



**RAVI PRINJA AHAMED NASSER:.....:PLAINTIFF**

**VERSUS**

**ROZANE INVESTMENT :.....:1<sup>ST</sup> DEFENDANT**

**DOLLINE AUCTIONEERS:.....:2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiffs Ravi Prinja and Ahmed Nasser moved to the seat of justice and filed a plaint dated the 24<sup>th</sup> day of September, 1995. The plaint is directed at one Razane Investment one limited as the first defendant and Dolline official court Brokers as the second defendant. A reading of the entire plaint reveals that the plaintiffs were aggrieved with the actions of the defendants leading to the filing of these proceedings because:-

(i) The second plaintiff Ahamed Nasser was at all material times prior to the onset of events leading to the filing of these proceedings the owner and registered proprietor of land parcel known as LR. NO. 209/5919/9 situate on Manyani Road Nairobi while the first defendant was the occupier of the said premises with the knowledge, consent and approval of the 2<sup>nd</sup> plaintiff.

(ii) The first plaintiff used to pay all outgoings on the said property to the city council of Nairobi as and when these arose and it is their assertion that none were outstanding as at the time the City Council of Nairobi purported to sale the suit property to one Zaverchand Ramji Shah.

(iii) The peaceful and quiet occupation of the first plaintiff of the suit property was interrupted when the City Council of Nairobi allegedly moved to the subordinate court and filed civil suit number Nairobi CMCC 15/1987 seeking orders of court to enable it auction the suit property on account of outstanding land rates.

(iv) The plaintiffs had no knowledge of the said proceedings as they were never notified of the same leading to the issuance of the exparte orders authorizing the sale of the suit property by way of auction.

(v) In pursuance of the said exparte orders granted in CMCC number 15/1987 the City Council of Nairobi purported to sell the suit property in a purported Public Auction that never was to one Zaverchand Ramji Shah.

(vi) The second plaintiff moved to the same CMCC NO. 15/1987 and filed an application seeking review and the setting aside of the said exparte orders authorizing the City Council of Nairobi to auction the suit property which application was dismissed giving rise to the filing of Nairobi HCCA No.159 of 1993 between Ahamed Nasser as the appellant and the City Council of Nairobi as the Respondent which appeal remains undetermined to the present day.

(vii) During the pendency of appeal No. Nairobi HCCC No.159/1989 Nairobi HCCC Number 2484/1989

was filed and the plaintiffs obtained a prohibitory order therein prohibiting transfer or assignment or other dealings from being registered against the said Title.

(viii) One Zaverchand unlawfully obtained an ex parte raising order raising the prohibitory order without notice to the plaintiffs. The prohibitory order was signed and certified on the 27<sup>th</sup> day of June, 1995 but it does not indicate which Judge of the Honourable Court had granted the order.

(ix) The unlawful raising of the prohibitory order paved the way for the unlawful illegal and irregular transfer of the suit land from Zaverchand Ramji Shah to the first defendant despite the said Zaverchand having knowledge that the proceedings both in Nairobi HCCC number 2484 of 1989 and Nairobi HCCA 159/1993 were still pending determination.

(x) Upon raising of the prohibitory order in HCCC 2484/1989 one Zaverchand sold the suit property to the first defendant and it is on the basis of the said sale and transfer which propelled the defendants to serve notice to vacate the premises to the first plaintiff or else face eviction. The notice was served on a Friday afternoon on the 22<sup>nd</sup> day of September, 1995 purposely to deny the first plaintiff to seek and obtain an intervention court order.

(xi) They contend they contest the transfer of the suit property to the first defendant as the same is not protected by virtue of the provisions of section 52 of the transfer of property Act of India which is applicable to the suit land which is registered under the Registration of Titles Act cap 281 of the laws of Kenya.

In consequence thereof the plaintiff sought from the court four orders namely:-

**(A) An injunction to restrain the defendants orders and any of them by themselves, their servants or agents or otherwise howsoever from evicting the first plaintiff from the suit premises known as LR.209/5919/9 situate at Manyani Road Nairobi or otherwise howsoever interfering with the quiet enjoyment by the first plaintiff of the said suit property.**

**(B) Such further or consequential orders as this Honourable Court deems fit.**

**(C) The costs.**

The defendants filed a defence and counter claim dated the 24<sup>th</sup> day of June, 1996 in summary the defendants averred that:-

(i) It is correct that the second plaintiff was the registered proprietor of the suit property before it was auctioned by the City Council of Nairobi to one Zaverchand Ramji Shah in a Public Auction conducted by M/S Capital Auctioneers on 11<sup>th</sup> May, 1989.

(ii) That the 2<sup>nd</sup> plaintiff ceased being an owner of the suit property upon the auction of the property to Zaverchand and eventual transfer of the suit property to one Zaverchand who transferred the same to the first defendant.

(iii) To them the transfer of the suit property from one Zaverchand to the first defendant was lawful and passed on a good Title as there were no pending court actions challenging the sale of the suit property from Zaverchand Ramji Shah to the first defendant considering that existence of Nairobi HCCC No.159 of 1993 was irrelevant and in consequential to the transfer of the suit property from Zaverchand Ramji Shah to the defendant.

(iv) They concede having issued to the first plaintiff a notice to vacate the premises or else he faces eviction. The notice was issued through the 2<sup>nd</sup> defendant and to them issuance of the notice was justified because the 1<sup>st</sup> defendant was the lawful owner of the suit property, the raising order raising the prohibitory order in Nairobi HCCC 2484/1989 had been lawfully and regularly obtained, the first

defendant had obtained Title from Mr. Zaverchand Ramji Shah who was the bonafide purchaser of the property at the Auction and the first defendant had acquired the said Title for value after paying Kshs.6,000,000.00 for it.

(v) The provision of section 52 of the transfer of property Act of India does not apply because as at the time the plaintiffs moved to court to initiate these proceedings, the suit property had already lawfully passed from the 2<sup>nd</sup> plaintiff to one Zaverchand Ramji Shah through the auction and from the said Zaverchand Shah to the first defendant through willing buyer/willing seller process.

In their counter claim the defendants reiterated the content of their defence and added that the first plaintiff has continued in illegal occupation of the suit property since 26<sup>th</sup> day of June, 1995 when ownership of the suit property passed from Zaverchand Ramji Shah to the first defendant. Upon the vesting of the said property in the 1<sup>st</sup> defendant made the first plaintiffs' continued stay in the suit property illegal, unjust, unfair and has resulted in loss being occasioned to the first defendant from the first day of July,1995 to date. The dependants went on to assert that they have a good Title over the suit property because all the processes prior to and after the sale and transfer of the suit premises from Zaverchand Ramji Shah to the first defendant were lawful and by reason of this the first defendants' Title to the suit property is valid and the first defendant should be at liberty to evict the first plaintiff forthwith and take over possession at its property.

In consequence thereof, the defendant sought the following reliefs from the court:-

**(a) The plaintiff's suit be dismissed with costs.**

**(b) A declaration that the 1<sup>st</sup> plaintiffs continued occupation of the suit premises, without the consent and/or approval of the 1st defendant from 26<sup>th</sup> June, 1995 is illegal, unjust and unfair.**

**(c) A declaration that the 1<sup>st</sup> defendant is the lawful and bonafide proprietor of the suit premises to the exclusion of all other persons including the first plaintiff.**

**(d) A declaration that all processes prior to and subsequent to the sale and transfer of the suit premises to the 1<sup>st</sup> defendant were lawful.**

**(e) That the defendants be at liberty to forthwith evict the 1<sup>st</sup> plaintiff from the suit premises.**

**(f) That the first plaintiff do pay to the 1<sup>st</sup> defendant sums in respect of loss of rental income on the said house from 1<sup>st</sup> day of July, 1995 to date and the 2<sup>nd</sup> plaintiff to pay the 1<sup>st</sup> defendant deferred interest on the purchase price from the date of payments thereof to the date of actual possession of the suit premises.**

**(g) General damages for inconvenience anxiety and frustration caused in the attempt to take possession of the suit premise.**

**(h) Costs of the suit.**

**(i) Interests on (f) (g) and (h) above at court rates.**

**(j) Such further orders or consequential orders as this Honourable Court shall deem fit to grant.**

In the reply to defence and defence to counter claim dated 25<sup>th</sup> day of November, 1996, and filed on the 26<sup>th</sup> day of November, 1996, the plaintiffs denied the content of the defence and joined issue with the defence in their defence to the counter claim. They denied the first defendants contention that the first plaintiffs' occupation of the suit property was illegal, that the 1<sup>st</sup> defendant made a valid purchase of the suit property, that the first defendant suffered any loss of income as alleged or that the plaintiffs are

responsible jointly or severally for such loss, that the first defendant is entitled to any income from the suit premises; that all the process prior to and after the alleged sale and alleged transfer of the suit premises to Zaverchand Ramji Shah and from Zaverchand Shah and from Zaverchand Shah to the first defendant were lawful, that the first defendant purported Title is valid, and that the first defendant is at liberty to evict the first plaintiff or is at liberty to take physical possession thereof in the exercise of any rights or privileges appertaining to ownership and lastly denied that the defendants are entitled to the reliefs sought in the counter claim and put the defendants to strict proof.

The plaintiff called two witnesses namely the first plaintiff Ravi Prinja (PW1) and the second plaintiff Ahamed Nasser (PW2). Both gave concurrent evidence to the effect that:-

(i) The first plaintiff was engaged in real estate business under the name and style of Equity estate Limited. It is in the course of being so engaged that PW1 sold the suit property LR. No.209/59/9/10 situate along Manyani Road to the second plaintiff an Arab of Kenyan descend. The sale was made in the year 1974 at a consideration of Kshs.500, 000.00. The property is located in a posh Area of Lavington, sitting on 0.753 hectares of land, fully developed with the structure comprising an executive house containing 4 bed rooms, a large entertainment area comprising a large lounge, dining room, a study, guest wing, large balcony, 2 lock up garages, 4 servant quarters and very secure beautiful gardens and a fish pond.

(ii) Since its purchase by the second plaintiff, the second plaintiff never lived there. Instead he entrusted it to the care, custody and control of the first plaintiff who managed it through Equity Estates Limited by virtue of a power of Attorney executed by the second plaintiff in favour of the first plaintiff on the 8<sup>th</sup> day of January, 1974 and which is duly registered with the government. The management entailed leasing out the property to tenants, receiving rentals income in respect thereof, paying off out goings such as land rent and rates. The land rent and rates were paid upon demand by the City Council of Nairobi and it is PW1s testimony that none was outstanding as at the time the City Council of Nairobi purportedly auctioned the suit property.

(iii) Events leading to the filing of these proceedings started way back in the year 1989 when one Zaverchand moved to the premises wanting to take possession on the allegation that he had purchased the suit property at a public auction. PW1 duly instructed his lawyers to take action where by an application to set aside the sale was filed in Nairobi CMCC 15/1987 but it was declined giving rise to the filing of Nairobi HCCA NO.159/1993. They chose to contest the purported public auction because all council dues were paid as and when they arose, they had no knowledge of any that were outstanding. They were not notified of the demand notice which led to the auction, neither were they notified of the Auction, lastly that the property was under valued at the time of sale as the same was going for over Kshs.5,000,000.00 and yet it was auctioned for a paltry Kshs.800,000.00.

(iv) When cross-examined, the first plaintiff conceded that the main prayer in the plaint is to restrain the defendants from evicting him from the suit premises; there was no prayer for orders to be issued in favour of the second plaintiff; that he did not sign any lease with the 2<sup>nd</sup> plaintiff; conceded that one Obed Salim had been a joint owner of the suit property but was no longer a joint owner. PW1 asserted further that he had been paying rent to the second plaintiff from 1979 in cash and by cheque but did not have a record to that effect. He invited the court to believe his testimony that the 2<sup>nd</sup> plaintiff executed a power of Attorney in favour of the first plaintiff in 1974 because the second plaintiff travels in and out of the country quite often. Maintained they were not owing any dues to the city council of Nairobi.

(v) PW1s evidence was confirmed by the evidence of PW2 to the effect that indeed PW2 was born in Kenya, lived in Kenya for 32 years but had then moved out of the jurisdiction. He confirmed he is a frequent world traveler. He had known PW1 as a friend for over 26 years. He purchased the house through PW1 and entrusted the same house to PW1's care on mutual understanding and there is no formal agreement between them but PW2 has knowledge that rent is usual paid in PW2's bank account with Barclays bank but there were no records. PW2 confirmed that him PW2 has never lived in the suit property and he had entrusted to PW1 the duties of carrying out repairs and paying out outgoings on the property i.e rent, rates, insurance, electricity, water etc. confirmed the initiation of the current proceedings

when it was confirmed that PW1 had not sold the property. He confirmed PW1 paid rent but there were no records of these because there are no strict account procedures governing their relationship since they are more than brothers.

The defence evidence was tendered by a sole witness one, Jan Mohamed Hassanali Husein Suleman Veljee who testified to the effect that:-

(i) He purchased the suit property on the 19<sup>th</sup> day of June, 1995 from one Zaverchand Ramji Shah at the purchase price of Kshs.6, 000,000.00. Transfer was effected in his favour on the 27<sup>th</sup> day of June, 1995 and a Title deed issued but DW1 was never given possession hence these proceedings.

(ii) He was firm that as at the time they moved to court they knew they had a genuine complaint because as at the time they purchased the property from Zaverchand, DW1 was not aware of any court proceedings. But concedes the house was purchased without being inspected by DW1, Neither did he seek clarification on the condition of the Title from the first plaintiff whom DW1 knew. DW1 purchased the property without insisting on seeing the vendor or inspecting the premises but asserts that the transaction was clean and was supported by valid documents of Title.

(iii) It is DW1s testimony that the sale was not hurried and that his failure to contact PW1 whom he knew very well and his failure to inspect the property and insist on possession before completion of the sale transaction was not ill motivated.

At the close of the entire case parties filed written skeleton arguments. Those of the plaintiffs were filed on the 22<sup>nd</sup> day of August, 2008 and in them it is stressed that the plaintiffs rely on pleadings herein and other mentioned litigation. The strength of the plaintiffs' case is borne out by the injunctive relief granted by the court preventing the defendants from evicting the first plaintiff from the suit premises. The sale and transfer to the first defendant is highly contested because relevant rules were not complied with when an order of auction was issued in CMCC 15 of 1987. The facts of the suit stem from litigation under taken in CMCC No.15 of 1987 between Nairobi City Council and Ahmed Nasser, Nairobi High Court HCCC No. 2484 of 1989 Zaverchand Ramji Shah versus City Council of Nairobi and Ahmed Nasser High Court Civil appeal no. 159 of 1993 Ahmed Nasser versus City Council of Nairobi. Lastly that the court to believe the testimony of the first plaintiff as the occupier of the suit premises because he is a reputable person carrying on reputable business and he should be believed when he says that the city council of Nairobi was not owed any dues as at the time the default judgment was entered in CMCC No.15 of 1987 in favour of the City Council of Nairobi hence no valid Title could be acquired by both Zaverchand Shah and the first defendant.

The defence on the other hand in their submissions filed on 8<sup>th</sup> day of April, 2005 urged the court to find that the plaintiffs case stands ousted because the defence had demonstrated that the subject matter of the proceedings being LR. No. 209/5919/9 had been sold in a public auction to one Zaverchand Ramji Shah who sold it to the first defendant after obtaining a lawful order raising the prohibitory order in Nairobi HCCC Number 2484/1989. They were not aware of the existence of the proceedings in CMCC 15/1987, HCCA 159/93 and HCCC 2484/89 notwithstanding that they were not parties to them and as such their Title is good and lawful

On case law the plaintiffs counsel referred the court to the case of **HILL CREST SCHOOL LIMITED VERSUS BARCLAYS BANK OF KENYA LIMITED AND OTHERS NAIROBI MILIMANI COMMERCIAL COURT NO. 177 AND 178 OF 2005** wherein Azangalala J granted an injunction on the 26<sup>th</sup> day of September 2007 pending hearing and determination of the suit on the grounds that there was an arguable case anchored on allegation of fraud. The case of **MBUTHIA VERSUS JIMBA CREDIT FINANCE CORPORATION NAIORBI CIVIL APPEAL NUMBER 111 of 1986** (UR) wherein the court of appeal faulted a sale to abonafide purchaser due to failure to follow the correct procedure by the bank. The case of **DAWOOD KHAN M. KHAN VERSUS EABS BANK LIMITED NAIROBI** Milimani Commercial court number 352 of 2006 decided by Warsame J on the 23<sup>rd</sup> day of April, 2007 in which the applicant sought rescision of the sale. The court granted an interim injunction.

Lastly the case of **INDUSTRIAL DEVELOPEMENT CORPORATION VERSUS KARIUKI & GATHECA (1977) KLR 52** where in the court of Eastern Africa ruled that the sale of mortgage property to a buyer does not extinguish the right of redemption.

The defendant on the other hand referred the court to the case of **MBOTHU & 8 OTHERS VERSUS WAITIMU & 11 OTHERS 1986 KLR 171** wherein the court of appeal held inter alia that

**“under section 23(1) of the registration of Titles Act a certificate of Title issued to a purchaser of land upon a transfer or transmission by the proprietor is conclusive evidence of proprietorship and the Title of the proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to have been a party.”**

The case of **NAIROBI PERMANENT MARKETS SOCIETY AND OTHERS VERSUS SALIMA ENTERPRISES AND OTHERS (1995-1998) IEA 229 (CA)** wherein a court of appeal also held inter alia that **“under section 23 of the Registration of Titles Act a certificate issued by the Registrar to any purchaser of land has to be taken by the courts of law to be conclusive evidence that the person named therein was the absolute and indefeasible owner thereof. That title was immune to challenge except on the ground of fraud or misrepresentation to which the purchaser was a party”**. The case of **KAHUMBU VERSUS NATIONAL BANK OF KENYA LIMITED (2003) 2EA** decided by Njagi J where in it was held inter alia that **“a court order is valid and binding unless and until it is appealed against, amended or set aside.”** The case of **KENYA COMMERCIAL BANK LIMITED VERSUS MWANZAU MBALUKA AND ANOTHER NAIROBI CA 274/97 (UR)** wherein the counterclaim filed by the defendant was dismissed because there had been no plea for the annulment of the sale of his land and for the refund of the price thereof. Lastly the case of **GALAXY PAINTS CO. LIMITED VERSUS FALCON GUARDS LIMITED (2000) 2EA 381** wherein the court of appeal held inter alia that

**“the issue of determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgment on the issue arising from the pleadings or such issues as the parties framed for the courts determination unless pleadings were amended parties were confined to their pleadings.**

A total of ten (10) issues were put forward for determination by this court namely:-

1. Is the 2<sup>nd</sup> plaintiff the registered proprietor of the suit premises?
2. Is the first defendant the registered proprietor of the suit premises?
3. Is the raising order in HCCC.2484/89 signed on 27<sup>th</sup> June 1995 a lawful order?
4. Was the transfer from Zaverchand Ramji Shah to the 1<sup>st</sup> defendant lawful?
5. Are these pending court actions challenging sale and ownership of the suit premises to Zaverchand Ramji Shah and if so what is their legal effect?
6. Does the 1<sup>st</sup> plaintiff stand to suffer any loss or damage arising out of the transfer of the suit premises to any party?
7. Is there any tenancy relationship between the 1<sup>st</sup> plaintiff and the first defendant?
8. Has the 1<sup>st</sup> defendant suffered any loss of income or damage by fact of the continued occupation of the suit premises by the first plaintiff?
9. Is the first plaintiff entitled to his prayers?

## 10. Is the first defendant entitled to its prayers?

In respect to issue number 1,2 and 4 the court makes a finding that indeed a perusal of the provisional title of the suit property exhibited, the second plaintiff had been registered as an owner vide an entry made on the 30<sup>th</sup> day of October 1974 showing that indeed transfer had been effected in the 2<sup>nd</sup> plaintiffs favour but further perusal reveals that the 2<sup>nd</sup> plaintiff became divested of the said ownership when the City Council of Nairobi auctioned it to one Zaverchand Ramji Shah. It is also on record that the 2<sup>nd</sup> plaintiff Ahamed Nasser filed an application to set aside the order authorizing the auction but that application was dismissed. The dismissal order gave rise to the filing of the appeal Nairobi HCCC NO. 159/93 which has never been determined to date allegedly because proceedings have never been supplied. This means that the dismissal order on an application to set aside the order authorizing the auction of the said suit property solidified the city councils' right to sell the suit property. The court appreciates that indeed there are correspondences from the plaintiffs counsel then on record to the court authority including the Hon. The Chief Justice complaining about the non delivery of the proceedings. The court is however of the opinion that their existence does not affect the order solidifying the right to sell the suit property to Zaverchand Ramji Shah by the city Council of Nairobi.

The reason for the auction was outstanding land rent and rates stated to have been outstanding and owing as council dues which had allegedly not been paid a fact denied by both plaintiffs. They have also taken issue with the auction alleging that it did not take place. But that notwithstanding there is no order declaring the said auction null and void as such. **One Zaverchand Ramji Shah** who is also not party to these proceedings purchased the said suit property in an Auction properly and rightfully in May 1989. He was not fielded to give evidence and as such it is not clear as to whether he inspected the property before purchasing the same in an auction or not. Neither did any witness come from the city council of Nairobi to shed light on what really transpired at the auction. That notwithstanding the court is satisfied that failure to inspect the property before purchase does not operate to vitiate the auction. It simply goes to show that the purchaser took the risk of accepting the purchased property in the condition in which it was at the time of purchase.

The sale by way of public Auction to Zaverchand Ramji Shah paved the way for the sale of that property to the first defendant. There is an agreement of sale made on the 19<sup>th</sup> day of June, 1995 between Zaverchand Ramji Shah as the vendor and the 1<sup>st</sup> defendant as the purchaser. A transfer was prepared and executed on the 19<sup>th</sup> day of June, 1995. The copy of the Title produced in evidence shows that a prohibitory order was registered against the Title vide entry number 12 in favour of civil suit number 15 of 1987. This prohibitory order was removed vide a raising order under entry number 13 on the 14<sup>th</sup> day of July, 1989. At entry number 15 the court order issued in number HCCC 2484 of 1985 was registered and thereafter a provisional certificate was issued. The raising order was registered on 27<sup>th</sup> day of June, 1999 and on 27/6/95 the transfer in favour of the first defendant was registered and it is the last entry on the provisional certificate. The first plaintiff is alleged to be in possession of the original title.

Turning to the orders issued variously, there is an order issued on the 27<sup>th</sup> day of June, 1995. It was issued in civil suit number 2484 of 1989 between one Zaverchand Ramji Shah and the city council. It sought to raise the prohibitory order which had been registered against the Title on 8<sup>th</sup> August 1989 prohibiting the defendants from alienating or dealing in any manner whatsoever with the suit property.

In the same file HCCC 2484 of 1989, in a heading showing the Nairobi city council as the plaintiff and the 2<sup>nd</sup> plaintiff as the defendant and Zaverchand Ramji Shah as the interested party, there is an order issued on the 30<sup>th</sup> day of July, 1999. The order set aside the raising order and then restored the prohibitory order. The pleadings in Nairobi HCCC number 2484/89 have not been exhibited to show who was claiming what as against who. It appears that the prohibitory order was restored after transfer had been effected on to the first defendant. It means this subsequent prohibitory order could only prevent the moving of the Title from the 1<sup>st</sup> defendant to any other 3<sup>rd</sup> party. It means that as matters stand now, the first defendant is the registered owner of the suit property. Though the plaintiffs have complained that the first defendant unlawfully or illegally got itself registered using a provisional Title in the wake of an

original Title in their favour, this court has not been shown any court order nullifying the said provisional Title or a pleading where there is challenge to the issuance of the said provisional Title. A part from the prohibitory order relied upon, this court has not been shown the original Title showing the second plaintiff as the Title holder of the suit property in the last entry of the said Title.

From the foregoing assessment, the court makes a finding that in the absence of exhibition of the original Title showing the 2nd plaintiff as the Title holder, and in the absence of a court order faulting the provisional Title, the court has no alternative but to find that the provisional Title is the reigning title document to the suit property and as long as it stands, the Title holder of the suit property is the first defendant.

With regard to the raising order granted on 26<sup>th</sup> day of June, 1995, it is correctly submitted by the defence counsel that indeed as assessed above, a prohibitory order was registered against the provisional Title on the 8<sup>th</sup> day of August, 1989 vide entry number 15. It was subsequently removed by a raising order granted on the 26<sup>th</sup> day of June, 1995 and registered on the 27<sup>th</sup> day of June 1995 an entry number 17. The plaintiffs' complaint is that it had been illegally obtained. But as submitted by the defence, proof of its attack in the said case file number 2484/89 has not been exhibited.

One of the reasons for asserting to an entitlement to an injunctive relief as a final order was the fact that the property was sold and or transferred to the first defendant, in contravention of the provisions of section 52 of the Indian transfer of property Act. It provides:-

**“ During the active prosecution in any court having authority in British India or established beyond the limits of British India by the governor, general in court of a contentious suit or proceedings in which any right to immovable 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 other party thereto to under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose”**

This court has construed this provision and also has judicial notice of its construction in other judicial pronouncements within and without this jurisdiction and in its opinion the correct position for the applicability of this doctrine is that it applies where:-

(a) There is previous existence of proceedings whose central borne of contention is the ownership of the proprietary rights of the subject matter.

(b) Once that has been established, that establishment operates to taint the actions of not only the participating parties and those claiming through them but also 3<sup>rd</sup> parties who may not even have had notice of the court proceedings.

Applying the above construction to the rival arguments herein, it is the finding of this court that what was in issue in CMCC 15/1987 was a tussle over non payment of City Council of Nairobi rates and not a tussle over proprietary rights. Likewise in the absence of exhibition of the pleadings filed in HCCC No. 2484/89 there is nothing to show that what was in issue therein was a tussle over proprietary rights over the suit property and not merely issues of the raising of the prohibitory orders. In order for any party to invoke the applicability of this doctrine and make it not only apply but also taint the movement of Title from one Zaverchand Ramji Shah to the first defendant.

With regard to the issue as to whether the first plaintiff stands to suffer any loss or damage by reason of transfer of the suit property to the first defendant, the court agrees with the submissions of the defence that the only party who could suffer such loss or damage is the would have been proprietor who is the 2<sup>nd</sup> plaintiffs. The court has purposely used the words **“would have been proprietor”** because it is on record that the 2<sup>nd</sup> plaintiff was divested of that proprietorship by reason of orders issued in Nairobi magistrates civil case number 15 of 1987 which have not been reversed and which orders led to the property being vested in one Zaverchand who in turn transferred the same to the first defendant.

With regard to the issue as to whatever the first plaintiff is a tenant of the first defendant, it arises from the plaintiffs assertion in evidence that the first plaintiff was a tenant of the second plaintiff. It is however noted that this assertion was not backed up by the production of lease agreement, audited accounts on rent payment, revelation of the 2<sup>nd</sup> plaintiffs bank account into which rental payments were being made and disbursements from the said bank account towards payment of out goings on the suit property. Instead what the court has before it is a clear pleading that the first plaintiff is an occupier on behalf of the 2<sup>nd</sup> plaintiff. It means that just like in the case of a tenancy arising from circumstances of holding on, occupation can also arise from an occupier holding on. In law holding on tenancy is recognized the action of the holding on tenant tendering rental payment to the incoming land lord and by the action of the incoming land lord accepting those rental payments.

This court has judicial notice of the fact that in such circumstances the acceptance of the rental value creates an oral tenancy protected by law. This court however has no knowledge of any law which protects the right of occupancy. In the absence of establishment of existence of a tenancy relationship to oust the clear pleadings in the plaint that the first plaintiff is only an occupier, there is no way a tenancy relationship can be traced from the 1<sup>st</sup> plaintiff to the 2<sup>nd</sup> plaintiff then to Zaverchand Ramji Shah and then from Zaverchand Ramji Shah to the first defendant. The court therefore makes a finding that there has never been and there is no tenancy relationship between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant.

With regard to issue as to whether the first defendant has suffered loss of income or damage by reason of the continued occupation of the suit premises by the first plaintiff, it is on record that the first defendant purchased the suit property and became duly a registered proprietary on the 27<sup>th</sup> June, 1995. They intended to have it used as a residence for the directors of the first defendant or to be rented out. It therefore follows and it is correctly submitted by the defence that in the absence of a court order divesting the proprietorship from the first defendant, there is no way this court can fail to rule that the first defendant has indeed suffered loss and damage by reason of their non occupation and possession of the suit property which they acquired for value over many years back.

With regard as to whether the plaintiffs have earned their reliefs or not a revisit to the plaint reveals a plea for three reliefs:-

**“A. An injunction to restrain the defendants and each of them by themselves, their servants or agents or otherwise howsoever from evicting the first plaintiff from the suit premises known as LR.209/5919/9 situate at Manyani road Nairobi or otherwise howsoever interfering with the quiet enjoyment by the first plaintiff of the said suit premises.**

**B. Such further other or consequential orders as this Honourable court deems fit.**

**C. The costs of this suit”**

In support of these prayers, the supportive evidence is along these lines:-

(i) There were no outstanding dues of rates or land rent outgoings owed to the City Council of Nairobi which could have justified the city council of Nairobi action of moving to court to auction the suit property.

(ii) The value of the property was much more than the paltry Kshs.800, 000.00 it fetched at the alleged public Auction that never was.

(iii) The plaintiffs moved to safeguard their interests in the said property by moving to register a prohibitory order against the Title then held by Zaverchand Ramji Shah in abid to prevent it from being divested from the said Zaverchand to any other 3<sup>rd</sup> party.

(iv) It is on record that the said prohibitory order was reversed by a raising order which the plaintiffs have asserted was raised fraudulently and illegally. The said plaintiffs went back and re-registered the

prohibitory order and by reason of this, it is contended that the transfer to the first defendant was fraudulent and illegal.

(v) That by reason of what has been stated in number (i)-(iv) above as observed herein, the pleadings in CMCC 15/1987 and 2484/89 have not been exhibited to enable the court know whether there are counter pleadings aimed at wresting the Title from the first defendant or not.

(vi) That there are pending proceedings namely CMCC 15/1987 which had given rise to HCCA no.159/93 and the challenge to the raising of the prohibitory order.

(vii) Although the plaintiff took issue with the raising order and had pleaded in paragraph 17 that they would amend the plaint, no amendment was effected to introduce particulars of illegality.

(viii) Although the plaintiffs have asserted in their testimony and submissions that the whole transaction which led to the Title being transferred to the first defendant were fraudulent, there is no plea in the plaint particularizing particulars of fraud, not even a declaratory prayer to fructify the said plea.

To counter what the plaintiffs have fronted in support of their claims above, the defendants contend the plaintiffs stand non suited with regard to their plea in the plaint because of the following:-

(i) There is no court order challenging the transfer of the suit property from the city council of Nairobi to Zaverchand and then from Zaverchand to the first defendant.

(ii) By reason of what has been stated in number (i) above, the movement of title from the 2<sup>nd</sup> plaintiff to Zaverchand through a court order at the instigation of the city councils of Nairobi in CMCC 15/1987 and then from the said Zaverchand to the first defendant, the first defendants' Title is protected by the provisions of section 23 of the Registration of Titles Act cap 281 laws of Kenya as construed by case law assessed herein.

This court has given due consideration to the afore set out strong points relied upon by the plaintiffs as cementing their right to entitlement to the reliefs sought and those relied upon by the defendants to oust that right of entitlement and in this courts' opinion the plaintiffs are not entitled to the reliefs sought by them in this plaint because of the following reasons:-

1. The main relief in the plaint is an injunctive relief intended to issue in favour of the first plaintiff who has described himself in the plaint as an occupier. Indeed it is the court which granted the interim relief. But it cannot be forgotten that the interim relief was only meant to last till the determination of the suit namely to finally determine the proper proprietor of the suit property. It was therefore necessary for the plaintiffs to plead and demonstrate why the first plaintiff should be allowed to continue occupying the suit property even after it had been determined that ownership had passed onto the first defendant.

2. Section 23 of the Registration of Titles Act (supra) as construed by case law cited and assessed namely **MBOOTHU & OTHERS VERSUS WAITIMU & OTHERS (SUPRA) AND NAIROBI PERMANENT MARKETS SOCIETY AND OTHERS VERSUS SALIMA ENTERPRISES AND OTHERS (SUPRA)** all demonstrate that challenge to title registered under the said Act can only lie on account of fraud or misrepresentation to which the Title holder is proved to have been a party. Applying this to the plaintiffs' assertion herein, it means that the first plaintiffs' right of assertion to continue occupying the suit property have to be solidified by demonstration of existence of fraud and misrepresentation attributable to the defendants and committed against the plaintiffs. It is the stand of this court that no such demonstration has been made because no fraud and or misrepresentation have been pleaded and proved against the defendants herein.

3. The undetermined litigation in Nairobi HCCA 159/93 and HCCC 2484/89 do not empower this court to take note of their pendency and use that pendency in favour of the plaintiffs as against the defendants because firstly the defendants were not parties to the said litigation, and secondly there are no orders in the said litigation in favour of the plaintiffs which can be used against the defendants herein.

4. The injunctive relief sought by the plaintiffs as framed was not sought to operate permanently and perpetually and as demonstrated by case law assessed namely **BLAY VERSUS POLLARD AND MARKS (1930) IKB CA 628, AND GALAXY PAINTS CO. LIMITED VERSUS FALCON GUARDS LIMITED (SUPRA)**, this court cannot introduce the issue of permanent and perpetual in the said relief if the same were to be granted. The fore going findings notwithstanding the court has to bear in mind the existence of the provisions of Article 22(3)(d) and Article 159(2)(d) of the current Kenyan constitution which enjoins courts of law not to deny rendering of justice on account of technicalities. Even if it were to be taken that the court has jurisdiction to invoke its inherent jurisdiction and give the plaintiffs an effective remedy by converting the temporary injunctive relief into a permanent and perpetual one, it has to bear in mind that there has to be facts to support it. Herein the first plaintiffs' right of occupancy stems from the proprietorship of the 2<sup>nd</sup> plaintiff. Demonstration of its existence is mandatory before an injunctive relief can issue to cushion the 1<sup>st</sup> plaintiffs continued occupancy of the suit property. Herein the 2<sup>nd</sup> plaintiffs' proprietorship was taken away long time ago and it has never been restored. As such there is no way this court can invoke its inherent jurisdiction to convert the temporary injunctive relief sought into a permanent and perpetual one as there is no Title to the suit property currently vested in the 2<sup>nd</sup> plaintiff on which the first plaintiffs right of occupancy can be anchored.s

5. There is an order in existence in Nairobi HCCC No. 2484/89 which authorized Zaverchand to effect the transfer in favour of the first defendant and thereby validating the transfer from the said Zaverchand to the first defendant and as long as the said order stands, it has to be obeyed and respected. See **KAHUMBU VERSUS NATIONAL BANKS KENYA LIMITED (SUPRA)**. Denying the first defendant the right to pursue its proprietary rights and quiet enjoyment of the suit property would be an infringement on the said orders.

6. This court is alive to the existence of the relief in prayer B of such further and other or consequential orders as this Honourable court deems fit to grant but this court has judicial notice of case law which has construed and laid parameters for the application of this relief which is to the effect that in order for such a relief to be granted under this phrase are those that are consequential to the main plaint relief and which could either have been prayed for together as a main relief or in the alternative as an alternative relief. Applying that to the concerned relief herein it is the opinion of this court that the only auxiliary or consequential relief that can be granted along side an injunctive relief are those falling in the same class as mandatory injunctions and permanent and perpetual injunctions. The grant of these reliefs have not been urged before this court. In any case even if they had been urged just like the relief based on fraud and misrepresentation, they need to be pleaded and demonstrated to exist.

Turning to the reliefs sought in the counter claim, on the basis of the assessment of the pleadings, evidence and submissions as well as case law assessed herein, it is the finding of this court that the defendants counter claim, has merit because of the following reasons:-

(1)Once the court has discounted the granting of the continuing in existence of the main injunctive relief and the failure to find any suitable relief consequential to or auxiliary to the main injunctive relief to be granted under such further or other relief that the court may deem fit to grant, in order to shield or cushion the first plaintiffs right of occupancy, there is nothing to stand in the way of the success of the defendants counter claim.

(2)It is undisputed that there are in place orders which were granted in Nairobi CMCC 15/1987 and HCCC No. 2484/89 which confirmed the divestation of the right of proprietorship from the 2<sup>nd</sup> plaintiff which proprietorship had formed the anchor of the first plaintiffs' right to occupancy. These have not been upset and as long as they have not been upset and or declared otherwise inoperative they are lawful and they bind this court.

(3)So long as they are lawful they sanctify the divestation of the title to the suit property from the 2<sup>nd</sup> plaintiff to Zaverchand Ramji Shah at the instigation of the City Council of Nairobi in CMCC 15/1987, culminating in the litigation in Nairobi HCCC No. 2484/1989 which divested Title from Zaverchand Ramji Shah and vested it in the first defendant, which Title in terms of section 23(1) of the Registration of

Titles Act (Supra) deserves protection against all other claimants unless and until the same has been faulted on account of fraud and misrepresentation to which the Title holder is proved to have been party to, which faulting has not been done in favour of the plaintiffs herein. In the premises the first defendant has earned an order for vacant possession.

Turning to damages, the relief in prayer (f) of the counterclaim falls into the category of reliefs known in law as special claims. The law requires that these be pleaded, particularized and proved. See the case of **OUMA VERSUS NAIROBI CITY COUNCIL (1976) KLR 297** in which the court drew inspiration from the decision in the case of **RAT CLIFE VERSUS EVANS (1892) 2QB54** as approved in the case of **HANN VERSUS SINGH (1985) KLR 716** crystallizing the principle that

**“Special damages must not only be specifically claimed but also particularized and strictly proved.”**

The first defendant/plaintiff in the counter claim has pleaded special damages in paragraph (f) but has not particularized and strictly proved them. As for prayer (g), on a plea for general damages for in convenience, anxiety and frustration caused in their attempts to take possession of the premises, it is noted from the record that DW1 gave no evidence regarding this relief in his main evidence in chief. When cross-examined, he stated that the property is not for investment. It was intended to be occupied by either DW1 or his son. This means that what the 1<sup>st</sup> defendant was entitled to claim are specials of what they have lost in monetary terms which lands them back in the would have been claims in prayer (f).

By reasons given in the assessment, the court proceeds to make the following final orders:-

(1)The plaintiffs suit be and is hereby dismissed with costs to the defendant because:-

(a) The first plaintiffs’ rights to occupy the suit premises stems from the second plaintiffs then proprietary rights over the suit property. These proprietary rights were divested from the second plaintiff vide Nairobi CMCC 15/1987. The second plaintiffs’ attempt to restore them in the said proceedings bore no fruits. Indeed an appeal was lodged against the dismissal order vide Nairobi HCCC number 159/1993 but that appeal has not been determined in order to vindicate the rights of the second plaintiff and as long as those rights remain un vindicated, the divestation of the second plaintiffs rights of proprietorship to the suit property, remain divested and as long as they remain divestated, the anchor on which the first plaintiffs’ right of occupation was anchored remain removed leaving the 1<sup>st</sup> plaintiffs’ right of occupation hanging in the air.

(b)The plaintiffs challenged the process which culminated in the 1<sup>st</sup> defendant being vested with the title to the suit property for the reasons that that process was illegal, unlawful and fraudulent. These allegations could only be upheld upon reversal of that process. Indeed the process of reversal had been set in motion vide Nairobi CMCC 15/1987 culminating in Nairobi HCCA No. 159/1989 and the initiation of Nairobi HCCC 2484/1989. As assessed, these processes had not been concluded confirming that the said process was illegal, unlawful and fraudulent. And as long as these remain unconcluded the 1<sup>st</sup> defendant’s vesture of the title to the suit property remains valid.

(c) Upon the first defendant’s title remaining so solidified in them; it became shielded by the provisions of section 23 of the Registration of Titles Act (Supra) which protection could only be faulted on account of fraud and misrepresentation to which the Title proprietor was proved to have been a party.

(d)Although the plaintiff relied on fraud, illegality and unlawfulness in their evidence and submissions these were not pleaded, particularized and proved to exist by adduction of evidence in order to fault the first defendant’s Title. in the absence of demonstration of their existence, this court has no alternative but the court to hold that the first defendant’s Title is fraudulent, illegal and unlawful. In other wards the said Title is not fraudulent illegal or in law. It is legal and lawful.

(e) The plaintiffs only sought an injunctive relief to prevent eviction without seeking declaratory orders conferring proprietary rights in the suit on to the 2<sup>nd</sup> plaintiff on which rights of occupation of the first

plaintiff could be anchored and shielded.

(f) Indeed there is a prayer for such other and further reliefs as the court may deem fit to grant. It is now trite and this court has judicial notice of the same that reliefs capable of being granted under this head are those which are consequential to the main relief and could have been claimed along side the main relief or as an equal alternative to the main relief.

(g) The main relief being an injunctive relief, the only other consequential reliefs capable of being granted under that cluster are mandatory and permanent and perpetual injunctions. In law, and this court has judicial notice of the same that reliefs of a permanent and perpetual injunction as well as a mandatory injunction are drastic reliefs awardable in the clearest of cases where the entitlement of the relief sought is clear and obvious and there is no justification for the court to withhold the same. The first plaintiffs' right of occupancy is not clear and obvious because the Title to the suit property which had previously been vested in the second plaintiff and on which vesture the first plaintiff's right of occupancy had been anchored, had been divested from the 2<sup>nd</sup> plaintiff to one Zaverchand Ramji Shah through a court process whose orders have not yet been upset, which divestation had not been reversed. As such there is no basis upon which a divested Title can be protected or shielded in order to cushion the first plaintiff's right of occupancy.

### **ON THE COUNTER CLAIM**

For the reasons given in the assessment, the defendants claim is found meritorious and the same is allowed for the reasons that:-

1. (a) The Counter claim is anchored on the Title to the suit property which culminated in the first defendant being vested with it following litigation in Nairobi CMCC 15/1987 culminating in HCCA No. 159/1993 and Nairobi HCCC no. 2484/1989 which proceedings have given rise to orders which culminated in vesting the Title in one Zaverchand Ramji Shah who transferred that vesture to the first defendant and which process had not been faulted.

(b) As long as that process stands, the resulting Title transferred to the first defendant became protected and shielded by the provisions of section 23(1) of the Registration of Titles Act cap 281 laws of Kenya and which protection can only be faulted on the grounds of fraud and misrepresentation to which the holder is proved to be a party. Here in the plaintiffs neither pleaded nor proved fraud or misrepresentation to which the first defendant was proved to have been party.

(c) The moment the right to protection solidifies in the first defendant, the first plaintiffs right of occupancy which had been anchored on the 2<sup>nd</sup> plaintiffs proprietorship stands ousted, paving the way for the issuance of the reliefs being claimed by the first defendant subject to their being proved of course.

2. For the reasons given in number 1(a)-(c) above the court proceeds to grant the following reliefs of the counter claim:-

(a) The order on the dismissal of the plaintiff's suit with costs to the defendants is confirmed.

(b) An order be and is hereby issued that by reason of what has been stated in the assessment, a declaration be and is hereby issued to the effect that the first plaintiffs' continued occupation of the suit premises without the consent and/or approval of the 1<sup>st</sup> defendant from 26<sup>th</sup> June, 1995 is illegal, unjust and unfair.

(c) An order be and is hereby ordered and declared that the first defendant is the lawful and bonafide proprietor of the suit premises to the exclusion of all other persons including the 1<sup>st</sup> plaintiff.

(d) An order be and is hereby ordered and made to the effect that all processes prior to and subsequent to the sale and transfer of the suit premises to the first defendant were lawful.

(e) That by reason of what has been stated in number 1,2(a) (b) (c ) above, the defendants be and are hereby given liberty to evict forth with the first plaintiff from the suit premises.

(f) Prayer (f) and (g) of the counter claim are declined because firstly they fall into the category of special damages. This court has judicial notice that it is now trite that these reliefs are not to be framed in a general manner. But they need to be specifically pleaded particularized and then strictly proved something which the defendants did not do in these proceedings.

(g) The defendants will have costs of the counter claim. The costs will carry interest at court rates in the normal manner.

(h)Also under such further or other relief as the court may deem fit to grant there will be liberty to apply granted to the defendant generally.

**SIGNED AT NAIROBI BY HON. LADY JUSTICE R.N. NAMBUYE-JA**

**DATED READ AND DELIVERED AT NAIROBI BY HON MR. JUSTICE LENAOLA ON THIS 28<sup>TH</sup> DAY OF AUGUST, 2012.**

**JUDGE.**