



WEST END BUTCHERY LIMITED.....PLAINTIFF

VERSUS

ARTHI HIGHWAY DEVELOPERS LIMITED.....1ST DEFENDANT

SOLOMON MWINZI MWAU.....2ND DEFENDANT

JOHN MICHENI MUSA.....3RD DEFENDANT

THE ATTORNEY GENERAL

On behalf of the Commissioner of Lands

and Registrar General.....4TH DEFENDANT

KENYA MEDICAL ASSOCIATION HOUSING

CO-OPERATIVE SOCIETY LIMITED.....5TH DEFENDANT

YAMIN CONSTRUCTION COMPANY LIMITED.....6TH DEFENDANT

GACHONI ENTERPRISES LIMITED.....7TH DEFENDANT

JUDGMENT OF THE COURT

The Plaintiff's claim is in the Plaintiff dated 19th February 2007 as amended on 23rd April 2008 and re-amended on 19th May 2011. The Plaintiff is seeking the following final orders:

1. A declaration that the 4th Defendant on behalf of the Registrar General do cancel the fraudulent entries in the Company file C-3958 relating to the 2nd and 3rd Defendant so that the previous directors Mohamed Asif, Mohamed Abdul Rauf and Mohammed Juma Allah Rakha remain the directors and shareholders of the Plaintiff company.
2. A declaration and finding that the transfer of the Plaintiff's property known as Land Reference Number 7149/10 registered under title number IR 30601 was fraudulent and illegal and that the 4th Defendant cancels the entry transferring the said property in favour of the 1st Defendant on the title deed 1R 30601
3. A declaration and finding that the sub-division of the suit land and the transfer of such unlawful sub-divisions of the suit land registered was fraudulent and illegal and that the 4th Defendant for and on behalf of the Commissioner of Lands cancels all the entries relating to the ownership of sub division LR Number 7149/111, 112,113,114,115,116,117 and 118 registered against the title of the suit premises.

4. A declaration and finding that the sub-division of L.R Number 7149/112,113 and 114 being illegal and unauthorized sub-division of the suit premises was fraudulent and illegal and that the 4th Defendant do cancel the entries transferring the said sub-division to the 1st Defendant and 5th Defendant.
5. A declaration and finding that the sub-division of L.R Number 7149/111, being illegal and unauthorized sub-division of the suit premises was fraudulent and illegal and that the 4th Defendant do cancel the entries transferring the said sub-division to the 1st Defendant and 6th Defendant.
6. A declaration and finding that the sub-division of L.R Number 7149/115 if done, being illegal and unauthorized sub-division of the suit premises was fraudulent and illegal and that the 4th Defendant do cancel the entries transferring the said sub-division to the 1st Defendant and if done in the name of the 7th Defendant.
7. A declaration that all other unauthorized subdivision of LR Number 7149/10 namely L.R. Numbers 7149/116, 117 and 118 and entries relating to these unauthorized sub-divisions wrongly and fraudulently obtained by the Ist Defendant and registered against the title be cancelled.

The Plaintiff and summons were served on all the Defendants, and leave was also granted to serve the 1st, 2nd and 3rd Defendant with summons to enter appearance by way of advertisement by a court order issued on 19th April 2007. The substituted service was effected by way of advertisement on 26th April 2007 in the *Daily Nation* and *Standard* newspapers, and an affidavit of service was sworn to this effect by Mohammed Amran Khan on 18th May 2007. The said Defendants were required to enter appearance within 21 days of the said advertisement, and the 2nd and 3rd Defendants did not enter appearance or file any defence, neither did they participate in these proceedings. Interlocutory judgment was entered against the 2nd and 3rd Defendants on 8th June 2007.

The 4th, 5th, 6th and 7th Defendants were thereafter joined as parties to this suit, and the hearing of the Plaintiff's suit proceeded on various dates between 23rd November 2011 and 8th August 2012. The following is a summary of the respective claims, responses and evidence presented by the various parties to this suit.

THE PARTIES' RESPECTIVE CASES:

The Plaintiff's Claim:

The Plaintiff's claim is summarized from its pleadings, and the testimony given by the witnesses called namely Mohammed Asif (PW1); Mohammed Abdul Rauf (PW2); Mohammed Juma (PW3); Praful Chandra Jethlal Soni (PW4); Antipas Nyanjwa (PW5); Charles Kipkurui Ngetich (PW6); and Mohammed Amran Khan (PW7).

The Plaintiff's claim in its re-amended plaint dated 23rd May 2011 and filed on the same date is that it acquired and was registered as proprietor of the property known as Land Reference Number 7149/10 through a certificate of title issued on 24th December 1976, for term of 999 years from 1st August 1930. However, that on or about 19th April 2004 by a form 203A dated 10th October 2000, a notification of change of directors was fraudulently registered with the 4th Defendant by the 2nd and 3rd Defendants, notifying that Mohammed Asif, Mohamed Abdul Rauf and Mohammed Juma Allah Rakha had ceased to be Directors of the Plaintiff and that the 2nd and 3rd Defendants had been appointed as the new directors. Further, that the shares of the aforesaid directors were also fraudulently transferred on 10th October 2004. The Plaintiff stated and denied that it never sold the suit property to the 1st Defendant, and if the land was so sold, then the sale was obtained through fraud.

PW1 stated that he is one of the directors and shareholder of the Plaintiff and he testified that his mother Aziz Bibi and brother Mohammed Juma bought the Plaintiff company from the original shareholders in

1962 and were registered as shareholders and directors. He produced the resolution effecting the sale and notification of change of directors dated 12th July 1972 as the Plaintiff's exhibit 1 and 2. PW1 testified that shares were then transferred to him by his brother, and that after his mother's death in 1969 her shares were transferred to his brother Mohammed Abdul Rauf and that there has been no change in the shareholding since then.

PW1 testified that the Plaintiff company bought the suit property in 1976 and produced in evidence the original transfer and title as the Plaintiff's Exhibit 4. It was also PW1's testimony that the Plaintiff has since 1957 continued to run the business at Westlands Nairobi that they bought together with the Plaintiff company, and have been filing annual returns. Further, that he and the other directors have never sold the company, business nor the suit property to anyone.

PW1 proceeded to testify that he received information from the watchman at the suit property that some documents had been left at the property by persons alleging to be its owners. He was given the said documents which were dated October 2000, and which he produced as the Plaintiff's Exhibit 6. The documents were from the Registrar of Companies and comprised a notification of change of Directors and Secretary of the Plaintiff Company; annual returns for the Plaintiff company for 2000; transfers of shares by himself, PW2 and PW3 and their deceased mother to the 2nd and 3rd Defendants; and a list of past and present members of the Plaintiff company showing the 2nd and 3rd Defendants as the present owners.

Also among the documents was a copy of an Indemnity from the Ministry of Lands claiming that the Plaintiff's directors had lost the title document to the suit property. PW1 testified that the signatures on the said documents were not his or that of PW2 and PW3 which he was familiar with, and that at the date of the said transfer of shares his deceased mother had been dead since 1969. Further, that he never appeared before one Lucy N. Mburu who was indicated in the said documents from the Registrar of Companies to be the Plaintiff company's Secretary, neither had he met her, nor did he know and had never met the 2nd and 3rd Defendants.

PW1 testified that the title to the suit property has been kept under lock and key in a bank safe, and that he had always had in his possession the original memorandum and articles of association of the Plaintiff Company which he produced as the Plaintiff's Exhibit 7. PW1 continued with his testimony by stating that upon receipt of the documents he and PW1 and PW2 contacted their lawyer Mr. M.A Khan, and reported the matter to the Criminal Investigation Department, the Lands Office and the Registrar of Companies.

Upon cross-examination, PW1 clarified that upon reporting the transactions by the 2nd and 3rd Defendants to the CID, they were asked to write a statement, and left it to the police to follow-up on the investigations. Further, that the police never came back to them. PW1 also stated that at the Registrar of Companies they had been informed that the Plaintiff Company's file was missing. Further, that the 2nd and 3rd Defendants could not be located after the Plaintiff suing them, and they were served with court process through advertisement in the newspapers.

PW1 denied that there had ever been any squatters on the suit property, and that the only claim was a suit for adverse possession which had been brought by former employees of the Plaintiff, which case was decided in the Plaintiff's favour. PW1 stated that they had placed a caveat emptor notices in the newspapers explaining that the suit property was not for sale. He also explained that they had been farming on the suit property and stopped in about 2002, and had built a house on the property which had since been vandalized. Further, that there are now houses on the suit property that were being constructed by the 5th Defendant. PW1 reiterated that they were the directors of the Plaintiff Company, and had never sold the suit property to the 2nd and 3rd Defendants or any of the other Defendants.

The second witness for the Plaintiff (PW2) was Mohamed Abdul Rauf, who stated that he is a director of the Plaintiff company and that that he did not know Solomon Mwinzi Mwau (the 3rd Defendant), nor had he ever sold transferred his shares to the said Solomon. He also gave the same account in his testimony as

that of PW1 of the events surrounding the transfer of the suit property to the 2nd and 3rd Defendants, and reiterated that the suit property was fraudulently transferred by the 2nd and 3rd Defendants. PW2 informed the court that he started working in the shop in 1964 and that their mother was also a director when they bought the business. This witness was emphatic that the signature on the transfer of shares and stock was not his.

During cross examination, PW2 maintained he was still a director of West End Butchery Limited as he never transferred his shares. However, PW2 could not recall the number of shares he held or when he became a director. PW2 informed the court that the title of the suit property which is in the custody of the bank has never been mortgaged.

The Plaintiff's third witness, Mohammed Juma Allah Rakha (PW3) stated that he was a director of the Plaintiff company and had purchased the company together with his mother from the original owners in 1962. That the initial shareholders and directors were PW3 and his mother, with each of them holding 250 shares which shares were subsequently increased to 9000. Further that PW3's brothers became shareholders in 1967. It was the testimony of PW3 that by the year 2000, the shareholding was 15,500 with his brothers holding 4,000 and 1,000 shares respectively. PW3 maintained that neither he nor his brothers have ever transferred their shares. PW3 denied that the signatures in the transfer forms belong to him and his brothers whose signatures he was conversant with.

During cross examination, PW3 stated that after acquiring the suit property, they did some farming thereon, in addition to building a home and a borehole on the said property. PW3 reiterated that the signatures on the transfer of shares forms were not his or his brothers, and that he came to know about the fraudulent transfer in the year 2007 although the Plaintiff's Exhibit 6 shows that the said transfer was made in the year 2000. Further, that he filed annual returns of the Plaintiff company which were accepted by the Registrar of Companies. This witness denied that there were squatters living on the suit property and that the persons claiming to be directors of West End Butchery Ltd were their employees. He was assertive that his brothers would never sell the suit property without informing him, and maintained that the documents showing the 2nd and 3rd Defendants to be directors of, and holding shares in the Plaintiff company were a forgery.

On re-examination, PW3 informed the court that they still operate West End Butchery and denied that they ever employed any person as claimed in the adverse possession case. PW3 clarified that the 2nd and 3rd Defendants did not claim to be employees of the Plaintiff, and that this claim was made by the persons who brought the adverse possession case.

The Plaintiff's fourth witness (PW4) was Praful Chandra Jettlal Soni, who stated that he has been the Plaintiff's accountant since 1984, and informed the court that he used to write all the books of account and prepared and filed annual returns on behalf of the Plaintiff from the year 1993 to the year 2007. Further, that as at 1993, Mr. Mohammed Juma was holding 9,455 shares, Mrs. Aziz Bibi had 3,575 shares, Mohamed Asif 1085 shares and Mohamed Rauf 1085 shares in the Plaintiff company. PW4 stated that Juma, Asif and Rauf were the directors and as at the year 1996, they were holding 9455, 1085 and 4650 shares respectively.

PW4 informed the court that he was not aware of any resolution transferring the Plaintiff's shares in the year 2007 when he filed the last returns, and that any such resolution would have been communicated to him. Further, that no resolutions had been made since 1992, and that in all the years he prepared the books of account and filed the returns the Plaintiff's company secretary was Mohammed Rauf. PW4 produced the annual returns from the year 1993-2007 as the Plaintiff's Exhibit 8, and the original receipts he was given upon payment for filing of the said returns for the years 1987-1993, 1994-1995 and 1996-1998 as the Plaintiff's Exhibit 9(a), (b) and (c) respectively. PW4 also informed the court that original shareholding of the Plaintiff company was 15,500 shares of Kshs 20/= and a share capital of Kshs 320,000/=, and that there has been no change to the shareholding since 1993.

In cross examination, PW4 admitted that the first receipt he produced as Exhibit 9(a) was for annual

returns for 1987 - 1993, and that the said returns were prepared by Templeton Registrars and not by him. Further, that he did not have the receipts for the returns made between 1999 and 2007, which receipts were with the directors of the Plaintiff company. He explained that he was the one who prepared the returns, which were signed by the Company Secretary and he would then send an assistant to file. He stated that he had not been told of any problems at the Company's registry during filing of the returns, and that he did not personally go to the Company's registry because he was not acquainted with the filing process and his work was to prepare the annual returns. He also informed the Court that in the memorandum the shares issued were 500 and also admitted that before 1993 the shares could have increased by bonus shares. PW4 informed the Court that returns were regularly filed and that the last returns were filed on 7/12/2007.

The Plaintiff's 5th witness, Antipus Nyanjwa (PW5) testified that he is a qualified forensic document examiner with over 15 years' experience in the Police department and as a consultant. He gave a detailed account of his qualifications and relevant training received. PW5 informed the court that on 27/1/2012 he received a request from M.A Khan Advocates in relation to a matter involving his client, West End Butchery, which was disputing the authenticity of some documents. Further, that the instructions were in a letter dated 31st January 2012, and he was to examine and compare the disputed signatures of one Mohamed Asif, Mohamed Juma and Mohamed Abdul in some transfer of shares forms against their specimen signatures, and to find out if there were any similarities. He was also to verify the authenticity of the signature of the Registrar of Titles on two title deeds together with the known signature of that registrar, and verify whether there were any similarities.

PW5 further stated that on 31/1/2012 he examined and compared the questioned signatures of Mohamed Asif, Mohamed Juma and Mohamed Abdul in the said transfer forms with the specimen signatures provided, and could not find any similarities between the signatures, and it was his opinion that they were not authored by the same hand. It was PW5's opinion that the signature of the Registrar of Title on the Plaintiff's title to the suit property, the original and a copy of which was availed to him, corresponded with the known signatures of that Registrar of Titles that were availed to him. However, that the signature of the Registrar of Titles in the photocopy of the title to the suit property produced by the 1st Defendant bore no similarity with the known signatures of the said Registrar of Titles. He produced his report with these findings as Plaintiff's Exhibit 10 and the letter of instruction as Plaintiff's Exhibit No. 11.

During cross-examination, PW5 clarified that he is a police officer of the rank of superintendent of police, and that he examined the documents in his report in his personal capacity as a document examiner. He explained that the signatures in the titles he was given for examination other than the one in the original title to the suit property were photocopies, and that as a document examiner he is able to tell if a title deed is an original by the feel and quality of the paper. He also informed the court that he cannot confirm if a paper has undergone oxidation, as it depends on the condition of storage, and that if the document is kept in a safe in a bank it will not deteriorate as the temperature is constant in contrast to a document kept in the open.

PW5 stated that he personally obtained the signatures of Mohamed Asif, Mohamed Rauf and Mohamed Abdul on 27th January 2012 but that the signature of Sobhag Shah, the Registrar of Titles who is alleged to have signed the two titles examined, was not available upon request. He therefore relied on a signature made in 1976 which he admitted could vary after 35 years. This witness stated that he examined the signatures on 31st January 2012 and wrote his report on the same date. He further denied generalizing the characteristics and similarities stated in his methodology, and stated that he individually examined each document.

PW5 confirmed to court that although there is a possibility of manipulating photocopies, according to his report, there was no evidence of digital manipulation. Further, PW5 stated that under normal police procedures, it is not the case that an independent person apart from the document examiner has to take the signature specimens, and that on several occasions he has personally obtained the specimens. It was the evidence of PW5 that he was informed by M. A. Khan that Shobag Shah was the Registrar of Titles at the material time, but he did not know if the said Shobag Shah was still alive and if available, it would have

been necessary to take his signature. In re-examination, PW5 maintained that the report he submitted was not manipulated and that the characteristics noted in the signatures examined had been noted in the report.

The sixth witness called by the Plaintiff was Charles Kipkurui Ng'etich (PW6), a Registrar of Titles at the Ministry of Lands in Nairobi. PW6 relied on a certified copy of the search of title in their records, and stated that the deed file for the suit property could not be removed from the strong room without a court order. PW6 stated that according to their records, there had been a subdivision and transfer of the suit property made to West End Butchery of P.O Box No. 14367 Nairobi on 24th December 1976, and that the transfer was from another title IR 3456/47. It was the testimony of PW6 that the presentation number of entry 47 on the title that transferred 100 acres to West end Butchery was 1218, and that a title issued on the same date of entry would have a similar registration number.

PW6 admitted to not having the transfer instrument in respect of the said transfer to West End Butchery, and stated that the first entry made on the title to the suit property was a deed of indemnity which was never registered. PW6 did not know the identity of the Registrar who issued the title, for the reason that registrars at the time used to sign without stamping and putting their numbers of identification like is the practice today. PW6 further stated that the transfer to Arthi Highway Developers was done on 15th March 2006, and that although the directors of West End Butchery and Arthi Highway Developers have signed the transfer, their names were not on the transfer. PW6 informed the court that the postal address of West End Butchery on the transfer was P.O Box 10, Athi River, which was not similar to the address on the title.

PW6 explained that titles used to have a serial number printed at the bottom, and that it is not possible for two titles to be issued on the same date with respect to the same property unless one was a forgery. In respect to the original title produced as Plaintiff's Exhibit 1 that was shown to him, PW6 stated that the serial number differed from the one in their records, and further, that it had a number 1219 written on it relating to the correspondence file, which was lacking in the one in their custody. Pw6 informed the court that he was not aware of any complaint by the Plaintiff on a missing file in the case. This witness explained to court the procedures to be followed when a title is lost or the deed file at the registry is missing including the owner being required to prepare a deed of indemnity upon which the Registrar would prepare a copy of the title.

During cross examination, PW6 stated confirmed to the court that the Plaintiff's original title had a serial number GPK 2084-IM-10/74 which was not appearing on the copy of title in the registry which had the serial number GPK 1809-507-11/76. He admitted that the serial numbers in their copy should correspond with the one in the original title and in his opinion, one of the titles may have been stolen. Further, that the Plaintiff's original title appears to have been issued in 1974 and not 1976. PW6 explained to the court that all their titles are printed by the government printer who are the authors of the serial numbers, and that the reference to 74 and 76 in the said serial numbers was in respect of the year of printing. It was his opinion that the title of 74 could not have been used in 76. Other than the different serial number and the presence of the registration number in the Plaintiff's original title, PW6 confirmed that the other details of the Plaintiff's title were the same as those in the title at the land's registry. PW6 stated that there was no application to put a caveat on the title, but that there was an attempt to register the deed of indemnity, when the deed file with respect to the suit property was missing.

It was the evidence of PW6 that the title in possession of the Plaintiff was no longer evidence of ownership since it had been closed following several subdivisions from March 2008. PW3 maintained that the signature of the Registrar was not a forgery as it was in the title in their records. In reference to a letter dated 6th February 2007 from M. A. Khan, Pw6 stated that a director of a company cannot place a caveat on the company's property and that instead, a court order would have protected the Plaintiff's interests. PW6 further stated that to the best of his knowledge, the transfer from West End Butchery Ltd to Ardhi Highway Developers Ltd was done in accordance with the law.

Upon re-examination, PW6 stated that it is possible for a title to have a reference in the serial number to another year other than the year it was issued, and that where the numbers do not tally in the two titles, one of them is a forgery. This witness confirmed that the original title was not surrendered back to them

after subdivision of the suit property. The copy of search of title relied upon by PW6 was produced as the Plaintiff's Exhibit 12.

The Plaintiff's seventh witness was Mohamed Akram Khan (PW7), an Advocate of the High Court of Kenya who testified that he has known and been the lawyer for the Directors of West End Butchery for many years. He stated that with respect to the present suit, he was informed by Mohammed Asif in the year 2007 that some people had brought documents and were alleging ownership of the suit property. The said documents comprised a Form 203A showing that Solomon Mwinzi Mwau and John Micheni Musa were appointed as new directors of the Plaintiff company; share transfers and annual returns purported to be signed by Mohamed Asif, Mohamed Abdul and Mohamed Rauf and which were already produced as the Plaintiff's Exhibit No. 6. PW7 testified that his clients denied ever signing any of the said documents or having employed a certified secretary by the name Lucy Mburu, and informed him that Mohamed Rauf was the company secretary at the material time

PW7 narrated the events that followed thereafter, and he stated that he first went to see the Commissioner of Lands together with his clients, and that on the advice of the Commissioner of Lands, prepared an affidavit and delivered it to the land's office so that a restriction could be placed against the title. He produced the said letter to the Commissioner of Lands dated 6th February 2007 together with the affidavit and waybill as the Plaintiff's Exhibit 13. Further, that upon follow-up at the Companies Registry, the file of West End Butchery and Arthi Highway Developers Limited, and PW7 produced a letter written to the Registrar of Companies dated 8th February 2007 as the Plaintiff's Exhibit 14. PW7 stated that he then put an advert of a caveat in the *Daily Nation* and *Standard* newspapers of 12th February 2007 which he produced as the Plaintiff's Exhibit 15. Lastly, that before filing the plaint herein, PW7 wrote to the Permanent Secretary, Ministry of Local Government because, according to the Plaintiff directors, Nairobi City Council had been offered the suit property for sale, and the said letter dated 6th February 2007 was produced as the Plaintiff's Exhibit 16.

PW7 explained that he then filed a Plaint dated 19th February 2007, and an application under certificate of urgency on the same date, and was granted temporary injunction orders on 20th February 2007. Further, that the orders was extended on 21st April 2007 until inter partes hearing, and that upon a further application directions that the *status quo* be maintained were given by the Court pending the hearing of the main suit filed herein. PW7 claimed that notwithstanding the said orders preserving the suit property, the 1st Defendant proceeded to subdivide the property and sell it. PW7 also stated that he also informed the 5th Defendant of the dispute herein in letters he wrote to the Kenya Medical Association dated 12th April 2010 and 2nd July 2010.

PW7 referred to the entries 3-10 of the 1st Defendant's copy of the title which were subdivisions registered against the title to the suit property on 23rd May 2008, and which showed that certificates of title issued on the same date. He stated that since the acreage of plots with separate titles was 28.786 and the suit property is approximately 100 acres, the original title for the balance of the property is still valid. Further, that if all the hectares had been subdivided and transferred, there would have been an entry to that effect. PW7 averred that the original title deed that was used must be in the possession of the 1st Defendant, as he must have presented it for sub-division to be effected or alternatively depended on the deed of indemnity registered in folio D1 39/616 DXXX III which was not signed, and that this would have been irregular.

Upon an objection by the 4th Defendant, PW7 laid the basis of his competence on the procedures at the land registry, and stated that he was the Registrar of Titles at the Ministry of Lands from 1960-1970, and was elevated to the position of Principal Registrar of Tiles and Collector of Stamp Duty in 1968, and in his words "knew the registry procedures backwards". He explained in great detail in his testimony the processes of registration that would have been involved with respect to the entries in the titles presented as evidence. It was his opinion that the title presented by the 1st Defendant was fake, as it did not indicate the daybook number, and because the signature of the Registrar, Shobag Shah whom he knew personally and had worked with was not the same

According to PW7, the application for registration of the transfer of the suit property from West End Butchery to Arthi Highway Developers was unprocedural since the title, Land Rent Certificate and consent to transfer were not shown to have been produced. Further, that they had requested the 1st Defendant to produce the original title that was used but that it was not.

PW7 informed the court that when he and the Plaintiff's directors went to the company's registry, the files of West End Butchery and Arthi Highway Developers Limited were not available. PW7 testified that subsequent efforts to trace the file were not successful, and produced copies of a letter to the Registrar of Companies requesting for the details of the file for West End Butchery and receipt for an official search both dated 9th February 2010 as the Plaintiff's Exhibit 20. PW7 also produced as the Plaintiff's Exhibit 21 caveats published in the *Daily Nation* and *Standard Newspaper* on 12th February 2007 and 11th May 2011 which were for the purposes of notifying the public of the Plaintiff's ownership of the suit property.

PW7 informed the court that prior to this suit, Ibrahim Lemarin and Mohamed Roba had brought Nairobi HCCC No. 310 of 2002 against West End Butchery which was dismissed, and that subsequently, they filed Nairobi H.C.C.C. No. 1540 of 2002 (OS) and Machakos HCCC No. 102 of 2002 claiming adverse possession in respect of the suit property, which cases were dismissed on 4th March 2004 and 19th August 2002 respectively. He produced the proceedings in these cases as the Plaintiff's Exhibit 22. PW7 stated that he also learnt of Machakos HCCC No. 127 of 2010 in which the 1st Defendant had been sued by one Monica Kiragu, and which revealed that it was still subdividing and selling the suit property despite the court issuing orders directing that *status quo* be maintained. PW7 also produced a charge sheet in a criminal case involving the DW1 as the Plaintiff's Exhibit 23 to demonstrate that the 1st Defendant was not truthful.

PW7 was subjected to a lengthy cross examination by the Defendants, and stated that his clients had never parted with possession of the suit property and that the people on the land are trespassers. Further that it is highly unlikely that Arthi Highway Developers were in possession in 2007 as alleged since there were cases of adverse possession in court from people claiming possession and the 1st Defendant was not joined as a party. PW7 informed the court that the process before sub-division is that a scheme of drawing is presented to the Commissioner of Lands who then circulates it to the Town/City Planning Departments in the City Council, the Ministry of Lands and the Director of Survey, and that the sub-division proceeds if there is no objection. PW7 informed the court that he first learnt of the sub-division of the suit property as a result of a sub-division plan that was in the 1st Defendant's Bundle of Documents filed on 5th July 2011, and stated that the said sub-division was not authorized by his clients. PW7 explained to court that he did not register the court orders against the title of the suit property for reasons that he had already placed a caveat emptor on the property, and further, that the Defendants' advocates were in court when the *status quo* orders to the effect that nobody should deal with the suit property were issued.

PW7 was emphatic that the title in possession of the Plaintiff directors was the genuine one as it the one that had the daybook number which was the practice then. He admitted that he did not know the name of the CID officer dealing with this case or the file number. According to the witness, there was no progress forthcoming from the police who never said that the Plaintiff's title was not authentic. PW7 averred that the 1st Defendant was fraudulent by getting the transfer registered without a title and that its sub-division of, and attempt to sell the suit property when there were court orders was contemptuous and fraudulent. Although PW7 admitted to not having amended his plaint to include particulars of fraud, he stated that the share certificates at the company's registry were fraudulently transferred by the 2nd and 3rd Defendants who transferred the land to the 1st Defendant. He reiterated that the certificate of title used by the 1st Defendant was fraudulent because Mr. Sobhag Shah's was forged. Further, that without a title number, an application for transfer would not be accepted by the land office.

PW7 stated that an allowance for a road would be very negligible and in his opinion, the 20 acres remaining after subdivision of the suit property could not be a road reserve. He admitted not taking into account the wayleaves for the pipeline shown in the survey plan in his calculations of the balance of the land remaining after sub-division. He explained that if the whole land had been subdivided the Registrar must put an endorsement on the tile showing that it has been extinguished. He also explained that there

are similar endorsements made in the original title kept at the Lands Office.

Contrary to the evidence adduced by PW6, PW7 informed the court that the serial number at the bottom of the title did not have any relation to the year the title was issued, but that it referred to the year the order and requisition for certificates was made at the Government Printer, and that the title could be used after that year.

PW7 informed the court that the failure of the Commissioner of Lands to place a restriction on the title to the suit property, made it open for transaction by other parties. PW7 admitted that by the time he sent letters dated 12th April 2010 and 22nd July 2010 to the 5th Defendant, the transfer had already taken place as title was issued in 2008. PW7 also admitted that no attempt had been made to contact the lawyer who registered the transfer and the shares. PW7 also stated that he did not have evidence that the 6th Defendant was involved in any fraudulent dealings and that he never wrote to them about the Plaintiff. Further, that the 6th Defendant was only enjoined to the suit on information that they were the ones undertaking construction on the suit property.

In re-examination, PW7 maintained that their request for putting a restriction on the property was not acted upon despite the Plaintiff having provided an affidavit as directed by the Commissioner of Lands. Further, that the 2nd and 3rd Defendants purported to have taken over the Plaintiff company in the year 2000 when the share transfer was purportedly effected, while the adverse possession cases commenced in the year 2002 and judgment was delivered in the year 2005. He confirmed that it was the Plaintiff who was sued in the adverse possession case, which the 2nd and 3rd Defendants were not parties to, and that there was no indication that the said defendants were on the property at the time. PW7 reiterated that no supporting documents were presented together with the application for transfer and that without the title; the transfer should not be accepted for registration.

PW7 further stated that in the event the title is lost, the registrar would require an affidavit for a provisional title to be used. That another affidavit would be sworn under section 75 of the Registration of Titles Act and a notice published in the gazette notice for 14 days after which the transfer would be registered with an endorsement to this effect. He states that this was lacking on documents produced by the 1st and 2nd Defendants. PW7 asserted that if the entire property had been subdivided, the registrar would put an endorsement in red ink that the title had been exhausted. He averred that there was no endorsement cancelling the title in this case as there is a balance of 9.033 hectares remaining after the sub division.

The 1st Defendants Defence:

The 1st Defendant in its Defence dated 17th May 2007 contended that it was a *bona fide* purchaser for value of the suit property for value without notice, and that having lawfully purchased it from the Plaintiff, it had obtained an indefeasible title. The 1st Defendant's witness (DW1) was Franklin Kamathi Kamau. He stated that he is a private developer and was aware of the parcel of land in dispute LR. No. 7149/10. DW1 averred that his company owns the suit property which is located in Mavoko Municipality along Mombasa Road.

The witness explained that while driving along Mombasa Road in 2005, he saw a signpost with a telephone number stating that the suit property was for sale. Upon calling the said telephone numbers he was told he could be put into contact with the owners of the land, and later met 3 persons on the land, who told him that they were the Directors of the company that owned the land. One of them was called John Micheni Musa and the other was called Solomon Mwinzi Mwau, and DW1 stated that this was the first time he was meeting the two and that at the time did not know of their company namely West End Butchery Ltd. DW1 described the suit property then as being a big block of land with shrubs, and that there was a water storage tank and some dilapidated building thereon. He also stated that there was no farming taking place on the land.

DWI testified that he then consulted with his colleagues namely Justin Wainaina, David Ole Konyo and

Onesmus Kimani to try and purchase the land together, and they agreed to form a company for that purpose. The company formed was Arthi Highway Developers Ltd on 1st November 2005 and DWI produced the Memorandum and Articles of Association and Certificate of Incorporation of the said company as the 1st Defendant's Exhibit 1 and 2.

DW1 testified that they undertook due diligence and verified that the persons they were dealing with were Directors of West End Butchery Ltd, and produced a form CR 12 from the Companies Registry dated 27th July 2004 as Exhibit 3, which showed that John Micheni Musa and Solomon Mwinzi Mwau were the Directors of the Plaintiff company. DW1 testified that he confirmed this information with the file at the Companies Registry personally. Further, that he also conducted an official search at the Lands Registry which showed the land was owned by West End Butchery Ltd, and produced as the 1st Defendant's Exhibit 4a and 4b the application for a certified copy of the title to LR No. 7149/10 dated 29/9/2005 made by Justin Njuguna, a Director of Arthi Developers Ltd, and a copy of the certificate of title that showed that the registered owner of LR No. 7149/10 was West End Butchery Ltd.

DWI testified that Arthi Highway Developers Ltd subsequently agreed on the purchase price and entered into a sale agreement dated 17th November, 2005 with the Directors of West End Butchery Ltd with respect to the suit property, which sale agreement he produced as the 1st Defendant's Exhibit 5. He further testified that Arthi Highway Developers Ltd made payments of Kshs.35,000,000/= as the purchase price, and produce the receipts as the 1st Defendant Exhibits 6a, 6b, and 6c. He also produced the completion documents being the Rates Clearance Certificate, the Transfer and the letter of consent by the Athi River Land Control Board as the 1st Defendant Exhibits No. 7, 8 and 9 respectively. The payment slip for stamp duty was produced as Exhibit 11. DW1 also testified that at the time of purchase there was a subdivision scheme for the suit property that had been requested by West End Butchery, and which had been approved by the District Physical Planner of Machakos on 25/08/04, and he produced it as the 1st Defendant's Exhibit No. 10.

DW1 stated that all the necessary documents were lodged with the Ministry of Lands for registration and produced the application for registration as Exhibit No 12. He explained that the documents could not be immediately registered because he was informed by their Advocate that the Deed File at the Ministry of Lands which had the original title was missing, and the Directors of West End Butchery Ltd were then requested to provide a Deed of Indemnity which was approved by the Chief Land Registrar on 24/04/06. DW1 further explained that the Deed File was eventually found and the transfer registered, and he produced as the 1st Defendant's Exhibit 13 a search which showed that the property was registered in Arthi Highway Developers Ltd's name on 15th March 2006.

DW1 further testified that Arthi Highway Developers Ltd took possession of the suit property immediately after registration, and brought evidence of the disturbances they thereafter started encountering from squatters, including advertisement for sale of the suit property, as the 1st Defendant Exhibit 14(a), 14(b) and 14(c). He stated that the squatters were chased away from the land and that they did not have any information at the time of anyone else laying claim to the suit property. He further stated that Arthi Highway Developers Ltd then wrote to the Commissioner of Lands to adopt the sub-division scheme that was already in existence and approved, as they were thinking of selling the suit property. DWI produced the subdivision plan as the 1st Defendant's Exhibit 15, and the response by the Commissioner of Land dated 14 September 2007 as the 1st Defendant's Exhibit 16.

It was DW1's testimony that the suit property was subdivided into 10 plots and the sub-title deeds were processed and collected, whereupon he surrendered the mother title. Further, that the said sub-division also provided for roads and an easement for the pipeline that passes through the suit property. DW1 stated that by 2007 the suit property was registered in the name of Arthi Highways Developers Ltd, and that he first heard of the challenge to the title by the Plaintiff from officials in the Lands Ministry at the end of 2006. Further that the Directors of Arthi Highway Developers Ltd thereupon presented themselves and left their identity and telephone numbers with the Criminal Investigations Department. DWI stated that they then later saw an advertisement in the newspapers with a summons to enter appearance, and they

instructed lawyers to enter appearance. DW1 denied that he was served with any order for injunction and that to the best of his knowledge his Co-Directors were also not served with any order. He also stated that he was not present in court when the order of status quo was given by J. Mbogholi in 2010.

DWI further testified that Arthi Highway Developers Ltd later sold some land to the 5th Defendant, and applied for change of user of the land from agricultural to residential by an advertisement. The said advertisement was not opposed and new grants were issued to the 5th Defendant. With reference to the criminal charges against him produced in evidence by the Plaintiff, DW1 stated that the same was brought by a co-Director one Justus Wanaina Njuguna, who later withdrew the same. He produced a Form CR12 dated 11th September 2009 from the Registry of Companies with the Arthi Highway Developers Ltd list of Directors as his Exhibit No. 17, and concluded his testimony by reiterating that the 1st Defendant has been in possession of the suit property since it was registered as owners on 2006, and that the Plaintiff have not been in possession.

Upon cross-examination by the Plaintiff's Counsel, DW1 stated that he could not remember the name of the person who first introduced him to the sellers of the suit property, and reiterated that the first meeting with the sellers on the suit property was his first contact with the two Directors of West End Butchery Ltd namely Solomon Mwinzi and John Micheni. He stated that the negotiations for the purchase took place at the Arthi Highway Developers Ltd offices at Upperhill in Nairobi, and that the said Directors of West End Butchery Ltd did not have an office in Nairobi, and that to date he did not know the location of their registered office. He stated that in most cases people who own land do not have offices. He also stated that he was only shown the Plaintiff's shop and address at Westlands in Nairobi two years after signing the sale agreement. He stated that the said Directors gave their proof of ownership being the form CR 12 dated 2004 which had their names as directors and shareholders of West End Butchery Ltd, which he verified. Further, that they also gave him the copy of the title to the suit property which he verified.

DW1 stated that the said Directors also submitted the original Title, their PIN numbers and pictures for the land control board consent and for the transfer. Further, that one of the directors (Mwinzi) was grazing his cattle on the suit property and resided in Mlolongo. DWI explained that the postal-address of P. O. Box 66697 Nairobi provided in the sale agreement belonged to his co-Director one Onesmus Kimani, and differed from the one used in his affidavits which is his personal postal address.

DWI admitted that the said Directors did not give him any resolution by West End Butchery Ltd to sell the property. He stated that the payments for the suit property were made through his lawyer, and that the receipts he produced in evidence are from the said lawyers. He confirmed that he did not have any receipts from West End Butchery showing the money was paid to them. He also stated that he did not have the letters of offer and acceptance for the sale of the suit property. DW1 explained that the selling price for the sub-divisions of the suit property was Kshs 3 million per acre, and that it is possible for land to appreciate from 30 million in 2005 to 300 million in 2010.

DW1 indicated that he did not report the said Directors of West End Butchery Ltd to the Criminal Investigations Department because he had not been told that they were not the owners of the suit property, and the police also told at him that the original complainants were reluctant to follow up with the matter. He confirmed that he was made aware at the Criminal Investigation Department that there were people who were claiming ownership of the property.

DWI was questioned on the sub-divisions and sale of the suit property and he stated that Arthi Highway Developers Ltd sold the first subdivision in 2009 to the 5th Defendant, and another sub-division to the 6th Defendant in 2010. He also stated that it entered into a transaction with a firm known as Gachoni Enterprises which did not go through, and that there are portions of the suit property not yet sold. He further stated that Arthi Highway Developers Ltd has been represented by various Advocates since the suit herein was filed in 2007, and that he had been involved in other sale transactions and developments of land; the one herein was not his first. He however clarified that Arthi Highway Developers Ltd was formed for purpose of purchasing the suit property.

DW1 confirmed that Arthi Developers did receive an offer to sell the suit property to the City Council of Nairobi at Kshs.500,000/= per acre for a cemetery project, and he was not aware that Mr. Khan on behalf of the Plaintiff wrote to the Permanent Secretary in the Ministry of Local Government protesting the sale. DW1 admitted being aware of the suit brought by Monica Kiragu and David Ndegwa in Machakos HCCC No. 127 of 2010 claiming that he was trying to defraud them of land, but claimed that it was based on falsehood and the same was withdrawn. He also stated that he was aware of the adverse possession claim on the suit property, but that nobody approached Arthi Highway Developers as claimants, although there were people grazing their cattle on the suit property. DW1 in addition stated that he did not have any documents showing the withdrawal of the criminal case in which he was charged with altering company documents.

DW1 stated that he was aware that if served with court orders, he must stop dealing with the land in question, and that the court orders stopping him from dealing with the suit property were brought to his attention in 2011 after he had already sold the land. He stated that he saw the caveat emptor published in the newspaper with respect to the suit property, however that there was nothing stopping Arthi Highway Developers Ltd from subdividing the property despite the said caveat. Further, that it was never brought to his attention that there was an application for contempt of court against him and he was never served. When shown a replying affidavit sworn by him filed in court on 20th March 2010, DW1 stated that he was responding to an application dated 16th February 2010., which was an application for contempt of court. He stated that he started selling the property in 2007 because he wanted to raise money to undertake construction.

The last set of questions put to DW1 by the Plaintiff's counsel were on the original title to the suit property, which DW1 reiterated he received from the persons who sold him the suit property, and which he presented to the lands office and surrendered when the entire land was sub-divided. He stated that he has sub-titles to the portions of the suit property that Arthi Highway Developers Ltd has retained. He confirmed seeing the title produced by PW 6, and agreed that it was not noted on the said title that the suit property had been exhausted. DW1 however stated that the transfer form presented to the land office by Arthi Highway Developers and which he produced as his Exhibit 12 showed that the original title had been presented to the Lands office, as there was an indication of LR number 7149/10 appearing on the said document. DW1 claimed that he surrendered the title in 2008 when he presented the registration of the last two sub-divisions, and that there should be such a note in the register in 2008.

Lastly, DW1 denied that Arthi Highway Developers Ltd. was set up to commit a fraud, and stated that he used different postal addresses in his affidavits depending on the time he was swearing the affidavit, and further, that the Directors have different addresses which can be used at any time. He also denied that the firm of lawyers paid the purchase price does not exist, but admitted not knowing where the said firm is located.

On cross examination by the 4th Defendants Counsel, DW1 stated that Arthi Highway Developers Ltd took possession of the property immediately after the sale agreement in 2005, and that there were developments existing on the suit property. DW1 confirmed upon cross examination by the 5th Defendants Counsel that Arthi Highway Developers sold a subdivision of the suit property to the 5th Defendant, and that a sale agreement was entered into. Further, that there was no court order registered against the title of the suit property when he was dealing with it. DW1 also confirmed that a seal was placed on the sale agreement entered into between Arthi Highway Developers and West End Butchery Ltd, and that the directors of the two companies signed the said agreement. Upon cross-examination by the 6th Defendant's counsel DW1 confirmed that there was a sale agreement entered into with the 6th Defendant with respect to LR 7149/111 and that Arthi Highway Developers signed the transfer to them after payment of the purchase price and gave them possession. Further, that he was aware that the 6th Defendant has fenced the said property and started construction thereon.

The 4th Defendants Case:

The 4th Defendant in its Defence dated 17th March 2008 and filed on 18th March 2008 denied the

Plaintiff's claims and put it to strict proof thereof. The 4th Defendant further stated that any acts by themselves were procedural, regular, within their statutory confines and lawful. The witness called to testify on behalf of the 4th Defendant was Johnson Otieno Odera (DW2), an advocate presently employed as Deputy Director at the Anti-counterfeit Agency since 1st December 2011. The witness stated that before his present posting he worked as a State Counsel and Senior Assistant Registrar General at the Companies Registry between January 2004 and November 2011, and that his duties included ensuring compliance with the Companies Act and other duties administered by the Registrar General. He stated that he became aware of the case herein in the course of his duties, and he made a witness statement dated 25th November 2011 which was filed in Court on 8th December 2011.

DW2 testified that he became aware of the allegations that the share transfers in this case were fraudulent when they were served with the Plaint at the Companies Registry. He then perused the files of the West End Butchery Ltd and Arthi Highways Developers Ltd in the Companies Registry and had recorded the findings in his witness statement. The findings from the witness statement are that Arthi Highway Developers was registered on 1st November 2005, and issued with a certificate of incorporation No. C. 120264. Further, that the company's file has always been available at the Companies Registry, and that its directors and shareholders are Franklin Kamathi Kamau, Onesmus Kimani Ngunjiri, Justus Wanaina Njuguna and David Lopo Koonyo.

As regards West End Butchery Limited the findings in DW2's witness statement were that the company was registered on 9th July 1957 and issued with a certificate of incorporation No. C. 3958. To the best of DW2's knowledge the company's file has always been available and accessible in the Companies Registry, and that he was not aware of any complaints that the file was missing or could not be traced. DW2 stated in his witness statement that the Registrar of Companies did receive notification of changes in the directorship and shareholding of West End Butchery Limited in the prescribed manner on 19th February 2004, and that the effect of the said changes is that the directors and shareholders of the company are John Micheni Musa and Solomon Mwinzi Mwau. Further, that the original file of the company does not have evidence of any documents filed after 2004 indicating a different position.

DW2 stated in his testimony that the effect of the notification was that from 10th October 2000 there were changes in directorship of West End Butchery Ltd., and that the Registrar was notified of the changes. DW2 testified that there was nothing unusual in the notification, it was in the required format and was properly executed at the last page on 10/10/2000. It was also DW2's testimony that there was a transfer of shares on the file dated 10th October 2000, made by from Mohamed Ali to John Micheni Musa, from Mohamed Juma to John Micheni Musa and from Mohamed Abdul Rauf to Solomon Mwinzi. Further, that the said transfers were on their face proper and provided all information needed, and the stamp duty was paid. DW2 stated that there was no reason for the Registrar not to have effected the transfers.

On the Plaintiff's evidence that Aziz Bibi one of directors of West End Butchery Ltd died in 1969, DW2 stated that this position was inconsistent with the records at the registry which prior to the changes being effected indicated that Aziz Bibi was a director of the Company, and there was no notification of her having been changed. DW2 in response to the Plaintiff's evidence that Lucy Nagaki Mburu who signed the forms on transfer of shares and change of directors was not a secretary of West End Butchery Ltd, stated that this is not information that could have been within the Registrar's knowledge especially at the time of receiving the documents. Further, that the Registrar is not under a duty to verify the same as the law states that every notification is a true reflection of the state of affairs therein.

DW2 further testified that there was nothing fraudulent about the documents presented to the Registrar as they confirmed with the statutory requirements and registrar had no reason to doubt them, and no one brought any notice of fraud to the Registrar prior to the filing of the suit. It was his view that the Registrar of Companies would not be able to detect any fraud because the relevant forms are standard and must be accepted if properly filled. DW2 also stated that the officers at the Companies Registry are not signature experts and have no way of knowing whether signatures on forms filed at the registry are forged. Further, that the law does not require the verifying of signature on the forms once filed, and that the official position of the Registrar of Companies is that whoever alleges fraud must report it to the police for

investigation. It was DW2's position that the Registrar of Companies does not have power cancel any entries in a company file, and that under section 118 of the Companies Act such entries or documents filed are public records and can only be cancelled or rectified by the High Court.

Upon cross-examination by the Plaintiff's counsel, DW2 stated that although he is now no longer an officer in the companies registry, he was when he made his witness statement. The witness was stood down twice during cross-examination to produce the original files of West End Butchery Ltd and Arthi Highway Developers Ltd. The original file for West End Butchery Ltd was produced by the witness in court on 10th May 2012, and a certified copy produced on 24th July 2012, which was marked as the 4th Defendant's Exhibit 1.

DW2 reiterated the findings on the file on the registration of West End Butchery Ltd and stated that in 1994 the shareholders of the company were Mohamed Juma, Aziz Bibi wife of Ala Raka, Mohamed Ali and Mohamed Abdul Rauf, and that the annual return showed that the Directors were Mohamed Juma, Mohamed Ali and Mohamed Abdul Rauf. It was also shown that Mohamed Abdul Rauf was the Company Secretary, although there was no stamp to show if he was a certified Public Secretary. He further stated that the Registry was notified on 19th April 2004 of the change of directors indicating that Mohamed Juma, Aziz Bibi and Mohamed Asif had ceased being directors and that Solomon Mwau Mwinzi and John Micheni Musa were the Directors with effect from 10th October, 2000. DW2 also stated that when the notification of change of directors was filed, the records show that the Company Secretary was Lucy Nagaki Mburu, and that there was no notification of change of Secretary from Mohamed Abdul Rauf to Lucy Nagaki Mburu, although according to DW2 this was not a weighty issue.

DW2 on cross-examination further stated that according to the file there are annual returns for 2002/2003 filed on 19th April, 2004 by Solomon Mwau Mwinzi. Further, that on the return there is a stamp showing a receipt number but that there was no duplicate of the receipt on file. DW2 did not find this unusual and according to him the evidence of payment is in the stamp, although he admitted that there duplicate receipts on the file for other documents. DW2 admitted that there were earlier returns before 2004 on the file, and that some were filed by Mohamed Abdul Rauf and some by Templeton Secretaries. He stated that the annual returns produced by the Plaintiff from 1993 to 1997 corresponded with those on the original file. He also stated that the receipts produced by the Plaintiff as evidence of payment for the annual returns on their face looked like the receipts normally issued by the Companies Registry and that there was a file number on the receipt which belongs to the file of West End Butchery. There were however no duplicates of the said receipts on the file. DW2 further stated that the duplicate receipts in the file were for returns filed from 2004 to 2007 by Solomon Mwinzi which were the last returns filed, and that there were no returns filed by Mohamed Abdul Rauf in the original file from 1998.

DW2 explained that he received a letter from the senior litigation counsel that a suit had been filed in relation to this case and that prior to the filing of the suit they had not received any complaint; neither did the file for West End Butchery Ltd have any copy of a complaint. When questioned on the complaint dated 8th February 2002 produced by the Plaintiff in evidence, DW2 responded that all such letters are stamped when received, and there was no such stamp on the said letter acknowledging receipt by the Companies Registry.

DW2 reiterated that from the records the last returns filed by Mohamed Rauf were in 1997, and that the directors were Solomon Mwinzi and John Muchemi from 2004. He explained that if the Registry were to receive parallel returns, then the practice is to write to the parties to clarify the position and file amended returns. Further, that if parties do not agree to file amended returns they are referred to the High Court for rectification as per the law. He however stated that there were no duplicate annual returns in the file corresponding to the duplicate of receipts shown to him by the Plaintiff, and admitted that receipts may get lost or misplaced in the process of filing.

DW2 explained that the procedure upon receiving a complaint about a fraudulent dealing in a company is to administratively write to the person who is facing the complaint, and advice parties to report the matter to the police. DW2 also explained that the purpose of Form CR 12 is that it reflects that a file is upto date in terms of all annual return having been filed, and shows the persons who are shareholders and directors

of a company. DW2 reiterated his testimony about the directors of West End Company upon cross-examination by the Counsel for the 5th and 6th Defendant and admitted that there was an error in his witness statement, and that the documents as to change of directorship were filed on 19th April 2004 and not February 2004.

The original file for Arthi Developers Ltd was produced in court by DW2 on 24th July 2012, as well as the certified copies which was marked as the 4th Defendant's Exhibit 2. On cross-examination by Counsel for the Plaintiff, DW2 admitted that the original file for Arthi Highway Developers was in the custody of another officer who was on leave, and he had only been able to retrieve it when the said officer resumed his duties. He explained it is a policy at the registry to have files with court matters kept under lock and key.

The 5th Defendants Case:

The 5th Defendant in its Defence dated 6th June 2011 and filed on 7th June 2011 denied that it unlawfully purchased or was party to any fraud or misrepresentation in the purchase of the three sub-divisions of the suit property namely L.R. Numbers 7149/112, 7149/113 and 7149/114, and that it carried out due diligence on the properties including carrying out searches at the Land Registry which showed that the properties were registered in the name of the 1st Defendant, and also adhered to all the applicable laws in the purchase of the said parcels land and was issued with certificates of title.

The 5th Defendant also filed a Notice of Claim against Co- Defendants dated 8th July 2011 wherein it was stated that without prejudice to its Defence filed against the Plaintiff, it was claiming as against the 1st and 4th Defendants jointly and severally full indemnity with respect to any relief, ruling judgement order decree and/or costs awarded to the Plaintiff in this suit. Secondly that it is entitled to full indemnity as against the 1st and 4th Defendants in respect of all costs, expenses, claims and/or proceedings arising from or related to the 5th Defendant's purchase and development of LR Numbers 7149/112/7149/113 and 7149/114.

The 5th Defendant called two witnesses to testify, namely Dr. Hezron Odoni Opere (DW3), the chairman of the 5th Defendant which is a society registered under the Cooperative Societies Act, and Mr. Ray Onoka Aboge (DW4), an Advocate of the High Court of Kenya who acted on behalf of the 5th Defendant in the purchase of three parcels of land namely L.R. Numbers 7149/112, 7149/113 and 7149/114 that were being offered for sale by the 1st Defendant. DW3 testified that part of the functions of the 5th Defendant is to buy and develop parcels of land for residential premises for its members. Pursuant to this mandate the 5th Defendant were given a letter of offer on or about 28th March 2008 by the officials of the 1st Defendant for the sale of 2 parcels of land namely L.R Number 7149/113 and L.R Number 7149/114. Land parcel number LR 7149/112 was also later offered to them for for sale.

DW3 also testified that the 5th Defendant entered into a sale agreement with the 1st Defendant, Arthi Highway Developers, with regard to L.R. Numbers 7149/112, 7149/113 and 7149/114, and transfers with regard to the three parcels of land were also effected. The letter of offer, sale agreements and transfers were produced as evidence in a bundle of documents produced by the 5th Defendants as its Exhibit 1. Also produced in evidence were the copies of the titles with regard to the said parcels of land; the change of user applications from agricultural to residential land and approval of change of user with respect to the said parcels of land; and the details of the 1st Defendant in terms of its Articles and Memorandum of Association, personal identification number, and the identity and personal identification numbers of its directors that were obtained by the 5th Defendant.

DW3 testified that the 3 parcels of land cost the 5th Defendant Kenya shillings 117,570,000/=, which money was sourced from its member's contributions, and a list of the members who made contributions was provided in the 5th Defendant's Exhibit 1. He further testified that the 5th Defendant intended to

develop houses for its members on the said parcels and had already negotiated a draft agreement with Shelter Afrique for accessing bridging finance, which draft agreement was also produced in the 5th Defendant's bundle evidence. The said financing was however never disbursed to the 5th Defendant because the project was halted by a court order on 7th April 2011. At the time of stoppage, a perimeter wall had already been constructed and there had been excavations on the three parcels of land for the construction of the foundation of houses. DW3 stated that the 5th Defendant had anticipated building 154 residential houses, a school and shopping centre on the three parcels of land.

DW3 denied that the 5th Defendant was part of any Plan to defraud the Plaintiff and that when they conducted a search at the Lands Office the 1st Defendant was registered as owner of the three parcels of land, and the transfers of the said parcels to the 5th Defendant were accepted and registered at the Lands office. He also stated that the 5th Defendant is currently registered as the owner of the three parcels, and there are no restrictions or court orders registered against their titles. Further, that they completed purchase of the properties in 2009, before they received communication about the dispute over the suit property.

Lastly, DW3 testified that the 5th Defendant had entered into various contracts which were produced in its bundle of evidence for environmental assessment; building works; electrical and mechanical works; quantity survey; land survey; architectural services; and structural engineering services, which have now been halted and are paying penalties as a result and risk escalation of prices under the said contracts.

Upon cross-examination by the counsel for the Plaintiff, DW3 stated that the letter from M.A Khan Advocates to the Kenya Medical Association dated 12th April 2010 produced in evidence by the Plaintiff advising against purchase of the suit property came to the 5th Defendant's attention in 2010, but that by that time the purchase of the three parcels of land had been finalised. DW3 admitted that the said letter did refer to the present court case. He also stated that their Advocate, Ray Aboge, did not receive the subsequent letter by M.A. Khan Advocates dated 22nd July 2010, and clarified that the Kenya Medical Association is an association of doctors that is different from the 5th Defendant.

DW3 reiterated that he received the court order on 7th April 2011 when it was taken to the site of construction, although he admitted that construction started on January 2011 after they had notice of the court case from M.A Khan's letter dated 12th April 2010. On cross-examination by the 1st Defendant's counsel, DW3 stated that the 5th Defendant exercised due diligence and established that the 1st Defendant were the registered owners of the three parcels of land it bought, and since it took possession in 2009 the 5th Defendant had not witnessed any activity on the three parcels of land by the Plaintiff.

DW4 adopted the contents of his witness statement dated 6th June 2011 and filed in court on 7th June 2011 wherein he stated that he is an advocate practicing with the law firm of Anne Wedah and Company Advocates, and that they were instructed by the 5th Defendant on 18th of April 2008 to act on their behalf in a conveyancing transaction relating to the purchase of three parcels of land being L. R. Nos. 7149/112, 7149/113 and 7149/114 that were being offered for sale by the 1st Defendant. Further, that the said parcels of land were subdivisions of L. R. No. 7149/10. DW4 stated that they conducted a personal search at the Companies Registry and confirmed that the 1st Defendant indeed existed and that they had filed annual returns upto 5th December 2007, and they obtained copies of Arthi Highway Developer's Memorandum and Articles of Association. DW4 further stated that once they obtained the obtained copies of the titles of the said parcels of land on 3rd of December 2008 from Messrs Mutuli & Apopo Advocates who were acting for the seller, they carried out official searches at the Land Titles Registry on L. R. Nos. 7149/112, 7149/113 and 7149/114 and the searches established that the titles indeed existed, the same were registered in favour of the 1st Defendant, and that no encumbrances were noted

It was DW4's testimony that the sale agreements were duly executed by the parties on 30th of January 2009, and the requisite deposit of Kshs.11,752,000/= paid to the 1st Defendant's Advocates as

stakeholders pending successful registration of the transfers in favour of the Purchaser. The 1st Defendant also subsequently obtained change of user for the land under purchase from agricultural to residential in June 2009 and new titles were issued by the bearing new L.R. Nos. 28183, 28184 and 28185. Further, that transfers were in due course registered in favour of the 5th Defendant towards the end of July 2009, and the total purchase price in the sum of Kshs.117,520,000/= duly remitted to the 1st Defendant. It was DW4's view that the purchase was done lawfully and legally, and that they conducted all due diligence on the property. DW4 also stated in court that he first got to know about the dispute herein after receiving a letter from the 5th Defendant written by M.A. Khan, and that the said letter came to his attention after they had concluded the purchase for the three parcels of land.

Upon cross-examination by the Plaintiff's counsel, DW4 admitted that he had not visited the parcels of land, and explained that they placed a number of advertisements and a caveat emptor in the newspapers on to alert the public of the said purchase, and also because one of the directors of the 1st Defendant claimed not to have been paid his share of the purchase price and was threatening to stop the transfer. He denied that it was because they had realized that the property was registered in the Plaintiff's name. DW4 also stated that he visited M.A Khan in 2009 upon being shown the letter that Mr. Khan had written to the Kenya Medical Association on the suit property, and which was brought to the attention of the 5th Defendant. He admitted that during the said visit Mr. Khan did inform him of the court case herein with respect to the suit property, but reiterated that by that time the transfers with respect to the three parcels of land bought by the 5th Defendant had been registered in its favour, and stated that he was not aware if at the time construction had started on the said parcels of land.

The 6th Defendants Case:

The 6th Defendant in its Defence dated 22nd June 2011 and filed on the same date denied the Plaintiff's allegations in its Re-amended Plaint and particularly that it unlawfully purchased the suit property, and that it had not been party to any fraud and misrepresentation in the purchase of the suit property. The 6th Defendant averred that it adhered to all laws in the purchase of the suit property; conducted all due diligence possible; and that it was a *bona fide* purchaser for value without notice of the Plaintiff's interest in the suit property.

The 6th Defendant also filed a Notice of Claim against Co-Defendants dated 19th July 2011 wherein it was stated that without prejudice to its Defence filed against the Plaintiff, it was claiming as against the 1st and 4th Defendants jointly and severally full indemnity with respect to any relief, ruling judgement order decree and/or costs awarded to the Plaintiff in this suit. Secondly that it is entitled to full indemnity as against the 1st and 4th Defendants in respect of all costs, expenses, claims and/or proceedings arising from or related to the 6th Defendant's purchase and development of LR Number 7149/111.

The General Manager of the 6th Defendant, Ahmednoor Mohamed Sheikh (DW5), gave evidence on its behalf, and adopted his written statement dated 22nd June 2011 and filed in court of the same date. DW5 stated that he resides at Mlolongo, Machakos County and was well versed with the transaction leading to the purchase by the 6th Defendant of the property known as L.R. No. 7149/111 (formerly L.R No. 7149/10). Further, that the said parcel of land is adjacent to the 6th Defendant's housing estate known as Yamin Park View Estate. DW5 stated that a director of the 1st Defendant one Mr. Wainaina approached the 6th Defendant with an offer to sell to it the said parcel of land, who commissioned its lawyers to conduct due diligence and a search at the lands office dated 14th June 2010 confirmed that indeed the land belonged to the 1st Defendant. DW5 further stated that they also undertook a search at the companies registry and confirmed that the 1st Defendant existed and the identities of its current directors whom he had personally met.

DW5 further stated that the 6th Defendant thereafter executed a sale agreement on 2nd August 2010 for the sale of the said parcel of land at Kshs.66,000,000.00 and paid a 10% deposit thereof and stamp duty of

Kshs.1,320,000 to the government. However, that upon presentation of the transfer documents for registration the 6th Defendant came to learn that a court Order had been issued in Machakos High Court Case No. 127 of 2010 brought by one Monica Wanjiru Karagu restraining the transfer of several parcels of land including the one it had bought, and that another Court Order was issued herein on 28th March 2011 leading to its inclusion in the present case.

DW5 confirmed that the transfer instruments are still lying at the lands office awaiting registration, and that in the meanwhile the 6th Defendant had spent a sum of Kshs. .90,000,000.00/= on erecting a perimeter wall, together with the purchase price, legal fees, stamp duty and other expenses. He asserted that the 5th Defendant is a *bona fide* purchaser for value without notice of the Plaintiff's purported interest, it was not aware of any Court Order in the dispute concerning the Plaintiff and the 1st Defendant and was not party to any purported fraud. DW5 asked that the suit herein be dismissed, the transfer in the 6th Defendant's favour be registered and it be allowed to continue with its planned development on the subject parcel of land. DW5 produced as the 6th Defendant's Exhibit 1 his bundle of documents filed on 21st November 2011.

On cross-examination DW5 confirmed that no title with respect to LR 7149/111 has been issued to them, and that they would not have bought the said parcel of land if they had known that there was an injunction in place in relation to it. He stated that they were approached by the 1st Defendant in 2010, and did not know its directors or the owners of the suit property before then. Dw5 also stated that they had owned the plot adjacent to the suit property since 2006, and were not aware of any squatter on the suit property, although they used to see animals grazing thereon. On re-examination DW5 confirmed that they conducted searches in the lands office and companies registry on the directorship of the 1st Defendant, which searches are included in the 6th Defendant's bundle of documents.

The 7th Defendants Case:

The 7th Defendant in its Defence dated 18th July 2011 and filed on the same date 22nd June 2011 and filed on the same date denied the Plaintiff's allegations in its Re-amended Plaintiff and stated that sometime in February 2010 the 1st Defendant fraudulently misrepresented that it was the legal owner of LR 7149/115 and was selling it to the 7th Defendant for Kshs 55,000,000/=. Further, that the 7th Defendant having done due diligence of searches at the Ministry of Lands paid a 10% deposit of Kshs 5,500,000/= to the 1st Defendant's Advocate to hold as stakeholder till completion.

The 7th Defendant averred that while in the course of conveyance it discovered that there were caveats and temporary injunctions restraining the 1st Defendant from selling and or dealing with the suit property, and that it did not have a good title to pass thus rendering the whole transaction a nullity *ab initio*. The Defendant thereupon demanded a refund of the deposit paid, and upon refusal by the 1st Defendant's Advocate filed two cases pending in court. The 7th Defendant denied being party to any fraud and stated that it was a *bona fide* purchaser without notice of the Plaintiff's interest in the suit. They also claimed that the Plaintiff was vicariously liable for the loss which the 7th Defendant has incurred, and detailed the particulars of the said negligence in its defence. The 7th Defendant counterclaimed as against the Plaintiff for general and aggravated damages owing to its negligence. The 7th Defendant did not call any witness to testify.

THE ISSUES AND FINDINGS

At the close of the evidence on 24th July 2012, the parties were directed to file and serve their respective submissions. The Plaintiff's Counsel, Mr. Newton Mwangi filed submissions dated 30th July 2012 and filed on 31st July 2012. The 1st Defendant's Counsel Mr Thuita's submissions are dated 7th August 2012 and filed on the same date, the 4th Defendant's Counsel Mr. Bitta filed submissions on 8th August 2012 of the same date; the 5th Defendant's Counsels Mr. Chacha Odera and Mr Mbaluto, filed submissions dated

22nd August 2012 and filed on 23rd August 2012; the 6th Defendant's Counsel Mr. Githinji also filed submissions on 23rd August 2012 that were dated 17th August 2012; and lastly the 7th Defendant's Counsel Mr. Wanjohi's submissions were dated 8th August 2012 and filed on the same date.

After a careful reading of the evidence and submissions made in this case, it is my opinion that there are five issues for consideration as follows:

1. Whether there was a fraudulent transfer of the shares and change of directors of the Plaintiff Company from Mohammed Asif, Mohamed Juma Alla Rakha, Mohammed Abdul Rauf and Aziz Bibi to the 2nd and 3rd Defendants, and if so, who was privy to the said fraud and the effect thereof.
2. Whether there was a fraudulent transfer by the 2nd and 3rd Defendant of Land Reference Number 7149/10 to the 1st Defendant, and if so, who was privy to the said fraud and the effect thereof.
3. What is the effect of the subsequent sub-divisions of Land Reference Number 7149/10, sale and transfers by the 1st Defendant to the 5th, 6th and 7th Defendants.
4. Whether the remedies sought are available to the parties herein.
5. Who shall bear the costs of the suit.

I shall proceed to examine each of these issues, and the arguments made by the parties and the law thereon.

On the Fraudulent Transfer of the Shares and of Change of Directors of the Plaintiff Company

The Plaintiff's case hinges on the primary allegation that the fraudulent transfer of its shares and change of Directors facilitated the fraudulent transfer of the suit property. The Plaintiff's counsel argued that it had brought evidence to show that Aziz Bibi one of the original Directors of the Plaintiff company died in the year 1969, well before the time of her alleged signature of the share forms. Further, that all the other original directors came to court and testified to the effect that none of them ever signed the transfer shares forms that were fraudulently presented to the registrar of companies by the 2nd and 3rd Defendant. They further testified that the signatures on the transfer of share forms were not their signatures. The Plaintiff's Counsel averred that it was quite notable from the Plaintiff company file presented by DW2 that other than the documents filed by the 2nd and 3rd Defendants at the time of filing the alleged forged share transfer forms, they have never filed any other documents since then. The original directors on the other hand unaware of the fraud perpetuated by the 2nd and 3rd Defendant had been filing their returns until the year 2008. Further, that that PW1, PW2 and PW3 confirmed that the Plaintiff company was still operating in the same name in Westlands in Nairobi Kenya where they had a well-known butchery in the name of West End Butchery, and that it was never their intention and neither have they ever sold or transferred the family business.

It was also argued that PW 4 who kept the books and prepared and filed returns on behalf of the Plaintiff Company had given undisputed evidence that during his tenure as the Plaintiffs bookkeeper, no transfer of shares ever took place, and that no company secretary in the name of Lucy Nagaki Mburu who appeared in the fraudulent share transfer forms that were presented to the registrar of companies by the transfer the 2nd and 3rd Defendants had been appointed by the Plaintiff. PW 5 who was the document examiner confirmed that the signatures appearing in the share transfer forms purporting to transfer the shares of the Plaintiff Company from the original directors to the 2nd and 3rd Defendant were distinctively different from well-known signatures of the said original directors, Mohammed Asif, Mohammed Abdul Rauf, and Mohammed Juma Alla Rakha. Lastly, that the 2nd and 3rd Defendant despite having been served with summons did not appear or participate in these proceedings to challenge these facts.

As to the question of which parties were privy to the said fraud, the Plaintiff's Counsel submitted that

from the evidence before the court it was clear that the fraudulent transfer of shares of the Plaintiff Company to the 2nd and 3rd Defendant was made possible by active collusion or inaction in the office of the Registrar of Companies. It was argued that copies of returns filed by the Plaintiff were produced to the court as were receipts for the payments of the filing of the returns, but were curiously missing from the Company registry file presented to the court by DW2 who gave evidence for the 4th Defendant.

Further, that DW2 admitted that the receipts were similar to receipts issued by the office of the Registrar of Companies, and offered no factual basis for disputing their credibility. The Plaintiffs contended that every time they asked for the Company registry file for the Plaintiff Company and that of the 1st Defendant Company with a view to investigating the fraud at the company registry, the files were always missing. The Plaintiff submitted that its allegation was proven when even under summons by the court the 4th Defendants witness was unable to bring the file to court on two occasions for reasons that the “files had been locked up an officer of the registry who had proceeded on leave.” It was the Plaintiff’s assertion that the files were never made available to them but were made available to the 1st, 2nd and 3rd Defendant in perpetuating their fraud.

The Plaintiff’s Counsel submitted that it is therefore established beyond doubt that the purported transfer of shares from the original directors to the 2nd and 3rd Defendants was part of a fraudulent scheme to facilitate the fraudulent transfer of the Plaintiff’s property namely Land Reference Number 7149/10 to the 1st Defendant. The Plaintiff consequently prayed for findings by the court that the purported transfer of shares to the 2nd and 3rd Defendant was done through forged documents and that the Registrar of Companies be directed through the 4th Defendant to cancel the said transfer of shares.

The 1st Defendant response to the Plaintiff’s allegation of fraudulent transfer of shares and change of directors was that the Plaintiff is a Limited Liability Company and a body corporate, and it can only act through resolutions passed by its organs namely the General meetings of the shareholders or the Board of Directors. In the present case, it was clear from the testimonies of the Plaintiffs, the 1st Defendant and from Mr. Adera the Assistant Registrar of Companies (DW2) that at the time of filing suit and even as at the time of the hearing, the only shareholders and the Directors of the Plaintiff’s Company were Solomon Mwinzi Mwau and John Micheni Musa as shown by the CR 12 form produced as an exhibit by the 1st Defendant, and that they are the only ones who would be able to pass resolutions to institute this suit. The 1st Defendant’s counsel relied on the decisions in **Bugerere Coffee Growers Ltd –vs- Sebaduka & Another (1970) EA 147** and **East African Safari Air Limited Vs. Anthony Ambaka Kegonde & Another (2006) eKLR** the on the need for resolution authorizing a company to launch proceedings.

The Counsel asked the Court to reach a finding in this case that there was neither a resolution nor a meeting of the Company or the Board agreeing to institute these proceedings. It was submitted that the firm of M. A. Khan & Co. Advocates drew the documents instituting these proceedings knowing very well that it did not have proper authority to do so and that Mr. Newton Mwangi Advocate also lacked proper instructions to take over the matter from M. A. Khan Advocates or maintain the proceedings. In addition that these two Advocates should be condemned to pay the costs of the suit. It was also submitted by the Counsel that if Mohammed Asif, Mohammed Juma Alla Rakha & Mohammed Abdul Rauf felt aggrieved by the actions of the 2nd and 3rd Defendants whereby they were fraudulently deprived of their shareholding and directorship, they should have instituted the suit in their own personal names and not in the name of the Plaintiff. Further, that such a situation is allowed generally and also as exception to the rule in **Foss –vs- Harbottle** to the effect that if a duty to be enforced through courts is one owed to the company, then the primary remedy for its enforcement is an action by the Company itself.

The 4th Defendant’s Counsel on his part submitted that from the pleadings of the Plaintiff there were no particulars of fraud pleaded against the Registrar of Companies, and that the Plaintiff merely sought to have the names of the purported directors to be registered as such and the names of the 2nd and 3rd Defendants removed as directors of the Plaintiff company. Further, that DW2 stated the position in respect to the registration and current status of both the Plaintiff and 1st Defendant companies, and that

the files of both companies were and have always been available at the Companies Registry, and that his evidence was corroborated by several witnesses who affirmed that they had been able to conduct physical and official searches in respect to the same. The 4th Defendant submitted that in the circumstances the hearsay allegation by Mr. Khan on behalf of the Plaintiff who has the burden of proof ought to fail.

The 4th Defendant further submitted that the correct position in law as regards the Registrar of Companies is that the said office has no powers under the Companies act to cancel entries in a company file, as that power vest with the High Court under section 118 of the Companies Act. It was further argued that the Registrar of Companies cannot determine whether a document filed is fraudulent or not, companies have the right to organize themselves as set out under their respective memorandum and articles of associations, and where they are internal wrangles within a company it is for the companies to resolve the same as provided under their instruments of formation or court action. It was contended that the registrar cannot arrogate to him/herself powers to determine who are the *bona fide* directors of a company, more so as in the present circumstances when the Registrar of Companies received a notification of change of directors in the prescribed form to effect changes in the directorship of West End Butchery Ltd.

After consideration of the arguments made by the parties and supporting evidence, I will start by addressing the question raised as to whether the Plaintiff is properly before this court. It is not disputed that the Plaintiff exists as a company registered in Kenya, and therefore has legal standing to bring this case. The issue that is before this court to determine is who its lawful directors are, and in the circumstances any set of the competing directors can give instructions for the institution of a suit on behalf of the company. The original directors are PW1, PW2 and PW3, and claim that there was a fraudulent change of directorship and that they are the lawful directors. They testified that they instructed a lawyer to institute the suit herein on behalf of the Plaintiff. This being a matter that affects the internal workings of the Plaintiff company, it was therefore upon the 2nd and 3rd Defendants to lay their rightful claim to directorship, or show the lack of instructions if any to institute the suit herein. The 2nd and 3rd Defendants never appeared or participated in these proceedings, and the 1st Defendant cannot take it upon itself to find that the original directors are not the lawful directors as this is an issue that is before the Court. I also note that the 1st Defendant in an apparent contradiction argues that the original directors are not the lawful directors, yet requires them to show a resolution giving instructions for the institution of the suit. In addition, alongside to the issue of directorship of the Plaintiff company, there are other issues in this suit with regard to the transfer of the Plaintiff's property, and it must therefore of necessity be a party to this proceedings, quite apart from its directors. It is therefore this Court's finding that there is sufficient evidence of instructions having being given by PW1, PW2 and PW3 as to the institution of this suit, and they have a right and locus to bring this suit in their claim as the lawful directors.

On the question of the alleged fraud committed with respect to the Plaintiff company, I will first swiftly dispense with the arguments that there were no particulars of fraud alleged by the Plaintiff. Upon perusal of the pleadings I found that these particulars are stated in the Re-Amended Plaint dated 19th May 2011 and filed on 23rd May 2011, as well as in the Reply to the 1st Defence of the 1st Defendant dated and filed on 24th May 2007. Coming to the actual fraud alleged, the Plaintiff's Exhibit 6 showed the disputed transfer of shares and notification of change of directors, which were both dated 10th October 2000. Under section 75 of the Companies Act (Cap 486 of the Laws of Kenya) the shares or other interest of any member in a company shall be movable property transferable in the manner provided by the articles of the company. Article 12 of the Articles of Association of West End Butchery Limited which were produced as the Plaintiff's Exhibit 7, states that the directors may in their absolute and controlled discretion refuse to register any proposed transfer of shares, except a transfer to an existing member. Section 77 of the Companies Act further provides that notwithstanding anything in the articles of a company, it shall not be lawful for the company to register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to the company.

From the foregoing provisions, two legal requirements were therefore crucial in the valid transfer of shares of a West End Butchery Company Limited. The first is the instrument of transfer, which was produced in evidence in the Plaintiff's Exhibit 6 and relied upon by the Defendants. The said instruments

all dated 10th October 2000 showed that Mohamed Asif transferred 1085 ordinary shares of 20/- to John Micheni Musa, Mohamed Juma transferred 9455 ordinary shares of 20/- to John Micheni Musa and Mohamed Abdul Rauf transferred 1085 ordinary shares of 20/- to Solomon Mwinzi Mwau. The vendors and purchasers signatures on the instruments were alleged to have been witnessed by a firm of Advocates by the name of Kimathi and Micheni Advocates which the PW1, PW2 and PW3 denied. They also denied ever selling or signing the said instrument, and the 2nd and 3rd Defendants did not appear to confirm if this was the case. It is therefore my finding that there is evidence of fraud in the preparation and presentation of the said instruments.

The second key legal requirement in the transfer of shares is that the transfer of shares and new members must be registered in the Register maintained by the Company. In this respect the Articles of West End Butchery gave its Directors discretion not to register any proposed transfer of shares except a transfer to an existing member. The original directors have denied ever selling the shares or indeed registering the 2nd and 3rd Defendants as members of the Plaintiff company. In addition, the 2nd and 3rd Defendant were not existing members of the Plaintiff company, and the Pw1, PW2 and PW3 gave evidence that indeed the intention was to keep the company as a family business.

It is therefore my finding that the alleged transfer of shares did not comply with the Articles of Association of West End Butchery Ltd and the law, and was also fraudulent. The general effect of not following these legal requirements is to invalidate the said transfer of shares as it was not done lawfully and in accordance with section 77 of the Companies Act. In addition there is a penalty of imprisonment that is provided for in section 86 of the act for any person who falsely and deceitfully personates the owners of shares of a company.

The second question I need to address under this issue is whether the notification of change of directors of West End Butchery Ltd was fraudulent. It follows that if as found, the transfer of shares to the 2nd and 3rd Defendant was fraudulent, then their appointment as directors of the Plaintiff Company could not have been lawful. The law on removal of directors is also clear under section 185 of the Companies Act, wherein it is provided that a company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its articles or in any agreement between it and the said director. The section provides in detail the procedures to be followed in making the resolution. The Articles of West-End Butchery Ltd on the other hand have no specific provision for the removal or change of Directors, and it therefore follows that what was needed was a resolution to effect such a change. The Plaintiff's witnesses testified to there having been no such resolution by the members of the Plaintiff company, and the Defendants did not bring evidence of any such resolution in rebuttal. There is no doubt in my mind that the said change of directors of the Plaintiff company was illegal and fraudulent. The effect is that the records in the Companies Registry do not reflect the true state of affairs of the Plaintiff company, and needs to be rectified.

It therefore does appear that the key players in the fraudulent transfer of shares and change of directors of the Plaintiff company were the 2nd and 3rd Defendants. Was there any collusion by the officials in the Registrar of Companies as alleged? Evidence was given of missing returns and receipts in the Plaintiff's file maintained at the Companies Registry, and of its unavailability to the Plaintiff's Advocate. This was strenuously denied by the 4th Defendant, but upon a perusal of the copy of the Plaintiff's company file provided by DW2 as the 4th Defendant's Exhibit 1, it is indeed the case that it did not contain annual returns that had been filed by the original directors of the Plaintiff company that were produced in evidence as their Exhibit 8, . The filing of these returns was confirmed by the receipts issued to the original directors which were also produced in evidence as their Exhibit 9. This leads to an inference of either incompetence at the Companies Registrar's office or of active collusion in the fraud perpetrated by the 2nd and 3rd Defendants to so as to present them as the *bona fide* directors to the rest world. The missing documents from the Plaintiff's company file lead credence to the allegations made that the file could also have been intentionally made unavailable to the Plaintiff's Advocate, who produced evidence of a letter written to the Registrar of Companies seeking that the file be produced.

The principal role of the Registrar of Companies office is set out in section 382 of the Companies Act,

which is that of registration of companies, and in addition the office may also perform any other role that it may lawfully do or is required to do under the Act (emphasis mine). There are also obligations on companies to provide certain information to the Registrar of companies under the Companies Act, for example under section 108 (1) notice of a company's registered office and any changes thereof, under 112(3) notice of the place where its register of members is kept and any changes thereof, under section 201(4) to notification within prescribed periods of any changes in its directors and secretaries and annual returns under section 127. Lastly, the Registrar of companies and the Attorney General have been given powers of enforcement under the Act, including institution of criminal proceedings under section 399.

With regard to the documents relating to companies that are in the custody of the Registrar of Companies, section 384 (1)(a), (3) and (4) state as follows:

“(1) Any person may–

(a) inspect the documents kept by the registrar, on payment of the prescribed fee;

(3) A copy of, or extract from, any document kept and registered at the office of the registrar, certified to be a true copy under the hand of the registrar (whose official position it shall not be necessary to prove), shall in all legal proceedings be admissible as prima facie evidence of such document or extract, as the case may be, and of the matters, transactions and accounts therein recorded.

(4) The registrar shall not, in any legal proceeding to which he is not a party, be compellable–

(a) to produce any document the contents of which can be proved under subsection (3); or

(b) to appear as a witness to prove the matters, transactions or accounts recorded in any such document, unless by order of the court made for special cause.”

It is indeed the case that the above-cited provisions are not explicit on the duty of the Registrar of Companies to verify documents that are presented to it. It is however my opinion that the Companies Act in section 382 and section 399 gives the Registrar of Companies and the Attorney General's office wide latitude to enforce the law required to be followed by Companies, and that the Company Registry has a duty and responsibility to the public to ensure that it is a depository of credible information on Companies registered in Kenya. It caused me considerable concern to hear DW2 pronounce that the fact that there was no notification filed of the change of the Plaintiff's Secretary from Mohammed Rauf to Lucy Nagaki Mburu was not important, when it is a clear requirement under section 201 of the Companies Act!

It is therefore my opinion that there is no legal basis for the approach adopted by the 4th Defendant in this case of “see no evil, hear no evil and say no evil” in terms of verification of documents presented to it for public consumption. The very least that the Companies Registry should do is to insist on evidence that the law has been followed when accepting documents presented to it. If the Companies Registry does not do so it risks being an unwitting player and facilitator of company identity theft and fraud, as happened in the case herein. It is therefore my finding that there was laxity on the part of the Companies Registry to this extent, and that either by way of omission or commission it did contribute to the fraud perpetrated by the 2nd and 3rd Defendants.

On the Fraudulent Transfer by the 2nd and 3rd Defendant of Land Reference Number 7149/10 to the 1st Defendant

It is not disputed that the 2nd and 3rd Defendant's putting themselves out as the Directors of the Plaintiff Company did sell and transfer the suit property to the 1st Defendant. The fraud on the part of the 2nd and 3rd Defendant in procuring the directorship of the Plaintiff Company has already been established, and the non-participation of the 2nd and 3rd Defendants in these proceedings is in my opinion a further indication

and admission of their fraudulent actions. The main question with regard to the issue of the fraudulent transfer of the suit property is what role the other key actors played.

It was also the Plaintiff's submissions that, even though DW1 for the 1st Defendant alleged that he was given original title by the 2nd and 3rd Defendants, he could not avail an original copy of the same to the court. His explanation that he surrendered the same to the registrar of titles upon subdivision of the suit property was questioned by the Plaintiff, who stated that DW6 from the Ministry of Lands confirmed that the original title had not been returned. Further, that there was no endorsement in the title which he produced to the court showing that the original title had been extinguished and surrendered. The Plaintiff further submitted that the authenticity of the 1st Defendant's title to the suit property was questionable. The signature on the title and the missing day book number of the copy held by the 1st Defendant clearly showed that the copy of title he held was forged as confirmed by the Document examiner called by the Plaintiff. PW1 on the other hand still held the original genuine title which he had held since the acquisition of the property by the Plaintiff, and no evidence was led by any of the parties alleging that the title had held by PW I was not genuine to challenge its credibility.

The Plaintiff claimed that the fact that the 1st Defendant's witness on behalf of the 1st Defendant used forged documents to transfer the suit property to himself and to process the subdivision gives every indication that he was part of the fraudulent scheme which included the 2nd and 3rd Defendant to fraudulently acquire the suit property. The Plaintiff also contended that the manner in which the sale of the property was done is questionable as no evidence was ever presented to the court that the money was ever paid to the sellers by the 1st Defendant.

The Plaintiff also submitted that the registrar of title through the use of forged titles and/or without seeing the original title thereby allowed the registration or transfers in favour of the 1st Defendant, subdivisions to the suit property and subsequent transfers to the 5th, 6th and 7th Defendant through willful collusion or through fraudulent inaction.

The 1st Defendant in his submissions contended that an allegation of fraud against a party is a very serious one and must be specifically pleaded under the provisions of the Civil Procedure Rules Order 2 Rule 4 (i). Further, that the standard of proof in civil cases involving fraud is much higher than the usual balance of probability as held in **Mutsonga –vs- Nyati 1984 (KLR) 425**. The 1st Defendant argued that it was not mentioned as having taken part in any fraud in the Re- Amended Plaint, and that though the Plaintiff already has interlocutory judgment against the 2nd and 3rd Defendant, their liability for any alleged fraud in the transfer of shares is of no consequence to the 1st Defendant as the 1st Defendant was neither privy nor party to the said fraud.

The 1st Defendant argued that it could not produce the original copy of the certificate of the title for L.R. No. 7149/10 because it had been surrendered as is required in all cases where there is total subdivision and issuance of new titles.

On the issue raised by the Plaintiff that there was no endorsement by the registrar of titles that the titles to L.R. 7149/10 had been cancelled or extinguished as required by section 70 (2) of the RTA, the 1st Defendant submitted that there is absolutely no duty upon the beneficiary of the subdivision to follow up with the registrar to see that this is done, and it cannot be faulted or accused of fraud due to non-compliance by the registrar. According to the 1st Defendant it was the title actually in possession of the Plaintiff that appeared to be a forgery for the reasons that it was too new in appearance to be a title issued in 1976, and that whereas the transfer was reasonably aged, the certificate of title was brand new. The 1st Defendant also relied on the testimony of PW6 when comparing the two titles with respect to the suit property.

The 4th Defendant also reiterated the evidence given by PW6 as to the two titles to the suit property and sought to discredit the evidence by PW7. In addition, it was argued that the 4th Defendant was described

as having been sued on behalf of the Commissioner of Lands and that there had been non-compliance with the provisions of the Government Proceedings Act in that regard, particularly section 19 (3) (d) which clearly state that the Attorney General could not be sued on behalf of Registrar of Titles for any claim made under the Registration of Titles Act. It was submitted that to this extent the 4th Defendant has been erroneously enjoined on behalf of the Registrar of Titles. Further, that the Plaintiff after discontinuing the suit against the Registrar of Companies and the Commissioner of Lands never effected service of the statutory notice of intention to sue before enjoining the 4th Defendant in the present proceedings.

It was also the 4th Defendant's submission that under the provisions of section 24 of the Registration of Titles Act, where a party is alleging to have been deprived of land or interest in land (as alleged by the plaintiff herein) then the plaintiff is to institute proceedings and prosecute its claim against the person upon who acquired title to the interest through fraud, error or misdescription. It was the 4th Defendants submissions that in this case against the Commissioner of Lands could not be maintained since the Commissioner of Lands neither benefited from the alleged fraudulent registration, nor was he registered as proprietor at the expense of the Plaintiff company. Further, that the alleged fraudulent transfer was committed within the Plaintiff company, and the Commissioner of Lands was not privy to its internal procedures.

The 4th Defendant relied on the decisions in **Koinange –vs- Koinange, Nairobi HCCC 66 of 1984** and **John Didi Omulo –vs- Small Enterprises Finance Co. Ltd & Another (2005) e KLR**, for the proposition that the Plaintiff in this case provided no proof whatsoever of any fraud or complicity to defraud on the part of either the Registrar of Companies, or the Commissioner of Lands. It was the 4th Defendant's submission that mere averments by PW7 cannot constitute proof of such serious allegations.

The 5th and 6th Defendants denied being privy to any fraud, and maintained that they were innocent purchasers for value, without notice of the Plaintiff's interest in the suit property at the time of their purchase of the sub-divisions thereof. The 5th Defendant in addition submitted that no fraud had been proved against them to the required standards stated by the Court of Appeal in **Urmila w/o Mahendra Shah vs Barclays Bank International Ltd (1979) KLR 76**

I have given careful consideration to the arguments made. I will at the outset address the objection raised that the 4th Defendant is wrongly sued. The process of registration of land transactions and issuance of titles at the Ministry of Lands involves various government offices, including but not limited to the Registrar of Titles. In addition under section 5 of the Registration of Titles Act the Commissioner of Lands is the *ex officio* Registrar General under the Act and can be sued in this capacity. There is therefore no merit in the arguments that it is the Registrar of Titles who ought to have been sued in this matter. I also find that the argument on lack of service of the notice of intention to sue has no merit, as there is on the court record a notice of intention to sue the Attorney General by the Plaintiff's Advocate dated 16th February 2007, with a stamp showing that it was duly received at the Attorney General's Chambers on 27th February 2007.

I will proceed with the substantive question as to which parties were privy to the alleged fraudulent transfer of the suit property by the 2nd and 3rd Defendants. I agree with the submissions made by the 1st, 4th and 5th Defendants and authorities cited that fraud must be strictly proved by the person alleging it. It is the finding of this court that no evidence of fraud was brought as against the 5th to 7th Defendants, and in any case they could not have been privy to the said transfer as they were not parties thereof. On the part of the 1st Defendant, its participation in the said fraudulent transfer hinges on the evidence brought as to when it became aware that there was a challenge to the 2nd and 3rd Defendants' title to the suit property and their conduct thereafter. DW1 stated as follows in his evidence in chief in this regard:

“I first heard of the challenge to the 1st Defendant's title from officials in the Land Ministry. We volunteered to go and present ourselves to CID headquarters with my co- Directors and met

Inspector Kirarie and Inspector Mwangi of the Land Fraud Department. This was at the end of 2006. They told us that the complainant had not come back, and we left our particulars....”

My understanding and interpretation of DW1 evidence is that the 1st Defendant became aware of the problem with the title to the suit property after registration of the same in its name. The suit property was registered in the 1st Defendant’s name on 15th March 2006, according to the certificate of search produced by DW1 as the 1st Defendant’s Exhibit 13, whereas DW1 states that he became aware of the problem with the title at the end of 2006.

Upon being informed of the challenge to the 2nd and 3rd Defendant’s title, DW1 stated in cross-examination that he did not think of taking the 2nd and 3rd Defendants to the CID as “nobody told him that he had paid Kshs 30,000,000/= to the wrong person”. He also admitted that he saw the caveat emptor published in the newspaper with respect to the suit property, however that there was nothing stopping Arthi Highway Developers Ltd from subdividing the property despite the said caveat. According to the court record the Defendant entered appearance in this suit on 3rd May 2007. The title produced in evidence by PW6 shows that the subdivisions to the suit property were undertaken by the 1st Defendant on 23rd May 2008. This is in my view is adequate evidence of complicity by the 1st Defendant in the 2nd and 3rd Defendant’s fraud, and particularly by proceeding with the subsequent sub-divisions and sale of the suit property whether there were orders or not stopping them to do so, while knowing very well that there was a challenge to the 2nd and 3rd Defendant’s title. Fraud has everything to do with one’s state of mind and intentions, and not the outcome of actions. It is therefore my finding that while there is no evidence that the 1st Defendant was aware of or participated in the initial fraud by the 2nd and 3rd Defendants, it however abetted and perpetuated the said fraud in the subsequent dealings with the suit property.

As regards the 4th Defendants participation in the alleged fraud, there were two titles to the suit property produced in evidence, ostensibly issued to the Directors of West End Butchery Ltd. The Plaintiff produced the original title in evidence as its Exhibit 4, the 1st Defendant a copy of the title allegedly given to them by the 2nd and 3rd Defendants as its Exhibit 4b. Both titles showed that they were registered on 24th December 1976 at 11.40 am and were in all material respects similar save for the differences noted by PW6 of the serial numbers indicated as footers, and the noting of the daybook number in the Plaintiff’s original copy. PW6 did admit that the presence of two titles with respect to the same property is an indication that one of them is a forgery.

My observation of the testimony by PW6 is that he came to court ill prepared, and his sole purpose was to defend the *status quo* obtaining at the Lands Office and not to unravel the truth. He was not able to produce in court the transfer of the suit property to West End Butchery Ltd in the Ministry of Lands records, which would have been crucial in determining who the Directors were at the material time of issue of the title to the suit property. The transfer produced by the Plaintiff as Exhibit 4 shows that the suit property was transferred by James Alexander Sand on 15th November 1972 to West End Butchery. This transfer was registered as number IR 3456/47 on 24th December 1976 at 11.40 am. The 1st, 2nd and 3rd Defendant produced no evidence of such a transfer, and have not explained how a title bearing the same date and time of registration as that of the Plaintiff’s transfer, came to be in their possession.

More importantly, according to the evidence relied upon by the 1st Defendant, the 2nd and 3rd Defendants were purportedly appointed as Directors of the Plaintiff company on 10th October 2000, and as between the title held by the PW1, PW2 and PW3, and that held by the 2nd and 3rd Defendants, that of the PW1, PW2 and PW3 was earlier in time as they were the Directors at the time of the transfer of the suit property to the Plaintiff Company. I am also persuaded in this regard by the decision in **Gitwany Investment Limited v. Tajmal Limited & 3 Others (2006) e KLR** wherein it was held as follows:

“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....’ ”

It is therefore my finding that even if the two titles produced in evidence were on their face alleged to be validly issued, the one in the possession of PW1, PW2 and PW3 would prevail as it was the first in time.

The suggestion by the 1st Defendant and PW6 that the Plaintiff’s title could have been a forgery, is one which this Court cannot uphold for various reasons. Firstly, no expert witness was called to show so, and the evidence produced by PW6 as the Plaintiff’s Exhibit 12 is of little assistance to the court on this issue as it is not disputed that it is the title that was in the possession of the 2nd and 3rd Defendant, who have already been found by this court to have fraudulently transferred the suit property to the 1st Defendant. It can also only follow that this title is suspect as were all other documents relied upon by the 2nd and 3rd Defendants. The Plaintiff on the other hand brought evidence by a forensic examiner to the effect that the signatures in the documents relied upon by the 2nd and 3rd Defendants were forgeries, including that on their title to the suit property.

Secondly, the issues raised by the 1st Defendant as to the state of the Plaintiff’s title were in my opinion adequately explained by the PW1, PW2 and PW3’s as well as the forensic examiner’s explanations that the title had been kept in a safe in the bank. Lastly, as to the issue of the different serial numbers on the title deed, no law or practice was cited by the parties showing this to be a determinant or requirement in authenticating a title document. PW7 whose considerable prior experience as a Registrar of Titles was not disputed, also informed the court that the serial number at the bottom of the title did not have any relation on the year a title is issued, but that it referred to the year the order and requisition for certification was made at the Government Printers. In my opinion this evidence was immaterial as to the issue of whether particulars on the two titles were forgeries, and in any event this Court has already found that the title in the possession of PW1, PW2 and PW2 was the one issued earlier.

The existence of two different titles with respect to the same property, and with all the necessary endorsements made thereon is in itself evidence of participation in a forgery by officials in the Ministry of Lands, who are the custodians and issuers of the titles. This is especially so in this case, when the copy of title produced as being in the records of the Ministry of Lands is one that has been found to be suspect, having been provided by persons this Court has established to be fraudsters. In addition the Ministry of Lands has adopted the land registration system popularly referred to as the **Torrens** system, in which it is the keeper of the master record of all land and the registered owners, and in which a land title certificate suffices to show full, valid and indefeasible title. A key role of the Ministry of Lands in this case was to explain the existence of the two titles and to clarify which is the genuine title, which in my opinion PW6 failed to do.

It is my view that the Government of Kenya has the full responsibility to ensure the accuracy of the register of titles and the authenticity of titles issued consequent to registrations made thereon, and this is the main basis for the provisions in the law for compensation in the event of fraud or errors committed in the process. These provisions were previously found in section 144(I) of the Registered Land Act and section 24 of the Registration of Titles Act, which Acts have since been repealed. Elaborate provisions as to indemnity are now found in the Land Registration Act of 2012 in sections 81-84 thereof. It is for the foregoing reasons that I find the 4th Defendant privy to any forged entries made upon registration of, and issuance of title as was the case herein.

The last question to be answered is the effects of the fraudulent transfer of the suit property by the 2nd and 3rd Defendants to the 1st Defendant. The Plaintiff relied on the legal principle of *nemo dat quod non habet* to argue that a seller cannot pass on to another a better title than the one he has, and that since the 2nd and 3rd Defendants did not have good title to the suit property that they acquired by fraud, the 1st

Defendants could not therefore acquire good title. The Plaintiff also relied on case of **Alberta Mae Gacie V Attorney General & 4 Others (2006) eKLR** where the court found that notwithstanding a plea of indefeasible title where the Defendants committed fraud this could not defeat the Plaintiffs entitlement to property.

The 1st Defendant on the other hand submitted that the principle of *nemo dat quod non habet* is only applicable to sales of goods under the Sales of Goods Act and clearly land is not goods. Further, that the Registration of Titles Act embodies the doctrine of sanctity and indefeasibility of title under section 23. Further, that the title held by that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party. The 1st Defendant argued that he had also undertaken due diligence, and that the only recourse for the victim of fraud is to recover damages against whoever perpetrated the fraud under section 24 of the said Act. The 1st Defendant in this regard relied on the decisions by the court of appeal in **Moya Drift Farm Ltd –vs- Theuri (1973) E.A. 114** and in **Dr. Joseph Arap Ngok Vs. Justice Moijo Ole Keiwa & Others Civil Appeal No. 60 of 1997.**

I concur with the 1st Defendant that the principle of *nemo dat quod non habet* is only applicable to the transfer of interests in moveable property, and not to immovable property which is governed by different set of rules and principles. Section 23 of the Registration of Titles Act (since repealed) is the applicable rule on transfer of interests in the suit property, and provides as follows:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.’

It is already the finding of this court that at the time of the transfer of the suit property and issue of title to it, the 1st Defendant was not party to the fraud by the 2nd and 3rd Defendants. This finding notwithstanding, it cannot be said that the transfer of the suit property to the 1st Defendant was by the proprietor of the suit property within the meaning of section 23(1) of the Registration of Titles Act, as it has also been found by this court that the 2nd and 3rd Defendants fraudulently transferred shares of the Plaintiff company to themselves and filed a fraudulent notification of change of directors to effect the said sale.

It is in my view unjust and inequitable that an innocent proprietor can be dispossessed of his or her legal title to land through the acts of a fraudster, and this cannot have been the intention of section 23 of the Registration of Titles Act. I am persuaded by the statements made in **Alberta Mae Gacie V Attorney General & 4 Others (2006) eKLR** where this court (Hon. Justice Onyancha) stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come....”

Likewise in the case of **Iqbal Singh Rai vs Mark Lecchini and the Registrar of Titles, Civil Case No 1054 of 2001**, this court (Hon. Justice Muchelule) held as follows:

“At the time when the 1st Defendant sought to buy the land in dispute the registered proprietor was the Plaintiff. There is no dispute that he never dealt with the Plaintiff in the transaction that followed. The person with whom he dealt was not the registered proprietor of the land in dispute. The person was a fraud who had no claim whatsoever to the land. The consequence is that the 1st

Defendant was a purchaser who did not deal with the registered proprietor of the land. Section 23(1) protects ‘title issued to a purchaser upon the transfer or transmission by the proprietor thereof’. The 1st Defendant did not obtain a transfer from the Plaintiff who was the registered proprietor. He obtained a transfer from a fraudulent person who had no claim to the land. He cannot I find invoke the provisions of section 23(1) to say he obtained an indefeasible title.”

It is thus my finding that similarly, in this case the 1st Defendant did not obtain a transfer from the registered proprietor, but from fraudulent persons namely the 2nd and 3rd Defendants who had no claim to the suit property. The 1st Defendant cannot therefore invoke indefeasibility of title and the transfer to him by the 2nd and 3rd Defendants was null and void.

I was also quite perturbed by the testimony given by DW1 that he never visited the Plaintiff’s registered office, and has never done so to date. He stated that he relied on documents at the Companies Registry, and in light of the testimony given on behalf of the 4th Defendant in this case, that cannot be said to have been exercising due diligence. The Companies Act is very clear that the responsibility for maintaining an up-to date register and records is on the company, which records are kept at its registered office or other specified place. Due diligence in my opinion would require an examination of the company’s records, and the 1st Defendant cannot be availed of this defence.

The Effect of the subsequent Sub-divisions of Land Reference Number 7149/10 and transfers by the 1st Defendant to the 5th, 6th and 7th Defendants.

On this issue the Plaintiff has claimed that the 1st Defendant sold portions of the suit property in violation of court orders and in violation of the doctrine of Lis Pendens as espoused in section 52 of the Indian Transfer of Property Act. The Plaintiff relied on the decision in **Mawji –vs- United States International University (1976) KLR 185** in this regard.

The Plaintiff also contended the principle of indefeasible title under section 23 of the Registration of Titles Act is of no use to the 6th and 7th Defendants who confirmed both in their defence and during evidence in court that they have not obtained title to the portions of the suit property that they purchased. It was further argued that the principle is only available to the 5th Defendant in whose favour titles were issued for three divisions of the suit property, but that the legal position is now different with the applicable law being section 26 of the Land Registration Act of 2012 (Act No. 3 of 2012) which became effective on the 2nd May 2012.

Further, that section 26 of the Land Registration Act of 2012 differs from the Registration of Titles Act by adding a further qualification to the principle of indefeasible title and expressly providing that a title issued to a party may be challenged ‘where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. It was the Plaintiff’s submission that the 1st, 2nd and 3rd Defendants illegally, unprocedurally and through a corrupt scheme purported to transfer the suit property and sell the same to the 5th Defendant.

The 1st Defendant on the other hand argued that the ex parte orders were obtained before the 1st Defendant entered appeared. DWI also testified that the said ex parte orders were never served upon the 1st Defendant by either personal service or substituted service. They were also not registered against the title. It was the submission that without service, the 1st Defendant cannot be accused of having illegally and contemptuously transferred title to the 5th, 6th and 7th Defendants. The 5th Defendant on its part contended that it was not made a party to the suit herein until orders of its joinder issued on 9th May 2011, and was not privy to any court orders made prior thereto. The 5th Defendant stated that it was only aware of the court orders issued by Hon. Justice Muchelule on 28th March 2011, and have strictly abided by the said orders to date.

Both the 1st and 5th Defendants argued that it was the Registration of Titles Act though repealed that was

applicable to these proceedings, as the Plaintiff's suit arose during the reign of the said Act. The 5th Defendant in addition relied on section 23 (1) of the Registration of Titles Act to argue that its titles to the properties LR Numbers 7149/112, 7149/113 and 7149/114 was indefeasible as they were not party to any fraud. The 5th Defendant relied on various decisions where the indefeasibility of title under section 23(1) of the Registration of Titles Act had been upheld, including **Mbothu & 8 Others vs Waitimu & 11 Others (1986) KLR 171**, and **Wreck Motors Enterprises vs The Commissioner of Lands & 3 Others, Civil Appeal No. 71 of 1997**. It was its submission that the Plaintiff's remedy if any lies in damages as set out under section 24 of the Registration of Titles Act.

I agree with the arguments put forward by the 1st and 5th Defendants that the Land Registration Act of 2012 does not have any retrospective effect and it does not extinguish the rights that had accrued to any party under the previous repealed Acts. In addition section 107 of the Land Registration Act, 2012 makes savings and transitional provisions with respect to rights, actions, and dispositions as follows:

“(1) unless the contrary is specifically provided for in his Act, any rights, interests, title power, or obligation acquired, accrued, established, coming into force or exercise before the commencement of this Act shall continue to be governed by the Law applicable to it immediately prior to the commencement of this Act.

(2) unless the contrary specifically provided for this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act.”

The benefits of the provisions of Land Registration Act of 2012 are therefore not available to the Plaintiff.

Section 23 of the Registration of Titles Act is still the applicable law in this regard, and this court has already made several findings on its applicability in this case. It has been found that there was complicity by the 1st Defendant in the 2nd and 3rd Defendants fraud specifically with respect to the subsequent sale and transfer of the suit property to the 5th, 6th and 7th Defendants. It has also been found that because of the 2nd and 3rd Defendant's fraud, the 1st Defendant cannot invoke the principle of indefeasibility of title. It therefore follows that the 1st Defendant had no interest or title to the suit property that it could lawfully pass on to the 5th, 6th and 7th Defendants, and it was therefore not a proprietor of the suit property within the meaning of section 23(1) of the Registration of Titles Act. It is therefore the finding of this Court that for these reasons the 5th Defendant cannot invoke the principle of indefeasibility of title with respect to the titles transferred to it by the 1st Defendant for LR Numbers 7149/112, 7149/113 and 7149/114, neither was any interest in the suit property or sub-divisions thereof passed on to the 6th and 7th Defendant pursuant to the sale agreements entered into with the 1st Defendant.

I will not belabor with the issue of the court orders granted in this case which are clearly on the court record, save to state that the Defendants who were present and or/represented at the time of granting such orders and directions with respect to the suit property were under an obligation to observe them. The effect of non-observance of the court orders is nevertheless now rendered immaterial in light of the findings in the foregoing.

The Remedies Sought by the Parties

The Plaintiff has sought various remedies for declarations and cancellation of the entries made in the Companies Registry and against the title of the suit property. The 1st and 5th Defendants argued that the Plaintiff is not deserving of the equitable remedies sought, for reasons of its lax conduct and that it was also guilty of laches in moving to protect its interest. It was their submission that the Plaintiff did little to secure the suit property. The 7th Defendant also counterclaimed against the Plaintiff for negligence in obtaining restraining orders against any dealing over the suit land and failing to register the said orders against the title of the suit property at the lands registry.

I have given consideration to these arguments and from the chronology of events undertaken by the Plaintiffs Advocate after this dispute came to his attention that was narrated in his evidence, and the exhibits he produced, I find that the Plaintiff did move with haste and took the necessary steps including the filing the suit herein to protect its interest. The Plaintiff went to great lengths and costs to publish caveat emptors in the newspapers to warn the public at large, some who may not have access to the land registries of the dispute herein. The 1st Defendants acknowledged being aware of the notifications by the Plaintiff, and yet proceeded with the subdivision and sale of the suit property. It cannot therefore plead to be aided by equity.

The Plaintiff cannot also be blamed for the failings and inaction by departments of government that were also supposed to discharge their duties, particularly the Criminal Investigations Department which has the responsibility for criminal investigation, and the Commissioner of Lands who was requested to register a restriction against the title to the suit property. The Commissioner is the *ex officio* Registrar General under section 5 of the Registration of Titles Act and the office was under an obligation to act on the evidence produced by the Plaintiff. It was also the responsibility of the 4th Defendant in this respect to ensure that the perpetrators of the fraud committed herein were brought to book, once the fraud was brought to its attention.

I am of the view that no more could have been asked of the Plaintiff in this case, and it is therefore deserving of the remedies sought. The 7th Defendant's Counterclaim also fails for the reasons given in the foregoing.

The 5th and 6th Defendants have also requested to be indemnified by the 1st and 4th Defendants for damages and costs arising from the suit herein and any fraudulent transfer of the suit property to themselves, as claimed in the Notices of Claim against Co-Defendants that they filed. The remedy of indemnity is available under section 24 of the Registration of Titles Act which provides as follows:

“Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person as proprietor of the land or interest, or in consequence of any error or misdescription in any grant or certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through the fraud, error or misdescription:

Provided that—

(i) except in the case of fraud or of error occasioned by any omission, misrepresentation or misdescription in the application of a person to bring the land under the operation of this Act, or to be registered as proprietor of the land or interest, or in any instrument signed by him,

that person shall upon a transfer of the land bona fide for value cease to be liable for the payment of any damages, which, but for that transfer, might have been recovered from him under the provisions herein contained; and in the last-mentioned case, also in case the person against whom the action for damages is directed to be brought is dead or has been adjudged insolvent or cannot be found within the jurisdiction of the court, then the damages with costs of action may be recovered out of the public funds of Kenya by action against the registrar as nominal defendant;

(ii) in estimating the damages, the value of all buildings and other improvements erected or made subsequently to the deprivation shall be excluded;

(iii) no such damages may be recovered out of public funds

for any loss, damage or deprivation occasioned by the improper or irregular exercise of the mortgagee's statutory power of sale conferred by the Transfer of Property Act, 1882, of India, in its

application to Kenya.”

Indemnity by the 1st and 4th Defendant under section 24 of the Registration of Titles Act is a proper remedy in the event of any loss occasioned to the 5th and 6th Defendant for reasons of their complicity in and participation in the fraud perpetrated by the 2nd and 3rd Defendant. Indemnity by the 1st Defendant will in addition be determined by the provisions of the sale agreements entered into with the 5th and 6th Defendants.

The 5th Defendant laid the basis of such indemnity by the 1st Defendant in its submissions, and argued that under clause 1 (h) of the Schedule of each of the Sale Agreements entered into between the 1st Defendant and the 5th Defendant for the purchase of L.R Nos. 7149/112, 113 and 114, the Directors of the 1st Defendant issued a warranty that the 1st Defendant was the legitimate registered owner of the properties and under clause 1 (m), the said Directors undertook to indemnify and keep indemnified the 5th defendant against any losses suffered or incurred as a result of its reliance on the warranty. The 5th Defendant also submitted that it fully relied on the respective Certificates of Title issued in respect of each sub-division, duly sealed and signed by the Registrar of Titles, as proof of the genuineness of the Titles thereby acquired. Upon perusal of the said agreements which were produced as evidence in the 5th Defendant's Bundle of Documents produced as its Exhibit 1, I did find that such provisions for indemnity by the 1st Defendant were indeed agreed upon.

No such basis for indemnity by the 1st Defendant arising from the sale agreement entered into was alleged by the 6th Defendant. Upon perusal of the sale agreement entered into between the 1st and 6th Defendants dated 2nd August 2010 and included in the 6th Defendant's Bundle of Documents produced as its Exhibit 1, I did not find any provisions for indemnity by the 1st Defendant. The indemnity by the 1st Defendant with regard to the 6th Defendant's claim is therefore only allowed to the extent provided in section 24 of the Registration of Titles Act.

Costs of the suit.

Costs of the suit follow the event. The parties who have been successful in this suit have been the Plaintiffs and to an extent the 5th, 6th and 7th Defendants. It is therefore the finding of this court that the 1st, 2nd, 3rd and 4th Defendants will meet the costs of the successful parties.

ORDERS OF THE COURT.

In conclusion, this Court finds that the Plaintiff have proved that fraud was committed by the 2nd and 3rd Defendant, and that there was complicity by the 1st and 4th Defendant, with regard to the transfer of shares and change of directors of the Plaintiff Company; in the transfer of the suit property to the 1st Defendant; in the subsequent sub-divisions of the suit property by the 1st Defendant; and in sale and transfer of the same to the 5th, 6th and 7th Defendants.

This Court therefore enters judgment for the Plaintiff as follows:

1. It is hereby declared that the entries and documents in the Plaintiff's company file C-3958 maintained at the Companies Registry relating to the 2nd and 3rd Defendant, and specifically the Notification of Change of Directors and Secretaries dated 10th October 2000, the Transfers of Stock and Shares dated 10th October 2000 and the Annual Returns filed showing the 2nd and 3rd Defendants to be members and Directors of the Plaintiff Company were fraudulent and illegal.
2. The 4th Defendant on behalf of the Registrar of Companies is hereby ordered to cancel and expunge from the Plaintiff's company file C-3958 maintained at the Companies Registry the said fraudulent

entries and documents relating to the 2nd and 3rd Defendant

3. The 4th Defendant is hereby further ordered to forthwith commence investigations on the fraud committed by the 2nd and 3rd Defendants and to undertake the necessary action as to the criminal prosecution of the 2nd and 3rd Defendants, and any other persons found to have participated in the said fraud.
4. It is hereby declared that that the transfer of the Plaintiff's property known as Land Reference Number 7149/10 registered under title number IR 30601 by the 2nd and 3rd Defendants to the 1st Defendant was fraudulent, unlawful and null and void.
5. It is also hereby declared that the sub-division of the of the Plaintiff's property known as Land Reference Number 7149/10 registered under title number IR 30601 and the sale and transfer of such sub-divisions by the 1st Defendant of the suit land registered was fraudulent, unlawful and null and void.
6. The 4th Defendant through the Commissioner of Lands is hereby ordered to cancel all the entries relating to the transfer of ownership of Land Reference Number 7149/10 to the 1st Defendant registered in the register of Land Reference Number 7149/10
7. The 4th Defendant through the Commissioner of Lands is hereby ordered to cancel all the entries relating to the sub-division of Land Reference Number 7149/10 to LR Numbers 7149/111, 112,113,114,115,116,117 and 118 registered in the register of Land Reference Number 7149/10
8. The 4th Defendant through the Commissioner of Lands is hereby ordered to cancel all the entries relating to transfer of the said sub-divisions namely LR Numbers 7149/111, 112,113,114,115,116,117 and 118 to the 1st Defendant registered in the respective registers of the said sub-divisions
9. The 4th Defendant through the Commissioner of Lands is hereby ordered to cancel all the entries relating to transfer by the 1st Defendant of the sub-divisions known as LR Numbers 7149/112, 7149/113, 7149/114, to the 5th Defendant, and subsequently issued as new grants as L.R. Nos. 28183, 28184 and 28185, registered in the respective registers of the said sub-divisions and grants.
10. The 1st, 2nd, 3rd and 4th Defendants shall pay the Plaintiff the costs of this suit in equal parts.

This Court also enters judgment for the 5th, 6th and 7th Defendants as follows:

11. The 1st and 4th Defendants are hereby ordered to jointly and severally indemnify the 5th and 6th Defendants with respect to any damage and costs incurred arising from the orders made herein, pursuant to the provisions of section 24 of the Registration of Titles Act(since repealed) as saved by the provisions of the Land Registration Act of 2012.
12. The 1st Defendant is hereby in addition ordered to indemnify the 5th Defendant with respect to any damage and costs incurred arising from the orders made herein, pursuant to the provisions of the sale agreements entered into with respect to LR Numbers 7149/112, 7149/113, 7149/114
13. The 5th and 6th Defendants are at liberty to bring legal proceedings for the recovery of such damages and costs pursuant to the indemnities ordered herein against the 1st and 4th Defendant.
14. The 1st, 2nd, 3rd and 4th Defendants shall pay the 5th, 6th and 7th Defendants the costs of this suit in equal parts.

Dated, signed and delivered in open court at Nairobi this ____20th____ day of ____December____, 2012.

P. NYAMWEYA

JUDGE