whether the 2nd defendant is entitled to the prayers in the counterclaim
- viii. Costs.

17. In summary these are the plaintiffs' submissions in brief is that; the plaintiffs husband held the property in trust for the family, the second defendant did not challenge the decree in HCC No 4539 of 1994 though he was aware of it, Mr Musyoka who handled the transactions affecting the property knew of the disputes between the parties. Mr Mugo did not assist in verifying the decree, a court order is superior to city council resolutions, that the fact that the lease was not in both the 1st plaintiff and her sons name is an error which only calls for rectification of the title names and that the 1st plaintiff properly acquired title to the property and had the right over it. That under section 142 of the Registration of Lands Act, Cap 300 (now repealed) the registrar has powers to correct errors only and not to change ownership which is the power of the High Court; only city council could cancel a lease being the lease holder. That limitation does not lie as there has been a continuous and on-going dispute between the parties. That this suit was not filed during the pendency of HCCC No 5913 of 2008 which has been withdrawn. That the issue on notice had been declared unconstitutional and relied on the case of HCCC No 504 of 2008. That under section 143 cap 300 (now repealed) fraud does not grant cancellation even if it is the first registration. That the 2nd Defendant was not the first registration as the suit property was first registered in favour of the plaintiff. That the certificate of lease does not bequeath title and since the land belonged to the City Council it is the council that bequeaths title and ownership. The city council never cancelled the 1st plaintiff's title. On damages counsel submitted that the 2nd defendant cannot sue for damages from the plaintiff as he had no privity of contract with him in the transaction and that there is no proof of rent lost. That costs should be awarded to the plaintiffs. The plaintiff cited the cases of Karanja-vs- Karanja (2008)1 KLR GG &F 170,N-vs-N (2008) 1 KLR G &F 178 on the issue of trust .The case of Ramesh Popotlal Shah-vs- National Industrial Credit Bank Ltd [2005] e KLR on the effect of a court order.

18. The 1st Defendant filed its submissions on 22nd November 2012. In its submissions it submitted 20 issues summarised as follows; that the plaintiff did not comply with section 13(A) of the

Government Proceedings Act ,that this suit was not filed during the pendency of HCCC No 4539 of 1994,that the suit property was the matrimonial home of the 1st plaintiff, that by entering a sale agreement with the 2nd defendant the 1st Plaintiff's husband legally transferred all his rights ,title and interest to the 2nd Defendant. That the plaintiff obtained a valid decree for the cancellation of the transfer to the 2nd defendant based on what DW4 told the court that the signature on the decree looked like the one for the other Deputy Registrar. That the decree obtained in HCCC No 4539 of 1994 was a nullity, void ab initio and tainted by irregularity as the 2nd defendant was never given an opportunity to be heard in court. That the lease issued by the 1st Defendant to the plaintiff was valid. That after the hearing before the land registrar the lease to the 1st plaintiff was cancelled due to irregularity and a proper lease LR No Nairobi/Umoja/Block/109/268/346 issued to the 2nd defendant. That the land registrar testified that the lease was recalled as it was wrongly registered and that since the 1st plaintiff's title was cancelled she lost her interest and right in the property and she could not pass title to the property to the 2nd plaintiff.

- 19.The 2nd Defendant filed his submission on 4th February 2013.His submissions are as follows; that the plaintiffs' suit is incompetent against the 1st Defendant and should be dismissed on the grounds of being sued wrongfully with regard to that fact that no notice of intention to sue was served upon the 1st Defendant. That this suit was filed on 18th June 2001 while HCCC NO 4913 OF 2993 was withdrawn on 28th June 2001 which offends Order 4 Rule 1 of the Civil Procedure Rules, that the suit property is not matrimonial home as it was never registered in the 1st plaintiff's husband's name. That the 1st plaintiff's husband didn't make any direct claim with regard to the suit property, that HCCC NO 4539 of 1994 has been shown to be non-existent by Mr Musyoka Annan who was the Nairobi City Council lawyer handling the material transaction. That the purported decree other than being forged is tainted by fraud that the 2nd defendants lease is indefeasible as per section 143 of cap 300 [now repealed], that the 2nd plaintiff's suit does not disclose any cause of action against the 2nd defendant and that the 2nd defendant is entitled to the prayers he has sought.
- 20.Having considered the pleadings, evidence and submissions the court shall now determine whether the parties are entitled to the prayers sought in their pleadings. Evidence adduced which is not in dispute is that the 1st plaintiff's husband Mr. Njuguna Njoroge entered into a tenant purchase scheme with Nairobi City Council and became the leasee of Nairobi city council on property known as Umoja 1 Estate House No D84 .That on the 4th December 1992 Njuguna Njoroge entered into an agreement with the 2nd defendant to sell the said property. According to the agreement, the purchase price was Kshs 530,000/-.The vendor acknowledged receipt of Kshs 230,000/- being part payment of the purchase price paid by way of a motor vehicle registration No KAB 255P that was to be transferred to the vendor and cash of Kshs 40,000 and Kshs 100,000/- by bankers cheque. According to Njuguna the money was paid but he was not given the vehicle. The 2nd Defendant on the other hand claims that a transfer was done and signed by the person whose name appeared on the certificate at that time and that he paid all the monies. Evidence of the transfer the said motor vehicle was not adduced to establish that Njuguna indeed took possession of the vehicle. Going further, there is evidence that a suit was filed by the 1st plaintiff against her husband Njuguna and the 2nd defendant and subsequently the 1st plaintiff and her husband entered consent to have the suit property transferred to herself and son and Njuguna to refund the money. A decree was obtained which was challenged by the 2nd defendant when he claimed that he was not a party to the suit. I note that there are pleadings of HCCC 4539 of 1994 and a decree from the said suit. The court file could not be traced and when Mr Mugo was cross examined on the authenticity of his signature on the decree he stated that it wasn't his. In order to make a finding on the decree it was necessary that either party adduces expert evidence on whether the signature in the decree was that of Mr. Mugo.
- 21.Evidence on record shows that after the consent order in HCCC No 4539 of 1994 the 1st Plaintiff obtained a Certificate of lease from Nairobi City Council for title No Nairobi/Block 109/1/346 dated 29th July 1997 which she obtained after they presented themselves before Mr Musyoka advocate to have the property registered in her name. Evidence on record shows that on 25th

March 1997 the 1st plaintiff and the 2nd plaintiff entered into an agreement to buy the suit plot. Around July 1997, the 2nd defendant proceeded to the Rent Restriction Tribunal and obtained eviction orders dated 16th July 1997 and within the same month he discovered that 1st plaintiff had sold the property to the 2nd plaintiff. From then on the two parties the 1st plaintiff and her husband went to Mr Musyoka's office and Mr Musyoka discovered that the 1st Plaintiff had obtained a title that had the title number erroneously indicated in her lease certificate as Nairobi/Block 109/1/346, that Block 109/1 was for Block C and not D. It is not in dispute that as a result of this, the parties were summoned by the lands registrar after Mr Musyoka wrote his letter dated 11th August 1997, 15th August 1997 and swore an affidavit. In his letter dated 11th August 1997 addressed to the Lands Registrar he states out as follows;

“We have instructions from City Council of Nairobi for the preparation and registration of Lease for Umoja Estate. Lease documents in the name of Mary Wanjiru Njunguna of P.O Box 59722 Nairobi in respect of LR No 109/1/346 were apparently forwarded to you for registration. We hereby inform you that no such registration should be effected by you because:-

- a. ***That the RIM to Block D has not been amended yet and therefore the parcel listed as 346 is not in the area list for Block 109/1 which is exclusively for Block C.***
- b. ***That the perimeter survey to Block D is not complete and therefore no parcel in the said Block is as yet Registable although the cadastral survey is complete.***

We hereby notify you that no parcel from Block D should be registered until all the necessary surveys are perimeter numbers have been completed. In the event that the parcel listed as 109/1/346 has indeed been registered we hereby inform you that you should cancel the said registration and ensure that no transactions in the same are registered”.

22. The contents of the of this letter was reiterated in the letter dated 11th August 1997 and Mr Musyoka's affidavit deposed on 15th August 1997. There is also another letter dated 19th August 1997 addressed to the 1st Plaintiff by the District Lands Registrar stating that ,

“I hereby give you 30 days' Notice to surrender the certificate of lease issued to you on 29th July 1997 as the lease was wrongly prepared and consequently registered”

There is also the ruling of the District land registrar dated 26th November 1997 which read as follows,

“I heard Mr Musyoka and counsel for Mr and Mrs Njuguna and this is my ruling. This matter has created a lot of heat for a mistake which can be corrected and ought to be acted on immediately. My summons to Mrs Njuguna were clear in that she was required to attend and show cause why the title issued to her should not be cancelled. She has however sent her counsel to represent her without proper instructions .The title for block D i.e Block 109/1/346 cannot be legal as it has no basis. The R.I.M has not been amended which in law renders any title for Block D null and void. Mr Musyoka should initiate the correction of a mistake which emanated from his office by drawing up fresh documents in the name of the proper owner for House No D84 present them for execution by the mayor and then present them finally to this office for the issuance of title. Similarly, Mr Musyoka should proceed and have the RIM for Block D amended as required. Title issued to Mary Njuguna was an extension of a mistake which ought not to be allowed to persist on record. Safe for such orders in the contrary I believe that Mr Musyoka should present documents to the office for registration since the title issued to Mary W Njuguna is of no consequence”.

23. My reading and understanding of these letters and ruling is that the title that had been issued to the 1st Plaintiff had an error which was to be rectified once she submitted the lease back. It is evident

that the Land registrar ruled that the lease certificate the 1st plaintiff had no legal basis and directed Mr Musyoka to initiate the correction of a mistake which emanated from his office by drawing up fresh documents in the name of the proper owner for House No D84, present them for execution by the mayor then proceed and have the RIM for Block D amended as required. Instead of having the RIM amended for block D as directed Mr Musyoka processed the title No Nairobi/Umoja/Block 109/268/346 in the names of the 2nd defendant James Muriithi Njeru. The argument raised that this was done because Njeru had all the papers from the city council that he had bought the property cannot stand. What Mr Musyoka should have done is to have the error that was on the 1st plaintiff's title rectified and not to process the registration of title held by the 2nd Defendants. Further it is my view the 2nd Defendant failed to establish he fulfilled the terms of the agreements they had with Mr Njuguna, as there was no evidence of transfer of the motor vehicle as consideration of the agreement and it is Mr Njuguna's evidence that the money was refunded to Mr Njeru as exhibited in the letter dated 7th May 1996 in which the late Mr Njeru Karanja advocate acknowledged receipt of Kshs 200,000/- of their client being a refund of the house No 84D Umoja Estate. Therefore the registration of the title of the 2nd Defendant as lessee to the property known as LR Nairobi/Umoja/Block 109/268/346 was irregularly done. The land registrar under section 142 of the RLA had the powers to rectify the register or any instrument presented in cases of error or omission. This is a procedure that was not followed by Mr Musyoka who had the conduct of both transactions when the parties appeared before him. The error in the title that was held by the 1st Plaintiff which had been issued and is not challenged as being valid should have been rectified the proper title number under Block D, as it is in evidence that the title she held was for Block C. I therefore find that the plaintiff's claim that the land registrar registered the 2nd defendant as lessee of the property without proper transfer to her stands. There was also no evidence on the land registrar while registering the 2nd defendant had an approved sign of the mayor and clerk. As per the letter dated 5th February 1997 Mr Musyoka detailed the documents to be presented by Mr Njuguna one being the lease approval of Nairobi City Council .I also note that in the ruling of the registrar he did not specify whose name would be on the title. What is stated was that the title issued to the 1st Plaintiff had no consequence which to my understanding does not mean that she was not the owner of the property. It is evident that with this scenario the 1st Plaintiff was indeed unable to complete her obligations to the 2nd plaintiff under the sale agreement by failing to give her proper title to the said property. I am persuaded that the 2nd plaintiff was a purchaser for value without notice and that she bought the property and paid the 1st plaintiff the full consideration as evidence by the cheques exhibited in the plaintiffs bundle. Having found that there was an irregularity in the manner in which the 2nd defendants title was obtained I find that the plaintiff is entitled to the order of declaration that the registration of the 2nd defendant lease to property known as LR Nairobi /Umoja/Block 109/268/346 was void ab initio. I therefore direct the Land registrar to cancel the registration of the 2nd defendant as the lessee to the property and register the 1st plaintiff Mary Wanjiru Njuguna as the lessee of LR Nairobi /Umoja/Block 109/268/346.

24. The 2nd plaintiff is in possession, there is evidence that the 2nd defendant sought her eviction, to protect her interest and peaceful occupation, I grant a permanent injunction restraining the 2nd Defendant whether by himself or through his agents and servants from interfering with the 2nd Plaintiff's peaceful occupation of the property LR Nairobi /Umoja/Block 109/268/346.
25. The plaintiff's suit against the 1st defendant shall fail for reasons that at the time this suit was filed, the mandatory statutory requirement was to file notice as provided under section 13 (A) of the Government Proceedings Act. My attention has been drawn to the judgment of Justice Majanja, however the Act has not been repealed. The suit against the 1st Defendant is dismissed with costs.
26. The 2nd Defendant alleges irregularity, misrepresentation and fraud. He mainly dwells on the decree of HCC No 4539 of 1994. I note that the court file could not be traced however the evidence adduce on the authenticity of the signature of the Deputy Registrar is insufficient. With my findings on the 1st Plaintiff's claim the counterclaim filed by the 2nd Defendant cannot stand as I

have declared that the title for the property that he has was irregularly issued. His claim for title, special and general damages including mesne profit and vacant possession fails and his suit is dismissed with costs to the 1st Plaintiff.

Orders accordingly.

Dated, signed and delivered this 28th Day of November 2013.

R. E. OUGO

JUDGE

In the Presence of:-

.....1st Plaintiff

.....2nd Plaintiff

.....1st Defendant

.....2nd Defendant

.....Court clerk