



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 144 of 2003

SERGIO LOLLIPLAINTIFF

VERSUS

PATRICK NJOGU KARIUKI DEFENDANT

JUDGMENT

The Plaintiff filed the Complaint against the Defendant on the ground of fraud committed by him in respect of a sale transaction of his land known as LR. No.4894/12 at Garden Estate which according to the Plaintiff is fraudulent transaction having entered into with an imposter.

The particulars of fraud of the Defendant are given in paragraph 7 of the Complaint:

- (a) Entering into an Agreement of Sale with knowledge of the fact that the “Vendor” was not the owner of the land.**
- (b) Transacting with an imposter for a grossly inadequate consideration.**
- (c) Transacting out of the usual procedure for land transactions.**
- (d) Colluding with the imposter to forge the indenture.**

The Defendant filed the defence and counterclaim. He denied the allegations of fraud and denied that he either himself or in collusion with any other person, fraudulently or irregularly entered into a wrongful agreement of sale.

He contends that he entered into a sale agreement lawfully for a consideration of KShs.6,000,000 and after following all the procedures lawfully, got the suit land registered in his name. He thus prays for dismissal of the complaint and declaration that he is the bonafide owner of the suit property.

He later on initiated a third party proceedings against the Registrar of Title and issued Third party Notice to claim indemnity in full and/or contribution, as indicated in the said Notice dated 24th June, 2004.

I heard the suit de novo wherein it was directed that the Complaint and Third Party proceedings be heard and determined together with the Complaint.

In brief the Plaintiffs case is that he is the proprietor of the suit land which he purchased in the year 1989. I may state here that although attempts were made to question the indentures on pages 14 and 18 of P.Ex.1 (both of which are for the suit property) nothing turned on that as the Defendant himself has used the one of the indentures to get the suit property registered in his names and that on page 14 was on the file held at the Land Offices as per the plaintiff witness. Moreover, further evidence led by the Plaintiff as to application for and approval of sub-division of the suit property by and to him, as well as the entry No.9 dated 21st March, 1991 on the title of the suit property of conveyance dated 28th March, 1990 in the name of the Plaintiff, (P.Ex.3), do support the claim of the Plaintiff that he became registered owner of the suit property. I reiterate that the Defendant does not deny the ownership of Sergio Lolli, the Plaintiff herein.

After the approval of sub-division, the survey was carried out and beacons were placed. The Plaintiff thereafter put the sub-divided plot for sale at the price of Shs.2,500,000 each. The property admeasures around 5.2 acres. A sign board (P.Ex.2) to that effect was put up on the suit property. This fact also is accepted by the Defendant. Even the fact that the telephone (mobile) number of Moses (PW.2), his agent, was put up in the sign board is accepted by the Defendant.

Before the sub-division, he had received an offer of sale at US.\$300,000 for the whole property which did not materialize due to rejection of change of user, required by the Purchaser.

Thereafter he received a telephone call from a lady, who stayed next to the suit property, that the suit property was invaded. He went there from Malindi and visited the same with one Moses his agent and found that the sign board was knocked down and some people were present on the suit property. He went to the Police and eventually got the whereabouts of the lawyer, who acted for the Defendant, Ms Susan Kahoya. He was informed that one Ms Nyakeriga Juma and Co. Advocates purported to act for him as a vendor. He denied having instructed him, having sold the suit property or having signed and executed instruction note, the sale agreement or the indentures.

He also stated that in the presence of police when Mr. Nyakeriga visited M/s Susan's Chambers, he denied having him known the Plaintiff.

He denied that the signature on the document on page 18 of P.Ex.1 was his. He further stated that the one on page 16 (P.Ex/1) is his.

He also emphasized that alleged Agreement for sale was purported to have been signed on 30th July, 2002 and the Indenture dated 5th August, 2002 was registered on 6th August 2002. He also emphasized the letter dated 9th August, 2002 (item No.11 D.Ex.1A) of Defendant's Supplementary list of document which gives authority to pay rates in order to facilitate the transfer is after the date of registration of the title.

It is also on record that the Defendant has only paid Shs.2,000,000 towards deposit and complimentary slip item No.1 of D.Ex.1A shows the purchase price at Shs.6,000,000. I may state here that the cheque for Shs.3,694,000 was stopped for payment after the police started investigation. It is also pertinent to note that Ms Susan Kahoya (DW.2) specifically stated that the cheque stopped for payment was after deducting the payment of rates as well as the commission of Shs.150,000 to one Mr. Njagi, an agent of the Defendant. I may note here that although the said Mr. Njagi is known to the Defendant as his agent, he is not called as witness by the Defendant without any explanation. I say so, because the Defendant's case is that he has followed all the due process for sale which was initiated by Mr. Njagi. Thus the onus to prove this issue, is squarely on him.

Coming back to the case of the plaintiff, he also emphasized that because of the lower purchase price, because of the speed with which the registration took place and because of the fact that despite the placing of sign board that ½ acre plot was for sale. The transfer of the whole property, the Defendant was deemed to have been involved in the fraudulent transaction.

In cross-examination, he agreed that he has not consulted any valuer. He gave written instructions to

Moses (PW.2) to find a buyer and not to enter into any sale agreement. He conceded that he did not remember that the sub-division the property was before the final approval which was given on 29th July, 2002. He also agreed that someone checking on Entry No.9 registering the suit property in his name can rely thereon and could be interested in buying the same. He was shown similar registration of conveyance to different parties. I do not understand the said question as on item No.8, the similar conveyance is registered in the names of Samuru Gituto Farmers Co-operative Society Ltd. for Shs.800,000 on 3rd March, 1978 from whom the Plaintiff purchased the suit property for Shs.2,400,000. These parties in both conveyance are the same.

He emphasized that the value of the suit property can be around Shs.20,000,000 for the whole property.

The witness of the Plaintiff Mr. Moses Chege (PW.2) testified that he knew the Plaintiff for more than 25 years and that he (the plaintiff) is the owner of the suit property and that he (the witness) was its caretaker. He met the Defendant on the suit property after the sub-division exercise supervised by him. The Defendant asked for the sale price and he informed him that each plot is of Shs.2,500,000. After five days the Defendant came back and told him that he had purchased the whole property and that he had to vacate. He telephoned the Plaintiff who denied having talked to anyone.

Then, the Defendant came with around eight people and he telephoned the Plaintiff who came, and they went to the police. The police arrested two persons.

In cross-examination he stated that he saw the Defendant driving in a four wheel vehicle when he visited the suit property first time. There were many persons who visited the suit property and thus he did not inform the Plaintiff about the Defendant's visit. He insisted that first time the Defendant came, it was in June, 2002. then he came back around middle of July, 2002. He had placed the sign board in April, 2002. The plaintiff came after three days from the day he telephoned him.

This is the evidence led by the Plaintiff.

The Third Party called Mr. Tedison Nyagaka Orare a Registrar with the Ministry of Lands.

He confirmed that the extract on pages 44 and 45 of P.Ex.1 refers to the suit property and Item No.10 contains conveyance dated 5th August, 2002 to Patrick Njogu Kariuki (the Defendant) for KShs.4,000,000. He clarified that the same was received by an Indenture which was as per the procedure the correct or proper document to enter the transaction into the register held at the Land Office. He further stated that the only duty of the Registrar is to receive the instruments of transfer or conveyance and the office of the Registrar is not mandated to keep a specimen signature of any party and that it has no machinery to know that any document presented for registration is a forgery. He also clarified that the officer who receives the document of an instrument under Government of Lands Act is not the Registrar of Government land.

In cross-examination from the Defendant's counsel he stated that the Indenture which is in their office is what is on page 14 of P.Ex.1. He further stated that the Indenture on page 18 (P.Ex.1) was presented on the same time and date which was not normal.

After the close of Third Party's case, the Defendant took the witness stand. In the midst of his Examination-in-chief, the court found out that he was referring to a document which was his written evidence. It was so done with the knowledge of his counsel and no permission was obtained from the court to allow him to read his written evidence. The court stopped him and the said document was placed in the court file.

According to him, he is running a business of property development and on 14th July, 2002 one Peter Njagi came to his office and informed him there was a five acre plot along Garden Estate for sale. The Defendant had dealt with the said person to purchase another property at Kileleshwa. On 15th July, 2002 they went to see the suit property which was fenced with brick-partially broken-and had an open gate. He

found a board (P.Ex.2) on the land. He was informed by Mr. Njagi that the mobile number of the board is that of one Moses “**who was known to the owner of the property and they were selling the property together**”.

He called and talked to Mr. Moses (PW.2) who agreed to meet the following day. He did so with Mr. Njagi when Moses informed him that the property was sub-divided awaiting the issuance of separate titles, but they were ready to sell the whole plot, at the price of Shs.8,000,000 as the neighbouring plot was sold at a price of Shs.2,500,000 ¼ acre. He counter offered at Shs.6,000,000. Mr. Moses showed him a letter of authority to sell by the owner and needed to consult him on the offer.

Next day Moses confirmed the offer and agreed on a commission of Shs.300,000 to be shared between Njagi and Moses. Moses had a copy of the Indenture. He thereupon gave Mr. Njagi a complimentary note written to his lawyer M/s Susan Kahoya (1st Document D.Ex.’1’).

After the agreement, Mr. Njagi and Moses were to proceed to vendor’s Advocate to commence the process.

After four to five days his lawyer confirmed to him that she had communicated with one Mr. Nyakeriga who had sent some documents and required Shs.2,000,000 deposit. A bankers cheque was sent in that sum which was dated 30th July, 2002. He took the cheque personally to her lawyer and found the documents ready. He signed the Agreement for sale and after few days he signed the Indenture. His lawyer confirmed that the transfer was ready and she asked him to prepare a cheque in the name of the Plaintiff in the sum of around Shs.3.9 million. Then he stated that he gave a cheque for Shs.3,694,000 which was rejected by Mr. Nyakeriga. After few days the police went to him and he recorded a statement.

He further stated that the value of the property cannot be Sh.20,000,000 as suggested by the Plaintiff and estimated the same as at Shs.5,000,000 to Shs.6,000,000. In addition even though the Agreement of Sale produced by him shows the sale price as Shs.4,000,000 he stated the same was agreed at Shs.6,000,000.

He denied that he colluded with an imposter and entered into a fraudulent agreement. He conceded that he has further sub-divided the land in ¼ acres’ plot and was offering Shs.2,500,000 per plot. He claimed the ownership of the suit property.

In cross-examination by Mr. Mesho the learned counsel for the third party, he testified, that he involved the Registrar of Government Land as the title was issued by the Registrar of Lands, while agreeing that the Registrar was not involved in preparing the instruments of transfer.

He also agreed that when he executed both documents after the vendor had already done so. He was referred to a letter dated 16th August, 2002 from the office of M/s Nyakeriga Juma returning the cheque for Shs.3,694,000 and also the two letters of 22nd August, 2002 from both lawyers, one asking for return of the cheque and other forwarding the same.

He was also referred to a letter from his lawyer dated 27th August, 2002 indicating a meeting in her office with the Plaintiff, asking for the passport of the vendor from Mr. Nyakeriga and also stating that she was holding the cheque for the balance till the Commissioner of Lands confirms the ownership of the suit property

He stated also “as far as I am concerned the balance was to be paid after completion once the new title is given out. I say title deed came in my name”.

In cross-examination by Mrs. Mbugua, the learned counsel for the Plaintiff, he averred that he knew Mr. Njagi as an agent of selling the properties and he knew the agent of the owner, a whiteman residing in Malindi. He then reiterated what he stated in examination-in-chief as regards his visit and conversation with Moses (PW.2).

After that he was confronted with his earlier affidavit sworn on 29th April, 2003. He had to concede that in paragraph 5 of the said affidavit he has stated that Njagi introduced himself as an agent of Sergio Lolli and that the following day, he followed directions given by Mr. Njagi who showed him the premises. In paragraph 5 and second part of paragraph 8 thereof he had stated that the sale was for Shs.6,000,000 and he informed Njagi that his Advocate was Ms Susan Kahoya. He also stated therein that Susan was contacted by Mr. Nyakeriga although, he testified and reiterated that he had given the name to his lawyer. He had to agree that he has not mentioned Moses either in his statement of Defence or in his affidavit. I may add here that the Defendant also swore an affidavit on 30th May, 2003 wherein the similar averments are reiterated. (See paragraphs 3 and 6 of the said affidavit filed on 30.5.03). This affidavit was in support of the Ex-parte chamber summon dated 30th May, 2003 for leave to issue Third Party Notice.

He, however, denied that he is giving this evidence to improve on his defence benefiting from the Plaintiff's case.

He was then confronted with the facts leading to show that the documents were prepared before search and then amended and sent together under cover of the same letter. (See item No.15 – letter dated 30th July, 2002). But he insisted that he did not sign both documents together and then testified that he could have signed one in the morning and another in the afternoon.

Then he was asked about the lighting speed with which the Indenture was filed and registered, and also the discrepancy between dates of payment of rates on 31st July, 2002 and demand of 30th July, 2002 and the letter dated 9.8.02 authorizing the payment of rates by M/s Nyakeriga. It is obvious that the said letter is written after the payment of rates and which is the case of the Defence. I shall further note also that the said letter refers to the note from the Advocate of the Defendant requesting the payment of rates to facilitate the transfer.

The said letter gave the authority to do so on the date before which as per the Defendant the rates were already paid and clearance certificate was obtained so that the Indenture can be applied for registration.

He also agreed that after the police investigation, he has not given any instructions to his lawyer as regards the payment of Shs.2,000,000 as deposit. Then he stated that he thought that Mr. Nyakeriga still held the same, his lawyer specifically testified that the money has been withdrawn and transferred to an unknown account. Thus it will be difficult for this court to accept that the Defendant was not aware or was not made aware of this fact, when he was giving this evidence on the same day his lawyer gave her evidence.

However, he did deny that he did not bother to investigate the matter as he knew he had committed fraud. He also agreed that what he saw in his lawyer's office is the Indenture appearing on pages 18 to 21 of P.Ex.1 and not on pages 14 to 17 thereof, and he could not comment obviously on the evidence that the latter was the Indenture held at the Land's office.

In re-examination, he attempted to clarify that he did not mention Moses in the affidavit as Njagi was the hand man of Moses. He again contradicted himself by saying that he obtained Indenture on page 18 (P.Ex.1) from the land Registry after stating that he left the matter with lawyers and that he saw the same in his lawyer's office.

His second witness was Susan Mbaire Kahoya the Advocate who acted for him in this transaction. According to her evidence, she got her instructions from one Mr. Njagi (a little man as she described) through a note from the Defendant who also gave the name of the vendor's Advocate. After she contacted Mr. Nyakeriga and asked for the copies of documents, she drafted a Sale Agreement and Indentures. In the process she instructed her clerk to conduct a search and got a copy of Indenture and then followed the process duly and sent her clerk to register the Indenture and was informed by him on 8th August, 2002 that the Indenture was fully (sic) registered. She also confirmed that she asked for a further cheque thereupon in the sum of Shs.3,694,000 offer deducting rates and clearance certificate as well as Shs.150,000 commission for Mr. Njagi. The cheque was returned by Mr. Nyakeriga.

Around 22nd August, 2002 the Plaintiff and Moses came to her Chambers with a lady police officer. He told her that she had wrongfully sold his land. She called Mr. Nyakeriga who did not come and she then “smelt a rat” and wrote a letter to return the cheque. I have already mentioned the letter from Mr. Nyakeriga which forwarded a cheque earlier to her letter of 22nd August, 2002.

In cross-examinations by two counsel, she agreed that in the sale agreement she has mentioned the purchase price as Shs.4,000,000 instead of Shs.6,000,000 as mentioned in complimentary note to save on the stamp duty as per the instructions. I do note that the plaintiff, even though questioned on the discrepancy, did not mention giving that instruction.

She also could not explain the discrepancy of the dates of rates statement and receipt which is 1st August, 2002 and 31st July, 2002 respectively and how the payment could have been made prior to the statement of rates. She had to agree that the issue of commission also has not been mentioned in the sale agreement and stated that no separate agreement was made in respect thereto. In this transaction, she relied on a note from Mr. Nyakeriga. She also agreed that she did not see any particular reason to issue Third Party Notice to Registrar of Titles and agreed that only on the ground of misfeasance an Indemnity or contribution could be prayed for.

She agreed that a letter from Mr. Nyakeriga with details is not before the court which he wrote after she contacted him. She did not have a letter from him confirming that he was acting for the vendor nor the letter forwarding a copy of Indenture.

She started preparing sale agreement as from 27th July, 2002 under her client’s instructions and instructions on telephone from Mr. Nyakeriga. She agreed that in normal practice the Advocate from the vendor prepares Agreement for Sale and other conveyance but according to her, that was the agreement between her and vendor’s lawyers though she did not have any written confirmation.

She agreed that as on 29th July, 2002 when she sent amended documents, she had not yet made any search which has to be done before the Indenture is prepared. She also agreed that the handwritten search (Item No.3 D.Ex.1) did not mention any date and on the face thereof it is clear that some part thereof is masked before photocopying she also agreed that Indenture she had is not certified copy while agreeing that the Land office always give a certified copy on application. As stated hereinbefore she stated that the cheque of Shs.2,000,000 was withdrawn and account was closed. But she agreed that the Plaintiff was not advised by her to sue Mr. Nyakeriga to recover the money.

As regards meeting in her chambers with the Plaintiff and Mr. Nyakeriga, she said the lawyer never came to her chambers and explained her letter of 22nd August, 2002 (Item No.22) that while referring to the meeting, she only meant the meeting with the plaintiff, which she further clarified in her re-examination.

On her evidence I had made a note to the effect that the witness tried to talk to the Defendant’s counsel during her testimony and gave undue explanations on the questions raised to her. To say the least she portrayed an unpleasant picture to the court.

The last witness from the Defendant was Julius Maina Karanja a clerk in the office of DW.2 Ms Susan Kahoya.

According to him he made a personal search on 26th July, 2002 and confirmed that the details therein are written in his hands. He could not explain the blocked or masked portion in that document. He then applied for a copy of Indenture on 30th July 2002 and obtained on the same day. He stated that Item No.18 (P.Ex.1) is similar to what he got.

In cross-examination, he stated that apart from that he did not do anything like forwarding any correspondence or Indenture to the office of Mr. Nyakeriga. He was never sent to the chambers of Mr. Nyakeriga.

He further stated that the Agreement of Sale and Indenture were executed by both parties on the day, the search was conducted. He did not pay rates nor did he obtain statement of rates or the clearance certificate. He could not say who did it but confirmed that he was the only clerk in the firm of Mr. Susan Kahoya. He suggested it could have been done by an outsider.

He was given certificate of clearance on 1st August, 2002. He stated from his experience that the certificate of clearance could be obtained within 3 days and registration could take around one week or around 10 days.

According to him registration of the Indenture took about one week and then he explained the steps to be undertaken in the process of registering an instrument. As regards the facts of registration in this case, he agreed that it was done against all expected facts.

This was the case from the Defendant.

I have taken extra efforts to narrate the evidence as I think in this case, as is usually in the case based on fraud, those facts are very relevant to the determination of the case.

The counsel for the Plaintiff and Defendant filed skeleton submissions highlighting the same. The counsel for the Third Party made oral submissions.

Mrs. Mbugua has in her submissions raised frowns on the way the transaction commenced and ended. She has also stressed on the absence of the agent Mr. Njagi which fact I have already considered hereinbefore.

She pointed out the swiftness in which Mrs. Kahoya started the drafting of Sale Agreement and Indenture and that too against the normal method of entering into and executing the land transactions. She took upon her self to draft all the instruments before search was made by her office and it was stressed that it was definitely an issue which this court has to take into consideration. She was unable to produce any written confirmation from the other Advocate for her to prepare those documents as well as the letter forwarding the Indenture by Mr. Nyakeriga. The manner in which rates statements and receipt were obtained also begs many questions.

In addition the permission to pay the rates from Mr. Nyakeriga came only vide his letter of 9th August, 2002 almost eight days after the rates were allegedly paid from her office.

Her own clerk stated that he has never gone to Mr. Nyakeriga's office either to hand over any correspondence or receive any documents. He specifically denied having anything to do with the demand of rates, its payment or certificate of clearance from the City Council. He was the only clerk in her office and he suggested that the aforesaid tasks could have been done by an outsider.

I also note that no action against Mr. Nyakeriga is taken even after the knowledge that against his personal undertaking he has withdrawn the money and closed the Account. No receipt of Shs.2000,000 paid as deposit to the said Advocate is before the court. Except for a photocopy of a Banker's cheque nothing more is before the court.

The Defendant mentioned the name of Mr. Moses (PW.2) only in his evidence after plaintiff closed his case. As rightly pointed out by Mrs. Mbugua he has not mentioned Mr. Moses in any of the pleadings filed by him. On the contrary he has specifically stated and reiterated that Mr. Njagi introduced himself as an agent of Sergio Lolli. This averment goes totally against his testimony.

Over and above all, the conspicuous absence of Mr. Njagi before the court is not at all to the benefit of the Defendant. It is trite law that the party who alleges has to prove the same.

Neither DW.2 Ms Susan Kahoya nor DW.3 her clerk has given any explanation as to how the Indenture was registered within a day. To be fair to DW.3 he has accepted that the registration in one day is not

normal and unexpected.

I also consider the fact that the Defendant had further sub-divided the suit property in ¼ acre plot each. He boldly stated that he was intending to sell the same for Shs.2,500,000 each. Yet he had tenacity to say that the value of the whole suit property was Shs.5 to 6 million. I may state that it admeasure more than 5 acres and according to him he expects to get Shs.2,500,000 for ¼ of an acre!!! So far he has allegedly paid Shs.2 million and I may agree with Mrs. Mbugua that the intention of the Defendant was an unjust enrichment. His own evidence justifies the plaintiff's case, that the value of the suit property shown on the Agreement for Sale is far below the price expected by a vendor.

The Defendant's case was not even supported by Mr. Moses who had candidly told the court what happened. Even from the whole case of the Plaintiff, if Moses was a partner in this fraud, why then the Plaintiff was made telephone calls to the effect that the suit property was invaded. The Plaintiff also saw that the beacons and board were removed with some people on the suit property while he was with Moses. It was not in the interest of Moses to let the Plaintiff know if he was really involved as the Defendant wants the court to believe. I get support from the fact that name of Moses came in defence for the first time during his evidence while pleading (Defendant's affidavit) showed that Mr. Njagi introduced himself as an agent.

Section 53 of Transfer of Property Act, 1882 (India) stipulates:

“Every transfer of immovable property made with an intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed.

Where the effect of any transfer of immovable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration the transfer may be presumed to have been made with such intent as aforesaid” (*emphasis mine*).

Simple dictionary meaning of fraud as per Concise Oxford English Dictionary is:

“Wrongful or Criminal deception intended to result in financial or personal gain.”

In Jowilt's Dictionary of English Law (2nd Edition) on page 827 fraud is described as

“advantage gained by unfair means, a false representation of a fact made knowingly, or without belief in its truth, or recklessly, not caring whether it is true or false”

It is further stated on the same page and I quote:

“Fraud sometimes exists where no wrongful intention is proved. In this sense of the word ‘fraud’ or ‘constructive’ or ‘legal fraud’ is a comprehensive expression which indicates the cases in which a court will not enforce or will set aside a contract, instrument or transaction, which court is of opinion that it is unconscientious for a person to avail himself of the advantage which he has obtained. (Torrance Vs. Bolton, (1873) L.R. 8 Chapter at P. 124.”

In my view it is impossible to lay down a definition which is all comprehensive or can encircle all instances of fraud. It is indefinable and can be termed as infinite.

With all these facts and observations made and what is commented in earlier part of this judgment, I do find that the Defendant is not a purchaser for value without notice and thus cannot claim that he was not a part of the fraudulent transaction which fact is admitted by his own advocate when according to her, she stopped the payment of balance purchase price.

Suffice it shall be to find that there are more questions than answers in the transaction executed by the

Defendant.

The Defendant's submissions that despite the loss of Original title the Plaintiff did not take any steps to safeguard any arbitral transaction bearing in mind that the original title was in the hand of a person who had stolen them cannot, in my humble view, come to his rescue in the circumstances of this case. Apart from this, I have seen the demeanour of both the Plaintiff and the Defendant, and I do not have any hesitation to state that the Defendant did not impress me as a witness of truth. The Plaintiff, who is an old man with failing memory, gave the evidence on all relevant facts with openness and was very candid.

Furthermore, the submissions by his advocate that the Advocate for the vendor could not be traced, once again cannot come to the Defendant's rescue. No evidence to that effect is led by him.

In view of the aforesaid I find that:-

- 1. The Plaintiff was at all material time the owner of the suit premises.**
- 2. The Plaintiff did not offer the land for sale.**
- 3. In any event the terms of offer and the transaction were not in line.**
- 4. As per the evidence, one Mr. Njagi purported to offer the suit property for sale who is not before the court and thus this court cannot determine who offered the suit property for sale.**
- 5. From the evidence before the court. The Plaintiff denied having signed the agreement and none of the witnesses from the Defence showed him signing the same. Thus there is no evidence that the plaintiff has signed those documents., and the Plaintiff has proved the same on balance of probability.**
- 6. There is no sufficient evidence to show that the Deposit of Shs.2,000,000 was paid to Mr. Nyakeriga or to anyone else.**
- 7. The Defendant is not a bonafide purchase for value without notice.**

I thus allow the plaint as prayed and dismiss the counter claim with costs.

Once I have found as aforesaid, I need not go into the Third Party case.

However, in the event, I am found to be wrong, I may state that the Third Party Notice is bad-in-law on the grounds that it is barred under Section 3 of Public Authorities Act (Cap 39) Laws of Kenya and that the Registrar of Titles is not the proper official to be sued in the transaction governed under the Government Lands Act (Cap.280). The official to be sued is Commissioner of Lands.

I also agree with Mr. Mesho that all the issues in defence which could have been raised under the Act, could not be raised due to the enjoining of the Registrar of Titles in place of Commissioner of Lands.

Furthermore, no particulars of fraud or negligence on the part of the Third Party are enumerated.

I have just mentioned the aforesaid salient points in brief to find, agreeing with the submissions, that the Third Party is bad in law and/or no sufficient proof of any involvement of the Third Party is before the court.

Thus I would dismiss the Third Party Notice also with costs.

Orders accordingly.

Dated and Signed at Nairobi this 21st day of April, 2008.

K.H. RAWAL

JUDGE

21.04.08