**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 308 OF 2007**

**AGAM INVESTMENTS LIMITED ……..…..…. PLAINTIFF**

**-VERSUS-**

**VOI DEVELOPMENT CO. LTD ….....…… 1ST DEFENDANT**

**CHRIS CANNAN ……...……..…….. 2ND DEFENDANT**

**JOHN KELL CAMPBELL …….....……. 3RD DEFENDANT**

**JUDGEMENT**

By their plaint filed in the High Court Mombasa on 4th December 2007, the Plaintiffs **AGAM INVESTMENTS LIMITED** have sued the 1st Defendant **VOI DEVELOPMENT CO. LTD** as well as the 2nd and 3rd Defendants **CHRIS CANNAN** and **JOHN KELL CAMPBELL** seeking the following orders:

(a) A declaration that the purported sale of Plot Nos. LR No. 15031/123 and 15031/124 by the 1st defendant to the 2nd and 3rd Defendants was fraudulent and was null and void and order that such sale be cancelled and nullified.

(b) A declaration that the Plaintiff purchased Plot Nos. L.R. No. 15031/41, 15031/42, 15031/118, 15031/119, 15031/120, 15031/121, 15031/123 and 15031/124 from the 1st defendant, paid the full purchase price and is entitled to be registered as the proprietor of the said plots.

(c) An order of specific performance against the 1st defendant to transfer and register Plot Nos. LR No. 15031/41, 15031/42, 15031/118, 15031/119, 15031/120, 15031/121, 15031/123 and 15031/124 in favour of the plaintiff.

(d) A mandatory injunction to compel the defendants to open and keep open the plaintiff's access to Plot Nos. L.R. 15031/41, 15031/42, 15031/118, 15031/119, 15031/120, 15031/121, 15031/123 and 15031/124.

(e) A perpetual injunction restraining the defendants by themselves, their agents, servants, directors and employees from selling or purporting to sell or offering to sell, charging, mortgaging, subdividing, pledging, entering, remaining upon repossessing, canceling the sale agreement or the letters of allotment or any manner interfering with the plaintiff's possession and use of Plot No. L.R. No. 15031/41, 15031/42, 15031/118, 15031/119, 15031/120, 15031/121, 15031/123 and 15031/124.

(f) A perpetual injunction restraining the defendants jointly and severally from registering or purporting to register the 2nd and 3rd defendants as the proprietors or lessees of the Plot Nos. L.R. Nos. 15031/123 and 15031/124.

(g) General, punitive and aggravated damages against the 1st defendant

(h) Costs"

The hearing of this suit commenced on 15th July 2009.

**MR. KINYUA** Advocate appeared for the Plaintiff, **MR. KARIUKI** for the 1st Defendant whilst **MR. MUNYITHYA,** appeared for both the 2nd and 3rd Defendants. The Plaintiff called one witness in support of their case, the 1st Defendant called two (2) witnesses whilst the 3rd Defendant appeared and testified on behalf of both 2nd and 3rd Defendants.

In brief terms the genesis of this suit is the alleged sale by the 1st Defendant to the Plaintiff of eight (8) plots of land vide an agreement for sale made on 30th July 1997. All eight plots were carved out of the mother Title LR No. 15031 and are as follows –

(1) 15031/41
(2) 15031/42
(3) 15031/118
(4) 15031/119
(5) 15031/120
(6) 15031/121
(7) 15031/123
(8) 15031/124

After payment of the full purchase price of Kshs.400,000/- the 1st Defendant did duly execute transfers to the Plaintiff with respect to the first six plots namely 15031/41, 15031/42, 15031/118, 15031/119, 15031/120 and 15031/121 and deed plans for **all** eight plots were surrendered to the Plaintiffs. However no transfer was signed nor executed in respect of Plot Nos. 15031/123 and 15031/124 which two plots form the subject matter of this dispute. The Plaintiffs having taken possession of the suit premises proceeded to construct thereon a tourist lodge known as Zomeni Lion Hill Lodge. On their part the 1st Respondent denies ever having sold to the Plaintiff company the eight plots as alleged, denies having executed the six transfers and further argues that the Plaintiffs obtained the deed plans to the eight plots by fraud and/or theft. The 1st Defendant through their executive chairman **MR. ELUID MWAMUNGA DW1,** proceeded to sell plot Nos. 15031/123 and 15031/124 as well as a third plot No. 15031/122 to the 2nd and 3rd Defendants in the year 2007 for a total consideration of Kshs.2,400,000/-. The 2nd and 3rd Defendants therefore purport to be innocent purchasers for value without notice.

Matters came to a head when the 1st Defendant blocked the access to the Zomeni Lion Hill Hotel owned and run by the Plaintiff. This act prompted the Plaintiff through its director **MR. SURJEET SINGH BASIL PW1** to rush to court seeking interlocutory orders. This application was heard by my learned brother **HON. JUSTICE NJAGI**, who did allow the interim orders to unblock access to the said hotel. I have had the benefit to carefully perusing the written submissions presented by counsel in this

matter and I will be guided by the consolidated list of issues prepared by Mr. Kinyua in his submissions filed on 13th October 2010. This is in order to ensure clarity and to avoid repetition. Those issues which I have identified as requiring determination as follows -

1. Did the 1st Defendant subdivide the plot known as Grant No. CR 13016/1, land Reference No. 9665 (originally part of land Reference No. 934/3) into numerous plots?

2. Did the 1st Defendant agree to sell to the Plaintiff Plot Nos. 15031/41, 15031/42 15031/118, 15031/119, 15031/120, 15031/121, 15031/123 and 15031/124?

3. Who is the bona fide and legal owner of Plot Nos. 15031/123 and15031/124?

4. Could the 1st Defendant then proceed to offer Plot Nos. 15031/123 and 15031/124 to the 2nd and 3rd Defendants for sale in the year 2007?

5. Were the 2nd and 3rd Defendants innocent purchasers for value without notice?

6. Did the 2nd and 3rd Defendant pay the full purchase price to the 1st Defendant?

7. Were the 1st, 2nd and 3rd Defendants justified in blocking off and denying the Plaintiff access to the suit premises? Did the Plaintiff suffer any loss and/or damage thereof?

8. Is the Plaintiff entitled to an order for specific performance by transfer and registration of Plot Nos. 15031/41, 15031/42, 15031/118, 15031/119, 15031/120, 15031/123 and 15031/124?

9. Is the Plaintiff entitled to the orders of injunctions both mandatory and perpetual as prayed for in the plaint?

**(1) DID THE 1ST DEFENDANT SUBDIVIDE PLOT KNOWN AS GRANT NO. LR 13016/1, LR No. 9665 INTO OTHER SMALLER PLOTS**

This question it seems can only be answered in the affirmative. A look at the Plaint dated 28th November 2007 paragraphs 4 and 5 read -

"4. The 1st defendant is registered as proprietor of a lease from the Government of Kenya for an unexpired residual of a term of 969 years from 1.8.1962 under the grant registered at the land Title Register at Mombasa under the Registration of Titles Act No. CR. 13016/1 of all that parcel of land situate in Taita District measuring 8369acres (less a road reserve of 10 acres or thereabout) known as land reference No. 9665 (original part of land reference No. 934/3) being the premises comprised in the grant and more particularly delineated and described on land survey plan No. 68891 annexed to the said Grant.

5 Further to paragraph 4 above, the 1st defendant sub-divided the said piece of land into numerous sub-plots including L.R. No. 15031/41, 15031/42, 15031/116, 15031/117, 15031/118, 15031/119, 15031/120, 15031/121, 15031/123, 15031/124 and 15031/127"

In the 1st Defendant's written Statement of Defence dated 14th January 2008 and filed in court on 15th January 2008, it is clearly stated that:

***"The Defendant admits the contents of paragraphs 1, 2 3 and 4 of the [Plaint] in far as they are merely descriptive of the parties …"***

The same defence goes on to state at paragraph 3:

***"The Defendant states with regard to paragraph 5 that subdivision of all that parcel of land known as LR No. 9665 was for the sole benefit of the First Defendant for use of residential purposes"***

Regardless of whatever the reason behind that subdivision this defence provides a clear admission of the fact of the subdivision of the said plot into several sub-plots. Likewise the 2nd and 3rd Defendants in their written statement of defence filed in court on 9th January 2008 at paragraph 2 readily admits:

***"The 2nd and 3rd defendants admit the contents of paragraph 4 and 5 of the Plaint"***

Aside from these clear admissions in the written pleadings **PW1** the 1st Defendant's executive chairman in his testimony to court admits that the mother Title was a former sisal estate well over 8000 acres and further he concedes that ***"There are several sub-divisions of the plots".*** This is testimony from the horse's mouth so to speak. Lastly but certainly not of lesser importance on this point is the evidence of **DW2 EDWARD MARENYE KIGURU** a licensed land surveyor who confirmed to the court that he did receive instructions from the 1st Defendant to carry out a sub-division of their property L.R. No. 9665. He did as requested and split the whole property into two main sections. Nos. 15030 and 15031. There can therefore be no doubt whatsoever that this subdivision was carried out at the request of and upon the instructions of the 1st Defendant and indeed on this issue there appears to be no dispute.

**2. DID THE 1ST DEFENDANT AGREE TO SELL TO THE PLAINTIFF THE SUIT PREMISES COMPRISING EIGHT SUB-PLOT NOS. 1503/41, 42, 118, 119, 120, 121, 123 and 124**

This second issue is somewhat more contentious. Whereas the Plaintiff claims to have bought and paid in full for these eight (8) sub-plots, the 1st Defendant on their part adamantly denies ever having entered into any sale agreement with the Plaintiff. In his evidence **PW1** the Executive Chairman of the 1st Defendant is categorical that:

***"At no time did Voi Development Company ever deal with the plaintiff company"***

**PW1** does however admit that the 1st Defendant did infact issue a letter of allotment to a company known as **EZAZERA PRODUCTS** which allotment letter is dated 10th March 1997 and is signed by **PW1** as the Chairman/Director of the 1st Defendant. The allotment letter refers to ***'10 acres'*** and specifically to Plot Nos. 41, 42, 118, 119, 120, 121, 123 and 124. **PW1** Mr. Basil a director of the Plaintiff company Agam Investments told the court that Ezazera was a company run by the son and daughter-in-law of **DW1** and acted as an agent for the 1st Defendant in this sale. Is this assertion borne out by the facts? Whereas **DW1** initially claimed to have no knowledge of Ezazera Products, he does later admit under cross-examination that Samuel M. Mwamunga and Esther K. Mwambui the two partners in Ezazera are his son and daughter-in-law respectively. It is clear that **DW1** in denying all knowledge of this company was not being truthful to court and was merely trying to put as much distance as possible between himself and the said company. The allotment letter dated 10th March 1997 provides that:

***"All payment must be made in Bankers Cheque drawn in favour of M/S VOI DEVELOPMENT CO. LTD"***

Following this letter of allotment one **Samuel Mazera Mwamunga**, a partner in Ezazera, and a son to **DW1** who is the Executive Chairman of the 1st Defendant, writes to **MR. SURJIT SINGH BASIL AND NOMINEES** a letter dated 25th July 1997. In that letter he offers to sell to **PW1** Plot Nos. 15031/41, 42, 118, 119, 120, 121, 123 and 124 Voi Township at a price of Kshs.550,000/-. Following that offer an Agreement for Sale was made and executed between Ezazera Products as the Vendor and Surjit Singh Basil as the Purchaser. The property being sold was described as:

***"ALL THOSE 8 plots 15031/41, 42, 118, 119, 120, 121, 123 and 124 totalling approximately 10 acres adjoining Voi Township which are subject to allocation in favour of the Vendors from Voi***

***Development Company Limited under letter of allocation dated 10th March 1997"***

Of importance here are the ***'special conditions'*** to this Sale Agreement and more specifically condition No. 4 which provided:

***"4. The Vendor shall arrange directly with Voi Development Company Limited for the transfer of the said plots in the name of the Purchaser"***

It is quite clear that although the vendor was named as Ezazera Products, there was a direct link with the 1st Defendant. Firstly the sale was dependent upon the allocation of the 8 plots to Ezazera by the 1st Defendant and secondly the transfer of the plots to the purchaser was to be effected by the 1st Defendant. It is even more telling that the payments made by the Plaintiffs for the eight Plots was received and receipted for by the 1st Defendant and **not** by Ezazera Products who were the alleged vendors. Receipt No. AH 045 dated 16th September 1997 was issued to the Plaintiff for Kshs.200,000/- and received with thanks by Voi Development Company Limited. Likewise receipt No. AH 046 dated 12th October 1997 was issued **again** by Voi Development Company to R. Kapila who was the lawyer acting for the Plaintiff for Kshs.200,000/- received in respect of this sale not by Ezazera but by the 1st Defendant. More important is that **DW1** by his own admission signed both receipts. If as **PW1** claims the 1st Defendant was not involved in any sale transaction with the Plaintiff then why did he on behalf of the 1st Defendant receive both payments and issue receipts for the plots being sold? There can be no doubt that Ezazera was in actual fact acting as the agent for the 1st Defendant in this transaction. Indeed **PW1** told the court that out of the stated purchase price of Kshs.550,000 the sum of Kshs.150,000/- was to be paid to Ezazera Limited as agency fee. The concise Oxford Dictionary defines an agent thus:

***"agent – a person who acts for another in business, politics etc"***

From the set of facts narrated above there can indeed be no doubt that Ezazera Products merely acted as the agent for the 1st Defendant in the sale of these 8 plots to the Plaintiff. In the letter dated 5th December 2006 from Voi Development Company addressed to M/s Agam Investments Limited, which letter **DW1** confirmed that he signed as the chairman of Voi Development Company it states:

***"M/s Ezazera Co. is still our and your agent"***

Nothing could be clearer than this. This is clear proof that Ezazera acted in this transaction with the clear authority of **DW1** in this transaction. I further find that it was extremely dishonest on the part of **DW1** the Executive Chairman of the 1st Defendant to deny any knowledge of or involvement in this sale transaction when by his own admission he authored a letter dated 12th October 1997 to Standard Bank advising them of the misplacement of one of the cheques issued by the Plaintiff in payment for the said plots. Furthermore there is the letter dated 15th October 1997 written by the Plaintiff's lawyer Mr. Kapila to the 1st Defendant replacing the lost cheque. If as **DW1** claims there was no sale agreement between the 1st Defendant and the Plaintiff, then why was the 1st Defendant receiving payments from the Plaintiff pursuant to this sale agreement and why would **DW1** write to report the lost cheque and receive the replacement cheque? There is no evidence that the 1st Defendant ever rejected said cheque or returned it to the Plaintiff as a mistaken payment to themselves. Of even great significance is the fact that **DW1** wrote his letter to Standard Bank through Mr. Basil (the Plaintiff) and also undertook to forward the lost cheque found through Mr. Basil. It is manifestly clear that **DW1** acting for the 1st Defendant knew and dealt with **PW1** who was a director of the Plaintiff company.

Linked to the question of whether the 1st Defendant entered into a legally binding agreement with the Plaintiff is the status of **PW1** Mr. Basil himself. Was he acting in this matter on his own personal behalf or was he acting as a director of and therefore on behalf of the named Plaintiff Agam Investments Limited? In his submissions Mr. Kariuki for the 1st Defendant submits that Mr. Basil was at all times

acting on his own personal behalf and not as a nominee of Agam Investments. In his evidence **PW1** told the court that Agam Investments is a family company whose directors include himself, his wife, his sister and brother-in-law. He claims that he acted at all times in this transaction as the nominee of Agam Investments with the full knowledge, consent and authority of the other directors. In all correspondences over this matter Ezazera referred to the purchaser as Mr. Surjeet Singh and/or nominees. In his letter dated 5th December 2006 **DW1** writes to "***Agam Investments Limited Lion Hill Zome Voi – "Attn Mr. Basil Surjeet"***. This is clear evidence that **DW1** was fully aware that Mr. Basil was acting for Agam Investments, the Plaintiff in this matter. In the letter dated 25th July 1997 from Samuel Mwamunga and in the Sale Agreement dated 30th July 1997 the purchaser is described as ***"Surjeet Singh Basil and his nominee or nominees"*** . The Collins English Dictionary defines a ***'nominee'*** as ***' a person or organization named to act on behalf of someone else …."*** It was generally agreed between the parties that Mr. Basil was acting on behalf of some other person or persons. By recognizing the existence of potential nominees it was evident that the buyer Ezazera was fully aware that **PW1** was not acting on his own behalf alone. The letters and agreements were acceptance of the fact that at any point in the transaction some other person (probably one of the other directors) could come in, take over, proceed with and complete the transaction. Failure by **PW1** to divulge whom he was acting for does not invalidate the transaction. As counsel for the Plaintiff has pointed out it is a common business practice for individuals or companies to buy or sell property using nominees. More conclusively on this point the six transfers executed for Plot Nos. 41, 42, 118, 119, 120 and 121 all of which were duly signed by **DW1** as the Executive Chairman of Voi Development Company all name the transferee as ***'Agam Investments Limited'***. This is clear proof that the seller knew that **PW1** was acting for the Plaintiff company. That is why they effected the transfer of those six plots to the Plaintiff company and ***not*** to Mr. Basil. From the foregoing I am satisfied and I do make a finding that the 1st Defendant did enter an agreement to sell to the Plaintiff the said plots .

Another issue in contention in this case is whether this agreement to sell included all the eight plots or only six of them. This is actually the crux of the matter. The 1st Defendant denies having sold to the Plaintiff Plot Nos. 15031/123 and 15031/124 which two plots the 1st Defendant purported to sell to the 2nd and 3rd Defendants ten years later in 2007. Having already found that a valid sale agreement existed between the Plaintiff and the 1st Defendant, the next obvious question that would arise is what was the subject matter of this agreement i.e. what was being offered for sale. The answer to this question is easily deciphered from the various correspondences in this matter. In the letter of allotment dated 10th March 1997 the 1st Defendant allots to Ezazera Products eight (8) plots listed therein as ***"41, 42, 118, 119, 120, 121, 123 and 124"*** at a price of 40,000/- per acre. It is quite true that the mere fact of allotment of eight (8) plots is not proof that Ezazera in turn sold 8 plots to the Plaintiff but it must be remembered that this court already found that Ezazera was acting as an **agent** of the 1st Defendant in the sale of land to the Plaintiff. It would therefore not be too far fetched to conclude that the 8 plots listed in this letter of allotment were the very 8 plots which the 1st Defendant were authorizing Ezazera to sell on their behalf. This view is confirmed by the letter of offer written by Ezazera to **PW1** dated 25th July 1997. The heading is:

***"SALE OF PLOTS NO. 15031/41, 42, 118, 119, 120, 121, 123 and 124 VOI TOWNSHIP BY SAMUEL MAZERA MWAMUNGA t/a EZAZERA PRODUCTS"***

The plots to be sold are clearly identified and they are eight and **include** Plot Nos. 123 and 124. The letter of offer goes on to state:

***"I hereby give you an option to purchase all the above plots together at a purchase price of Kshs.550,000/- …." [my emphasis]***

It is very clear that the offer was to sell **all** eight plots **together** – the Sale Agreement dated 30th July 1997 and signed by both **PW1** and Samuel Mwamunga for Ezazera at para (1) describes the subject-matter of the agreement as:

***"The property sold is <u>ALL THOSE</u> 8 plots 15031/41, 42, 118, 119, 120, 121, 123 and 124 totalling to approximately 10 acres adjoining Voi Township which are subject to allocation in favour of the Venders from Voi Development Company Limited under letter of allocation dated 10th March 1997"***

Nothing could be clearer than this. The Sale Agreement was in respect of **all** 8 plots **including** plot Nos. 123 and 124. Mr. Rajinder Kapila Advocate who acted for the Plaintiff in this matter in his letter dated 9th October 1997 forwarded a cheque for Kshs.200,000/- to the 1st Defendant in respect of sale of Plots L.R. Nos. 15031/41, 42, 118, 119, 120, 121, 123 and 124. Most tellingly the 1st Defendant upon receiving two cheques worth Kshs.200,000/- as payment in pursuance of this Sale Agreement issued receipts to **<u>PW1</u>**. In both receipts it is clearly indicated thus:

***"Being payment of letter of Allotment No. 053 of 10/3/1997 Plot Nos. 15031/41, 42, 118, 119, 120, 121, 123, 124 Approx 10 acres subject to survey"***

Therefore not only did the 1st Defendant offer to sell but also proceeded to receive payment and issued receipts in respect of **all** 8 plots **including** Plot Nos. 123 and 124. **<u>DW1</u>** Eliud Mwamunga admitted in court that it was he who as the Executive Chairman of the 1st Defendant signed both receipts. If the intention was to exclude Plot Nos. 123 and 124 then why were these plots included in all the relevant documentation? Nothing would have been easier than to cancel, erase or prepare fresh documents to include only six (6) plots. The fact that this was not done persuades me that at all times it was understood and accepted by all parties that Plot Nos. 123 and 124 were included in the Sale Agreement as well as the purchase price paid. It is interesting to note that at no time did 1st Defendant **<u>DW1</u>** himself or Ezazera attempt to offer the Plaintiff a refund of the monies paid equaling the value of the 2 contentious plots. I find that it is as clear as daylight that the sale agreement entered into and executed by 1st Defendant and the Plaintiff involved 8 sub-plots as the subject matter which 8 plots were 15031/41, 42, 118, 119, 120, 121, **123** and **124**.

**3. WHO IS THE LEGAL AND BONAFIDE OWNER OF PLOT NOS. 123 AND 124?**

In order to answer this question effectively the court may have to reiterate some of the findings already made. As it has already established the agreement for sale between the parties was for eight (8) plots which included Plot Nos. 123 and 124. The purchase price was stated to be Kshs.550,000/-. **<u>PW1</u>** explained that out of this sum Kshs.150,000/- was paid to Ezazera Products as an agency fee. **<u>DW1</u>** argues that the full purchase price was not paid as the Plaintiffs tendered no evidence of this 150,000/- paid to Ezazera. Both the letter of offer from Ezazera and the Sale Agreement indicate clearly that the price of the land was Kshs.40,000/- per acre. The eight (8) plots together made up ten (10) acres. At 40,000/- per acre 10 acres would cost a total of Kshs.400,000/-. The Plaintiff has produced evidence by way of receipts totaling Kshs.400,000/- paid to the 1st Defendant which monies **<u>DW1</u>** admits having received. I cannot be a mere coincidence that 550,000/- less 400,000/- comes to Kshs.150,000/- the amount the Plaintiff claims was paid as agency fees to Ezazera. The two receipts as stated earlier clearly indicated that the 400,000/- was received in payment for eight plots which included Plot Nos. 123 and 124. At no time from 1997 to 2007 when this suit was instituted have the 1st Defendants made a claim that they were underpaid by the Plaintiffs.

In his evidence **<u>PW1</u>** told the court that the 1st Defendant requested him to give back Plots 123 and 124 and in return the 1st Defendant would sell him three (3) additional plots for an extra Kshs.100,000/-. Whereas **<u>DW1</u>** denies ever having made such an offer he does concede to having received a letter dated 21st November 1997 from the Plaintiff's advocate which inter alia addressed him thus:

***"<u>LR Nos. 15031/116, 117 and 127 Taita</u>"***
***I am informed by my client that you have agreed to sell my client the above three plots in consideration of his giving you back the two plots known as LR No. 15031/123 and 124, and also agreeing to pay you***

***an additional sum of shillings One Hundred Thousand. The total consideration for the nine plots now will be shillings Five Hundred Thousand"***

Firstly this letter confirms my earlier finding that the total purchase price agreed upon and paid (as evidenced by receipts signed by **DW1** himself) for 8 plots was Kshs.400,000/-. An extra 100,000/- would raise the figure to Kshs.500,000/- as stated by counsel in his letter. Secondly despite the denials of **DW1** I am inclined to believe that such an offer was made to swop plots and this was communicated by **PW1** to his lawyer who reduced the negotiation into writing. I must at this point indicate that from my observation of Mr. Mwamunga **DW1** as he testified, he did not strike me as an honest or reliable witness. He was evasive and belligerent with counsel whilst under cross-examination. On several occasions he would make an assertion only to have to eat his words later upon being presented with proof of the contrary. In my view **DW1** was neither open nor truthful about the facts of this transaction and clearly he was more interested in concealing facts to suit his purposes. By making this offer to swop plots **DW1** was admitting that plots 123 and 124 actually belonged to the Plaintiff – hence his offer to replace those two plots with three others. This negotiation apparently died in the water and was never pursued or concluded by any party. The reason I mention it is to show that even **DW1** the original owner of the8 plots acknowledged by this offer that Plot Nos. 123 and 124 actually belonged to the Plaintiff having been bought and paid for. Much was made of the fact that whereas eight (8) plots were sold, transfers were only executed with respect to six (6) of the plots. These transfers were duly signed and sealed by the 1st Defendant and their two directors Mr. Mwamunga **DW1** and Mr. Vinoo Shah and bear the seal for Voi Development Company Limited. However no such transfers were executed in respect of Plot Nos. 123 and 124. Why was this so? The answer to this question is not entirely clear from the evidence on record. This may well have been due to the fact that the 1st Defendant was still trying to re-negotiate an exchange of these two plots. However I am in agreement with the submissions of counsel for the Plaintiff that notwithstanding the absence of signed and sealed transfers in respect of Plot Nos. 123 and 124, there nevertheless exists sufficient evidence to show that these two plots were part of the very same sale transaction which led to the legal transfers of Plot Nos. 41, 42, 118, 119, 120 and 121. As stated on page 14 of the submissions filed on 13th October 2010, there was only one sale agreement for all 8 plots, the purchase price for all 8 plots was paid as a lump sum in two equal installments, and the receipts issued for such payment quoted **all** 8 plots. It therefore stands to reason that transfers must also be prepared signed and sealed with respect to Plot Nos. 123 and 124 as they formed part of the same transaction. I therefore find that having purchased and fully paid for all eight plots inclusive of Plot Nos. 123 and 124, the Plaintiff is the legal and bona fide owner of the said two plots.

## 4. COULD THE 1ST DEFENDANT PROCEED TO OFFER PLOT NOS. 15031/123 AND 15031/124 TO THE 2ND AND 3RD DEFENDANTS FOR SALE IN 2007

The simple answer to this based on my findings on Point No. 3 above – is No. The 1st Defendant in the circumstances could not proceed to offer for sale to the 2nd and 3rd Defendants Plot Nos. 123 and 124 which had already been purchased and paid for in full by the Plaintiff. Any attempt to so offer these two plots to a third party for sale was void ab initio and a nullity. It is instructive to note that the sale transaction between the 1st Defendant and the Plaintiff took place in 1997 and it is not until a full ten (10) years later that the 1st Defendant purports to sell plots 123 and 124 to the 2nd and 3rd Defendants. During this ten (10) year period the 1st Defendant made no effort to rescind the sale, nor did they make any claim from the Plaintiff for any sum outstanding from the sale agreement made in 1997. All that the 1st Defendant apparently tried to do was to persuade the Plaintiff to accept in exchange for Plots 123 and 124 three different plots (see letter dated 21st November, 1997, from Rajinder Kapila Advocate addressed to The Chairman Voi Development Company). As stated earlier this endeavour did not go very far and was not pursued to conclusion by either party. I find that by 2007 the 1st Defendant had already sold Plots 123 and 124 to the Plaintiff. Full payment had been received for the same evidenced by the fact that the 1st Defendant never from 1997 to 2007 (a period of ten (10) years) made any claim that any amount of the sale price was still due and owing to it. Further the 1st Defendant had by this time already surrendered possession of the 8 plots (as per the sale agreement dated 30th July 1997) to the Plaintiff. **PW1** for the Plaintiff told the court that the Plaintiff had in he year 2002 already proceeded to build on the property a tourist class hotel known as **Zomeni Lion Hill Camp**. The fact of the existence of this hotel or the fact

that it was built and developed by the Plaintiff is not disputed in any way. I therefore find that having already sold Plot Nos. 123 and 124 to the Plaintiff, and having handed over vacant possession of the same to the Plaintiff the 1st Defendant was not entitled and had no right, ten (10) years later, to proceed to offer the very same two plots to the 2nd and 3rd Defendants for sale.

**5. WERE THE 2ND AND 3RD DEFENDANTS INNOCENT PURCHASERS FOR VALUE WITHOUT NOTICE**

In answering this question, I will also deal with the 6th issue for determination being –

**6. DID THE 2ND AND 3RD DEFENDANTS PAY THE FULL PURCHASE PRICE TO THE 1ST DEFENDANT?**

**DW2 JOHN KELL CAMPELL** gave evidence in this matter on his own behalf as the 3rd Defendant and on behalf of his business partner **CHRIS CANNAN**, who was the 2nd Defendant. **DW2** told the court that in January he and the 2nd Defendant visited Voi from their home in the UK and met Mr. Mwamunga who offered them land for sale. The two were desirous of putting up a hotel in the area. Their discussions culminated into an agreement being reached between the 1st Defendant as the Vendor and the 2nd and 3rd Defendants as Purchaser with respect to three plots being Plot Nos. 15031/122, 15031/123 and 15031/124 Voi. A Sale Agreement dated 30th March 2007 was duly entered into and executed by all parties. The agreed purchase price was Kshs.2,400,000/-. In furtherance of this sale agreement the 2nd and 3rd Defendants paid a deposit of Kshs.720,000/- by way of a bankers cheque dated 30th March 2007 followed on 29th August 2007 by another bankers cheque worth Kshs.1,680,000/- to cover the balance of the purchase price. **DW2** told the court that during all this time there was no objection to their purchase of the two plots. He asserts that he and the 2nd Defendant were innocent purchasers and had absolutely no notice of any third parties interest in the land they were purchasing. It is only after payment of the full purchase price in August 2007 when they received a demand letter from the Plaintiff's advocate, that they become aware of a dispute over the land they had purchased. In his evidence **DW2** insists that he and the 2nd Defendant '***innocently purchased'*** three (3) plots which included Plot Nos. 123 and 124. Is this contention by **DW2** borne out by the evidence on record? I think not.

The Plaintiff in his evidence told the court that sometime in early 2007 he met the2nd and 3rd Defendants viewing the said plots. One Mr. Njiru who had also purchased land in the vicinity also came and joined them at the scene. **PW1** stated that both he and Mr. Njiru warned the 2nd and 3rd Defendant to exercise care in purchasing land in the area and both pointed out their plots to the 2nd and 3rd Defendants. It is instructive that in his evidence **DW2** concedes that he did indeed met both Mr. Basil **PW1** and the said Mr. Njiru at the site. However he denies that **PW1** warned him against buying the plots or told them of his interest in any of the plots. To my mind it would be very strange and would serve no purpose for **PW1** and Mr. Njiru to bother themselves to visit the site when the 2nd and 3rd Defendants were determining which plots to buy if they had no reason to be there. The two men must have gone to the site for a reason. A plausible reason would be to safeguard their interest in plots they had already purchased and to warn the 2nd and 3rd Defendants not to be duped into buying plots which already belonged to them.

Be that as it may **DW2** does admit that Mr. Basil **PW1** visited both him and his partner in the United Kingdom and under cross-examination by Mr. Kariuki for the 1st Defendant **DW2** candidly states:

***"Mr Basil (PW1) came to see us in the U.K. We held a friendly discussion about the three plots. He said he had previously bought Plots 123 and 124."***

This is clear proof that the 2nd and 3rd Defendants were duly informed by none other than Mr. Basil himself that he had an interest in and had purchased the two plots. How then can **DW2** claim in court that they had no notice of the interest of any other party in the land which they were purchasing. **DW2**

attempts to insist that they only became aware of the Plaintiff's interest in the land after July 2007 when they had already paid out the full purchase price for the two plots. However this assertion made by **DW2** is not borne out by the evidence on record. The cheque paid to cover the final installment of the purchase price of Kshs.2.4 million was paid on 29th August 2007. **DW2** having earlier tried to imply that he met with **PW2** after this final payment had been made, later when faced with the evidence from **PW1's** passport admits that his discussion with PW1 took place in the UK in June/July 2007. Therefore one full month before making the final and larger payment for the plots they were purchasing, **PW1** had taken the trouble to seek them out in the UK and had himself informed them that he was the owner of Plots 123 and 124. The 2nd and 3rd Defendants having been so alerted still proceeded to complete the sale in August 2007. In no terms can they be said to be ***'innocent purchasers for value'***. The claim by **DW2** that **PW1** did not warn them against purchasing the two contentious plots is an outright lie. **DW2** and his partner were foreign businessmen planning to put up a hotel in Kenya (which was not their country of residence). **DW2** described himself as a '***shrewd businessman'.*** Even one not so shrewd being informed that property he intended to purchase had already been purchased by another, would certainly think twice before proceeding to complete such a transaction – it had red flags all over it. At the very least **DW2** would have postponed or delayed final payment until the issue of ownership of the 2 plots was conclusively determined. Their failure to do so can only be blamed on the 2nd and 3rd Defendants themselves. I find that these Defendants proceeded to conclude a transaction and paid 1.6 million (a substantial sum by any accounts) having full knowledge that Plot Nos. 123 and 124 were being claimed by **PW1** as his property. They were not **innocent** purchasers for value as they had full notice of the claim on the two plots by the Plaintiffs and I do so find.

Apart from this fact that the 2nd and 3rd Defendants were **not** innocent purchasers for value without notice, the question arises as to whether payment was properly made to the genuine vendor by the 2nd and 3rd Defendant in respect of the sale agreement they entered into. The sale agreement signed on 30th March 2007 names Voi Development Company Limited as the Vendor. Surprisingly the deposit of Kshs.720,000/- and the balance of Kshs.1,680,000/- were paid by cheque **not** to Voi Development Company Limited but to **Eluid Timothy Mwamunga** who was **DW1** in this case. It is not clear by what authority **DW1** received to himself payments due to the 1st Defendant. The 1st Defendant being a limited company is a separate legal entity totally distinct from its chairman Mr. Mwamunga. The fact that **DW1** was the Executive Chairman did not entitle him to receive and retain payments due to the company. There is no evidence that **DW1** later released this sum of Kshs.2.4 million to the 1st Defendant. Therefore as things stand, the legal position is that no payment has been received by the Vendor, the 1st Defendant in pursuance of the Sale Agreement signed on 30th March 2007. There is no company resolution signed by the other director, whom the court was informed was a Mr. Vinoo Shah, authorizing the 2nd and 3rd Defendants to remit the purchase price to Mr. Mwamunga instead of to the 1st Defendant. His action in diverting the purchase price to himself is illegal and cannot be sanctioned or sanitized by this court. This cannot be said to be proper business financial procedure. The 2nd and 3rd Defendants cannot therefore claim to have purchased Plot Nos. 123 and 124 when no single cent has been shown to have been received by the Vendor who was the 1st Defendant. On this basis I find that they have no legally valid claim to these two plots. My finding on point No. 6 is that the 2nd and 3rd Defendants **did not** pay the full purchase price to the 1st Defendant.

**7.WERE THE 1ST, 2ND AND 3RD DEFENDANTS JUSTIFIED IN BLOCKING OFF ACCESS TO THE SUIT PREMISES**

**DW2**Edward Marenye the land surveyorcontracted by **DW1** told the court that having secured the deed plans for the eight plots he surrendered the same to Mr. Kapila the advocate for the Plaintiff with the full authority of **DW1**. Surprisingly **DW1** later made a report to Voi Police Station claiming that these deed plans had been stolen from him. I do agree entirely with my learned brother Hon. Justice Njagi who stated in his ruling dated 9th May 2008 –

***"His (DW1's) tale of theft of the deep plans and/or the obtaining of the same by deceit or fraudulent misrepresentation can only be taken with a grain of salt. It is simply not true, and he knows it. To***

***make such serious and unfounded allegations in respect of a matter translated above board by an advocate of this court leaves behind a very sour taste"***

At the outset I wish to state that this court has not received any evidence to suggest that the 2nd and 3rd Defendants were involved in any way with the blocking of the access road to the Plaintiff's hotel. Their only involvement would have been desire to solidify their claim to Plots 123 and 124 which I have already found to be without basis. **PW1** told the court that it was ***'Eluid'*** **DW1** who blocked the access road to his hotel. This he claims was done in order to exert pressure on him to release the deed plans for Plots 123 and 124. It is quite evident that having realized that ownership of the 2 plots could not be legally transferred to the 2nd and 3rd Defendants **DW1** resorted to ***'strong-arm'*** tactics to obtain the 2 deed plans, which had already earlier been surrendered to the Plaintiff as the genuine purchaser. In his letter dated 27th October 2007 to **PW1** Mr. Mwamunga demands from **PW1** the return of six other deed plans in the same manner that he returned the deed plans for Plot Nos. 123 and 124 ***"under pressure"***. The ***"pressure"*** referred to was the blocking of the access to the hotel. By blocking this access, therefore denying guests, suppliers, employees and all other legitimate visitors to the Plaintiff's hotel access, no doubt leading to great financial loss and inconvenience to the Plaintiff the 1st Defendant ***'compelled'*** the Plaintiff to surrender to him the said deed plans. This action was uncalled for not to mention uncivilized. The 1st Defendant had several options available to him including instituting legal action to recover the deed plans. Citizens cannot be allowed to take the law into their hands in such a manner and this court will not sanction such acts. I find that there was no legal or proper justification for the blocking of the access to the Plaintiff's hotel. The only reason it was done was to threaten the Plaintiff and compel them to surrender to the 1st Defendant the deed plans which he wanted.

**8. IS THE PLAINTIFF ENTITLED TO THE ORDERS OF INJUNCTION BOTH MANDATORY AND PERPETUAL AS PRAYED FOR IN THE PLAINT.**

With respect to keeping open the Plaintiff's access to the suit property (prayer (d) of the Plaint), I believe that I have already covered this issue when discussing issue No. 7 above. The fact of the matter is that there was no justifiable, legal cause to block this access. The result was loss and inconvenience to the Plaintiff. The only reason why this action was taken was to compel the Plaintiff to release the deed plans demanded by the 1st Defendant. In his ruling dated 9th May 2008 Hon. Justice Njagi did award such a mandatory injunction at the interlocutory stage. I am inclined to agree that such an order remains necessary to prevent any future interference with the Plaintiff's quiet enjoyment of the property which he has paid for and legally purchased. As such I do allow prayer (d) and of the Plaintiff.

I refer now to prayer (e) and (f) of the Plaint seeking a perpetual (permanent) injunction with respect to any interference with the Plaintiff's possession of the eight (8) plots. A permanent injunction is defined in Blacks Law Dictionary 8th Edition thus:

***"An injunction granted after a final hearing on the merits."***

This court has heard this suit fully and has received evidence from all parties. My findings as earlier stated is that the bona fide owner of Plot Nos. 15031/41, 15031/42, 15031/118, 15031/119, 15031/120, 15031/121, 15031/123 and 15031/124 is the Plaintiff herein. I have already found that the Plaintiff paid the full purchase price for the eight plots, has in its possession signed transfers for six (6) of the said plots, has taken up possession of the eight (8) plots on which the Plaintiffs have put up a tourist hotel. The Plaintiff has acquired inalienable rights to the suit property which no party must be permitted to interfere with. The Defendants have showed an inclination to interfere with the Plaintiff's rights over the suit property and must therefore be restrained from doing so by this court. In order to protect the Plaintiff's rights over his property I do grant the permanent injunction as prayed for in terms of prayer (e) of the Plaintiff.

Lastly I now wish to consider prayer (g) of the Plaint which is the Plaintiffs prayer for ***'General,***

***punitive and aggravated damages against the 1st Defendant'***. Without a doubt and based on my findings above I am satisfied that the 1st Defendant through its chairman Mr. Eluid Mwamunga, acted in a dishonest and unconscionable manner throughout this transaction. The evidence clearly shows that the 1st Defendant having sold the 8 plots to the Plaintiff and having pocketed the full purchase price for the same later (indeed a full ten (10) years later) attempted to sell the same portion of land a second time to the 2nd and 3rd Defendants. No doubt this was because the 2nd and 3rd Defendants had offered to pay much more money for that land. Clearly the actions of the 1st Defendant were motivated by pure greed and self interest. Their actions undoubtedly led to great inconvenience to the Plaintiff. The illegal blockage of the access to the Plaintiff's hotel must have led to financial loss which despite not being quantified must be taken into account. The Plaintiffs had to engage counsel and endure the rigours of a full hearing to defend their right to the property which they had purchased. A clear case has been made out for punitive damages. I have considered the submissions of Mr. Kinyua for the Plaintiff asking for an award of Kshs.2,700,000/-. In my view that is more on the higher side. Taking into account all relevant factors I do award damages in favour of the Plaintiff and against the 1st Defendant in the sum of Kshs.500,000/- (Five Hundred Thousand only).

Finally this suit succeeds. I do hereby grant prayers (a), (b), (c), (d) (e) and (f) of the Plaint dated 28th November 2007. The 1st Defendant having led to the filing of this suit by their dishonest actions will be condemned to pay the Plaintiffs costs. The 2nd and 3rd Defendants on their part will meet their own costs for this suit.

It is so ordered.

**Dated and Delivered at Mombasa this 11th day of March 2011.**

**M. ODERO**
**JUDGE**