



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.233 OF 2009

JANENDRA RAICHAND SHAH.....PLAINTIFF

VERSUS

NASSOR MOHAMMED NAHDY.....DEFENDANT

AND

NASSOR MOHAMMED NAHDY.....PLAINTIFF

VERSUS

JANENDRA RAICHARND SHAH

NASSOR MOHAMMED NAHDY

KAVJI RAMJI MANJI

THE REGISTRAR OF TITLES

THE ATTORNEY GENERAL.....DEFENDANTS

JUDGMENT

PLAINTIFF'S CASE

1. The plaintiff instituted this suit by a plaint dated 10th July, 2009 seeking the following orders:

1. A mandatory injunction to order the defendants to forthwith pull down and remove from the said land the said construction and remove all their property of whatever nature as well as their workmen, servants or agents from the plaintiff's said property.
2. An injunction to restrain the defendant by themselves their servants or agents or otherwise howsoever from preventing the plaintiff from accessing its land and defendants should desist from trespassing onto the plaintiff's said property.
3. An injunction to restrain the defendants by themselves their servants or agents or otherwise howsoever from remaining on or continuing in occupation of the said land.
4. Demolition of all illegal structures and buildings erected on the plaintiff's premises.
5. Costs of and incidental to these proceedings
6. Such other or further relief that this Honourable Court may deem fit to grant

2. The plaintiff's case as pleaded is that the plaintiff is the registered owner of all that piece of land known as SUBDIVISION NUMBER 890(ORIGIN. NO.284/99) SECTION III MAINLAND NORTH under CERTIFICATE NUMBER CR.39208 and is entitled to the possession

of the said land. That the defendants have wrongly entered onto the said land and have constructed various illegal buildings and structures thereon. That the plaintiff was not aware of the said construction until May 2009 when one of them visited the suit premises for purposes of ascertaining its current status. The plaintiff states that in spite of his remonstrance, the defendants persist in and have continued to remain in wrongful occupation of the said land and to trespass thereon and continues with erection of various buildings and dwellings and have prevented the plaintiff from peaceful enjoyment of his property and that the defendants have refused to vacate and have degraded the suit premises into waste.

3. The plaintiff adopted and relied on his witness statement dated 29th March, 2012 and filed on 2nd April 2012 and a supplementary statement dated 16th April 2013 and filed on 17th April 2013. The plaintiff testified that he is the registered and legal owner of the suit property. In his evidence, the plaintiff testified that he purchased the suit property from one Ravji Ramji Manji in 2002. He testified that originally, one Ramji Manji Arjan, who was a friend to the plaintiff's father, was on the land in the 1950s together with his family and was carrying out farming. The plaintiff stated that he would accompany his father to the suit land. That later Ramji Manji died and in his will, he bequeathed the land to his son, Ravji Ramji Manji who the plaintiff said was his friend and whom he visited on the said farm on weekends.

4. The plaintiff testified that in the year 2001, Ravji Ramji Manji informed him that he wanted to relocate to the United Kingdom. That they went to the area Chief in whose presence the said Ravji Ramji Manji left the land to the plaintiff so that he could carry out farming on it. The plaintiff produced copies of the documents filed on 29th March, 2012 as p.exhibit 1. At page 8 of the said exhibit is a document dated 10th April, 2002, which the plaintiff stated was signed at Mtwapa Location Chief's office by Ravji Ramji Manji and the plaintiff, showing that the former left the land to the plaintiff. The plaintiff stated that in the year 2002, Ravji Ramji Manji returned from abroad and indicated that he wanted to sell the farm. The plaintiff testified that he got interested in buying the land and that they made a sale agreement in which the plaintiff bought the land for Kshs.1.5 million. The plaintiff produced the memorandum of sale which is at page 4 of p.exhibit 1.

5. The plaintiff testified that there were two parcels of land. The first is PLOT NO. 48A, currently number PLOT NO. 890 measuring about 26 acres which the plaintiff stated he purchased for Kshs. 1.5 million. The second plot is NO. 97A which the plaintiff stated he bought for Kshs.1.5 million. He stated that the agreement was for the land together with the structures, and equipment such as tractors among others. The plaintiff testified that the memorandum of sale was made before M. A. Metho Advocate on 10th May, 2002. He stated that he got a transfer for PLOT NO.890 (ORIGINAL No.284/99). The said transfer is on page 6 of p.exhibit No. 1. The plaintiff testified that they both signed the said transfer (page 7), and the plaintiff was given the Deed Plan at page 2.

6. The plaintiff also produced copies of the supplementary list of documents dated 14th April 2013 and filed on 17th April 2013 as p.exhibit no. 2. The plaintiff stated that the document at page 31 of p.exhibit 2 indicated that Ravji's father, Hamji Manji Arjan, had bought the plot from Mohammed Ali Nahdy while page 32 showed the receipts for payment made to U. K Doshi & Doshi Advocates. The plaintiff also stated that Ravji Ramji Manji gave him a copy of the Grant of Probate for the Estate of Ramji Manji Arjan (page 34 of p.exhibit No.2) and a caveat (page 35-36 of p.exhibit 2) as well as the will at page 28 of p.exhibit No. 1 in which Ramji Manji Arjan bequeathed the property to Ravji Ramji Manji who in turn sold it to the plaintiff.

7. The plaintiff testified that after purchasing the land, he continued farming on it. That later in the year 2009, Nassor Mohammed Nahdy, the 1st defendant herein, evicted the plaintiff from the suit land, claiming the property belonged to him. The plaintiff stated that the 1st defendant did not show him any title. The plaintiff testified that he has title (in p.exhibit 1) in his name and which title has never been revoked. He stated that he has been paying rates and referred to the receipts and rates clearance certificate in his name at pages 9-16 of p.exhibit 1. The plaintiff stated that he instructed Edward Kiguru Land Surveyors to establish his beacons (shown at page 17-21 of p.exhibit 1), and that after establishing the beacons, the said surveyor issued him with a beacon certificate which is at page 19 of the said exhibit. The plaintiff urged the court to grant him the reliefs sought in the plaint herein.

8. The plaintiff was cross-examined by Mr. Hayanga Advocate for the 1st defendant and Ms. Kiti, counsel for the 3rd and 4th defendants and also re-examined by Mr. Kibara who held brief for Ms. Langat for the plaintiff. The plaintiff stated that the suit is over plot no.890. That he knew the owner, Ravji Manji who was a friend to the plaintiff's father. That he used to visit the suit land with his father and in the process he became a friend to the land owner's son, Ravji Ramji Manji who later inherited the land from his deceased father. That Ravji Ramji Manji sold the suit land to the plaintiff. He stated that he never encountered anybody claiming the land. The plaintiff stated that he was no aware that his friend Ravji Ramji Manji was sued in Mombasa HCCC No.346 of 1993. He denied knowing Nassor Mohamed Nahdy, the plaintiff in that case, and when shown the judgment in HCCC NO.346 of 1993, the plaintiff stated that he was learning of that case for the first time in court. The plaintiff stated that there was no court order barring him from doing anything in the plot. When shown the order issued herein on 4th August, 2011, the plaintiff stated that he has been complying with the said order. He denied knowledge of case No.346 of 1993 or the judgment therein, insisting that Ravji Ramji Manji did not tell him about it. The plaintiff denied colluding to get a fake title over the suit plot, maintaining that he entered into an agreement before the area chief where after his lawyer obtained the title deed for him. He stated that he got the land and title legally, adding that he obtained the deed plan from the lands office. The plaintiff stated that he was aware that there is usually a land control board before land is transferred, but did not attend any Land Control Board meeting. He denied that he colluded with the Land Registrar to obtain a fraudulent title. He stated that the Transfer from Ravji Ramji Manji to the plaintiff was prepared by Metho Advocate and the same was registered at the Land Registry. The plaintiff stated that he was given the sale agreement dated 19th November 1969 at page 31 of p.exhibit 2 by Ravji Ramji Manji to show how they had acquired the property. He stated that the judgment in HCCC NO. 346 of 1993 referred to LAND NO. 284 SECTION III/MN which is the big land while the plaintiff's land is PLOT NO.890, adding that the judgment did not bind him or his land.

9. The plaintiff called one witness, Batholomew Mwanyungu (PW2) who is a licenced land surveyor. He testified that he prepared a report dated 18th January, 2019 on PARCEL NO. MN/III/284 and MN/III/890 (FORMERLY 284/99). That the purpose was to establish the acreage of plot no. 284 and whether it exists in the survey records, and if not, when it ceased to exist. That the exercise was also to establish the roots of PARCEL NO.MN/III/890 (formerly 284/99). His observations were that parcel No.284 originally was 1590 acres on PLAN NO. FR.NO.8/154 before it ceased to exist. That the plan indicates that the owner of the parcel was Mr. Mbwana Bin Maro and company and had a dispute on the ground. That since then, several parcels have been excised from PARCEL NO.284, starting with MN/III/549 -551 original numbers 284/1-3 as they appear on survey plan FR 139/48, and that is the time the plot ceased to exist as plot 284 in the survey records. That since then, many other parcels were excised from PARCEL NO.284. He stated that PLOT NO. 890 was created on an excision that was

done on 19.5.1988. That the survey was an excision of 6 parcels of which PLOT NO. 890 was one of them. That PLOT NO. 890 was the 99th excision from that excision of PLOT NO. 284, and its acreage is 9.77 ha which is 24.164 acres. His conclusions were that parcel no. 284 according to survey records ceased to exist on 15.11.1978. That before it ceased to exist, it was 1590 acres and the name of the original owner was Mbwana Bin Maro with dispute on the ground. That parcel no. 890 is 9.779 hectares (24.164 acres) and was the 99th excision from PLOT NO. 284, and happened on 19.5.1988. He stated that the registered owner according to the title is Janendra Shah, the plaintiff in this case. PW2 produced his report as p.exhibit No.3.

10. When cross-examined by Mr. Hayanga, the witness stated that he sourced the information he used from former survey plans which must have been made by surveyors like him. That it showed Philip Zimmerlin as the surveyor who did it. When shown the letter in the 1st defendant's list of documents, he agreed that it was correct to state that Zimmerlin did the excision in 1988, and PLOT NO. 890 was part of it. He stated that under the Registered Titles Act (repealed), one could not register land without deed plan. That PLOT NO. 890 came as a result of survey that was done by Zimmerlin. He stated that in case of the loss of a deed plan, the Director of Survey would issue a duplicate for registration upon the request of the owner through a licensed surveyor who did the subdivision. That a deed plan cannot be registered twice. He stated that in his report, he did not state when the plaintiff was registered as owner of PLOT NO.890 but added it should be after 1988.

DEFENDANT'S CASE

11. In his amended statement of Defence and counter-claim dated 27th July, 2012, the defendant in the suit and plaintiff in the counter-claim (hereinafter referred to as defendant), denied that the plaintiff is the rightful owner of the suit property. He avers that before the alleged entry into the suit land by the plaintiff, he was already in possession of the said land through and from his father Mohamed Ali Nahdy who died on 21st August 1972 while seized in fee of the said plot and thereafter the defendant remained rightfully in possession of the said plot and/or became the legal and beneficial owner thereof as the administrator of the estate of his late father Mohammed Ali Nahdy. The defendant avers that the title certificate which the plaintiff holds over the suit property is fake and void *ab initio* having been obtained by a person who had no title or right over the same, and therefore could not pass a good title to any purchaser.

12. The defendant avers that there has been a previous suit touching on this same suit property between the defendant as plaintiff and one Ravji Ramji Manji as the defendant therein being Mombasa High Court Civil Case No. 346 of 1993 in which the court decreed in favour of the current defendant (Nassor Mohammed Nahdy) to be the rightful owner thereof, and not Ravji Ramji Manji who had no title thereof. Pursuant to the court order dated 19.07.12, the defendant was granted leave to amend his defence to include a counter-claim and Ravji Ramji Manji, the Registrar of Titles and the Attorney General were joined as defendants in the counter-claim.

13. In the counter-claim, the defendant has pleaded that the plaintiff is not the proper owner of the suit property known as SUBDIVISION NUMBER 890 (ORIGINAL NO.284/99) SECTION III MAINLAND NORTH, CERTIFICATE NO. CR. 39208 and therefore not entitled to possession of the same as it belongs to the defendant. It is his contention that the transfer that was done notwithstanding the meaning and effect of the decree in Mombasa HCCC No. 346 of 1993 is void *ab initio* and ineffectual and that the plaintiff trespassed into the subject land, committed waste and made wrongful claims to the same land and wrongfully destroyed buildings standing thereon. The defendant states that his father was the registered owner of PLOT No. LR. 284 SECTION III MAINLAND NORTH. He avers that the original owner of the property was one Nassor Ali Nahdy who died intestate at Mombasa on 25th September, 1964 where after his brother Mohamed Ali Nahdy who is the father to the defendant took out letters of administration in respect to the estate of his late brother aforesaid. That the said administrator Mohammed Ali Nahdy also died interstate on 21st August, 1972 and his son Nassor Mohammed Nahdy, the defendant herein took letters of administration in respect to the estate of his deceased father aforesaid, and that the defendant remains the legal and beneficial owner of the suit property. That at the time the plaintiff claims transfer of ownership of the said plot to himself, the same was and is still in the name of the defendant. The defendant states that at no time had or has he alienated, transferred, sold or given to anyone the said or part of the said land or at all and that any claim to that effect is imagined, fraudulent, untrue and a misrepresentation. The defendant has listed particulars of fraud, particulars of negligence against the plaintiff and the other defendants in the counter-claim. The defendant prays that the plaintiff's suit against him be dismissed with costs and judgment be entered for him in the counter-claim as follows:

- a) **That the 1st, 2nd, 3rd and 4th defendants be ordered to pay the plaintiff herein damages for interference with quiet possession and enjoyment of the suit property.**
- b) **That the 1st and 2nd defendants, i.e. Janendra Raichand Shah, Ravji Ramji Manji be ordered by way of perpetual injunction to stop, abstain, leave and in any way obstructed and barred from holding out the TITLE NUMBER CR.39208 and purporting the same to be a genuine title, the same two persons to be stopped from making any claims of ownership against the said suit of land.**
- c) **That the 1st and 2nd defendants i.e. Janendra Raichand Shah, Ravji Ramji Manji be ordered to vacate the suit premises.**
- d) **That this Honourable Court to issue an order to revoke the certificate of TITLE NO. CR 39208 purporting to be owned by Ravji Ramji Manji**
- e) **That this Honourable Court to order the said title certificate in the name of Shah to be cancelled and rendered null and void.**
- f) **That the Honourable Court order the Registrar of Titles to cancel the title deed.**
- g) **That the plaintiff be the rightful owner of the suit property.**

14. Munir Mohammed Sketty testified on behalf of the defendant. He stated that he is the Administrator of the Estate of Nassor Ali Nahdy,

who died in 1964. That when Nassor Ali Nahdy died, his brother Mohammed Ali became the Administrator of his estate and when Mohammed Ali Nahdy died in 1972, Nassor Mohammed Nahdy became the administrator. He stated that when Nassor Mohammed Nahdy died in the year 2005, he became the administrator. That he applied to be made a party to this suit and it is in that capacity that he was giving evidence. He stated that the plan attached to Mr. Mwanyungu's report relates to PLOT NO.890. That the plaintiff went and got a title deed over the said plot. He stated that Mohammed Ahmed Nahdy, the uncle of Nassor Mohammed instructed Zimmerlin surveyors in the 1980s to do a survey on several plots, including plot no. 890. That the surveyor was to carry out subdivisions. He stated that Zimmerlin carried out the exercise and took the deed plans to the Director of Surveys. He stated that Mohammed Ahmed Nahdy collected deed plans from the Director of Surveys office. That he took three deed plans for plot numbers 890, 1002 and 1004 to Nassor Mohammed. He stated that Nassor Mohammed managed to get title deed for plot numbers 1002, and 1004, but could not get title for PLOT 890 because he had no deed plan for it. According to the witness, somebody must have picked the deed plan for PLOT 890. That he tried to write a letter to the Director of Survey to get a duplicate but he did not get it. He stated that the letter was written in the year 2010, but a true copy of the deed plan was not given. He stated that up to date, they do not have a title deed for PLOT 890. He stated that he was aware that the title is in the plaintiff's name, and that is the reason there is a case in court. He wants the court to nullify the title the plaintiff has, adding that the land was never sold to anybody. In his statement filed on 17th January, 2017, he stated that he knew that in or about November, 1969, his deceased grandfather Mohammed Ali agreed to sell to Ramji a portion of the plot, but added that the sale did not materialize. That after his grandfather's death, Ramji continued to occupy the portion of land as a tenant at a monthly rate of Kshs.100/- per month and paid the rent to Nassor Mohammed Nahdy until 1982. That after Ramji's death in 1985, Ravji took over possession and continued to occupy a portion of the land.

15. The witness stated that he remembered going to the High Court over the suit land because the son of Ramji, by the name Ravji refused to vacate from the plot. He stated that Mr. Ramji was a tenant who was paying rent of Kshs.100/=. That Nassor Mohammed wrote letters asking him to pay rent but he refused and he went to court vide HCCC No. 346 of 1993. Nassor Mohammed Nahdy versus Ravji ramji Manji. He stated that in the judgment in that case, the defendant was ordered to vacate within 30 days and to pay mesne profits. That the said judgment has not been appealed against. He stated that the plaintiff herein is not right to state that he bought the land from Ravji. He further stated that the plaintiff herein got title in the year 2002 when that other case was going on. Judgment in Case No. 346 of 1993 was delivered on 24th February, 2006. The witness stated that no consent was obtained from the Land Control Board. He wants the court to cancel the plaintiff's title. He produced a letter dated 31st May 2017 by Hime & Zimmerlin as D.exhibit No.1 and the documents filed on 11th January 2017 as D.exhibit 2. He stated that he did not know how the plaintiff got title, but added that there was a lost deed plan.

16. When cross-examined by Mr. Kibara advocate for the plaintiff, the witness stated *inter alia*, that the deed plan was misplaced by Nassor Mohammed and that the plaintiff did not get it from anybody in their family. He stated that he had an affidavit showing that the deed plan was lost, though the affidavit was not addressed to nor stamped by the Director of Surveys, though there were letters. He stated that he was the Administrator of Nassor Mohammed Nahdy but not of Mohamed Ali Nahdy. He confirmed that the plaintiff was not a party in Case No.346 of 1993 and the land in dispute in that case was PLOT NO.LR 284/II/MN. That in Case No. 346 of 1993, Ravji Ramji Manji who was the defendant was ordered to vacate from PLOT NO. LR 284 SECTION III MN. That Nassor Mohammed Nahdy, who was the plaintiff in that case did not produce title documents for PLOT NO. 284 SECTION III MN. He confirmed that there was no declaration by the court to the effect that Mr. Nassor Mohammed Nahdy was the owner of PLOT NO. 284/III/MN.

17. The second defendant's witness was Nassor Mohamed Nahdy also known as Mohamed Ahmed Mohamed Nahdy. He is the defendant's uncle. He relied on his witness statement dated 3rd August, 2017. He stated that he remembers one Zimmerlin Surveyors who conducted survey on his plot pursuant to his instructions. During cross-examination. He stated that he did not remember selling the plaintiff the land which he stated was family land. He stated that he is the one who took the deed plans from Zimmerlin but did not remember where they went. He stated that the land was registered in four names, though he did not remember the names of the four people who were, three men and one woman.

18. The 2nd defendant in the counter-claim did not enter appearance nor filed defence. The 3rd and 4th defendants in the counter-claim entered appearance but never filed defence nor called any witness in the matter.

SUBMISONS

19. The plaintiff's advocates filed their submissions on 23rd September 2020 and supplementary submission on 19th October, 2020. The plaintiff submitted that the defendant's claim is predicated and founded on PLOT NO. MN/III/284 while the plaintiff's claim is in respect of PLOT NUMBER MN/III/890. That the defendant's claim should lie elsewhere since he has clearly misconstrued and misapprehended the subject suit property and by extension his cause of action. Further, that PLOT NUMBER MN/III/284 has never been owned by the defendant or his descendants and that the said PLOT NUMBER MN/III/284 according to the evidence of the surveyor, ceased to exist in the year 1978. The plaintiff's submission is that the evidence of the surveyors has not been contradicted or repudiated by the defence and remains good evidence tendered by an expert in the field of survey and therefore should be believed by the court and taken as a good report. The plaintiff further submitted that he was never made a party in High Court Civil Case No.346 of 1993 which was between **Nassor Mohamed Nahdy-v-Ravji Ramji Manji** and that in any event the subject matter in that suit was LR. NUMBER 284 MAINLAND NORTH MTWAPA. Further, that the said suit did not seek any declarations against Mr. Manji. That it was a simple claim for eviction and mesne profits and no more. The plaintiff submitted that the piece of evidence in the form of a judgment in High Court Case No. 246 of 1993 does not come to the aid of the defendant since the same is in respect of a different parcel of land.

20. Regarding the defendant's allegation that the plaintiff's title is fake and further that the plaintiff must have stolen the deed plan to the suit property, the plaintiff referred to the substituted defendants' statement signed by Munir Mohamed Sketty and filed on 17th January 2017 and submitted that the same is a clear admission by the defence of the plaintiff's proprietary ownership of the suit property as well as having a genuine and a clean title. The plaintiff in particular referred to paragraph 4 of the said statement in which Mr. Sketty states:

“ I know that on or about November 1969, my deceased grandfather Mohammed Ali agreed to sell to Ramji a portion of the plot, but the sale did not materialize....”

The plaintiff submitted that this is profound because it is a clear acknowledgement by the defence that there was a land transaction between

Mr. Ramji from whom the plaintiff purchased the property and Mohamed Ali (deceased). That it is not clear why the defendant alleges that the land transaction did not materialize and no reason has been offered to explain why the defendant alleges that the transaction did not go through contrary to the clear documentary evidence tendered by the plaintiff. The plaintiff submitted that indeed there was a land transaction supported by documentary evidence and urged the court to make a finding that there is enough and cogent evidence to support this position.

21. Regarding the defendant's allegation that the plaintiff participated in fraud because he allegedly knew that there was litigation in HCCC Number 346 of 1993 involving the suit property but deliberately acted against the same judgment and that the plaintiff was a party in the production of a fake certificate of title, the plaintiff submitted that the court cannot possibly find fraud in the supposed knowledge or lack of an existing suit, and further that no evidence has been brought before this court to demonstrate that the plaintiff had any role to play in the purported production of a fake certificate of title. The plaintiff submitted that the evidence tendered by the defence is incompatible, conflicting and irreconcilable and urged the court to disregard the same and dismiss the counter-claim because the evidence tendered is inconsistent dangerous and incredible. The plaintiff further submitted that allegations of fraud must be distinctly pleaded and distinctly proved with specificity and that the finding of the court must be based on the evidence on record. The plaintiff's counsel relied on the case of **Kinyanjui Kamau –v- George Kamau (2015)eKLR; Vijay Morjaria –v – Nansingh Madhusingh Darbar & Another (2000)eKLR; Patel –v- Lalji Makanji; Mirko Blaeterman (suing through his power of Attorney – Shabir Hatim Ali) & Another –v- David Mwangi Muiruri & 2 Others (2015) eKLR; Selina Mecca Wekesa –v- Kennedy Ellam (suing as the Personal Representative of the Estate of George Ellam Wekesa (deceased) & 4 Others (2020)eKLR**. The plaintiff added that the defendant did not obtain Letters of Administration in respect of the Estate of Mohamed Ali Nahdy a descendant of his, who was once registered as the owner of the suit property and therefore is not entitled to bring any action. The plaintiff relied on the case of **Rajesh Pranjivan Chudasama –v- Sailesh Pranjivan Chudasma (2014)eKLR**. The plaintiff further submitted that he made steps that legally and lawfully conferred to him the legal right and further vested the suit property in him as the absolute and the indefeasible owner of the property, having produced the original certificate of title in respect of the suit property subdivision number 890 (original number 284/99) and the original deed plan number 134301. The plaintiff cited section 23 (1) of the Registration of Titles Act (now repealed) under which the suit property is registered and submitted that that section gives an absolute and indefeasible title to the registered owner of the property. That the title of such an owner can only be subject to challenge if found to have been obtained through fraud or misrepresentation to which the owner is proved to be a party. The plaintiff relied on the case of **Joseph Arap Ngok –v- Moiwo Ole Keiwua & 4 Others (1997)eKLR**, and **Civil Appeal No. 86 of 1999 between Ndambuki Musembi & Another –v- Joel Ngugi Magu & 2 Others**.

22. On the allegation introduced by the defendant in his written submissions that the plaintiff in his land transaction over the suit property did not obtain a Land Control Board consent in line with Section 6 of the Land Control Act, the plaintiff's counsel submitted that the law has since changed. That Section 6 of the said Act in particular has been found to be draconian and harsh to the extreme. It was also the plaintiff's submission that the defendant other than making mere unsubstantiated allegations which did not form part of the pleadings or defence did not prove on a balance of probabilities that the plaintiff had not obtained a Land Control Board Consent. That even assuming that the plaintiff did not obtain consent while transacting over the suit property the Court of Appeal in **Willy Kimutai Kitilit –v- Michael Kibet (2018)eKLR** stated categorically that given the facts and circumstance of this kind and facts, the court must come to the aid of the plaintiff. The plaintiff's counsel also urged the court to be guided by the Court of Appeal case of **William Kipsoi Sigei –v- Kipkoech Arusei and Another (2019)eKLR** which upheld the equitable doctrine of constructive trust and proprietary estopped were applicable, would override the requirement for Land Control Board Consent in a controlled land transaction.

23. The plaintiff urged the court to dismiss the defendant's counter-claim and enter judgment as prayed in the plaint with costs to the plaintiff.

24. The defendant on his part submitted *inter alia* that there was no evidence presented before court showing that the plaintiff bought the land from Ravji Ramji Manji, and wondered how Ravji Ramji Manji could sell land he had been evicted from in 2006 as a trespasser in HCCC No. 346 of 1993. That there was no appeal against the judgment in HCCC NO.346 of 1993. The defendant submitted that there was no transmission at death of Ramji Manji Arjan since it was not part of his estate and was not even mentioned in his will. The defendant also wondered why the transaction had no Land Control Board Consent. The defendant's submission was that there was evidence that deed plan for PLOT MN/III/890 got lost or misplaced, but that the plaintiff seems to have got it and used it to secure title to the suit property. The defendant's counsel submitted that none of the administrators sold any plots, except Mohamed Ahmed Nahdy who sold his PLOT NO. 889. He cited Section 108 of the Registered Land Act Cap 300 Laws of Kenya (now repealed) and the provisions of Registrar of Titles Act (repealed) and Section 3 of Law of Succession Act, Cap 160 Laws of Kenya and submitted that there could not have been a transfer of the land to Ravji Ramji Manji without probate of the will or Letters of Administration showing it even if PLOT NO. 890 belonged to the deceased. It was submitted that the transfer did not rightfully take place because the Registrar had no right to insert Ravji Ramji Manji when he was not bequeath the same and secondly that there was no previous registration of the deceased as owner of PLOT No. 890 which was not part of the estate of Ravji Manji Arjan. That he could not bequeath what was not his property. It was submitted that the purported transfer was not properly described in the "Transfer" and that means the Registrar of Titles had shut his eyes against the law. The defendant further submitted that the land as agricultural land which was governed Section 6 of the Land Control Act. That Land Control Board Consent was a requirement for any of the alleged transactions under Section 6 of the said Act. The defendant's advocate relied on the case of **Elizabeth Cheboo –v- May Cheboo Gimyigei (2006)eKLR and Gabriel Makhoha Wamukota –v- Sylvester Nyongesa Donati (1987)KLR 280**. The defendant submitted that the sale between Mohamed Ali Nahdy and Ramji Manji Ravji did not materialize. That the price agreed was not shown to have been received by Mohamed Ali Nahdy and the Land Control Board Consent was not obtained. That there was a forged copy of purported consent dated 1974 which could not be true since Mohamed Ali Nahdy, the intended seller, died in 1972. That the judgment in Mombasa HCCC No. 346 of 1993 showed that Ravji Ramji Manji was a tenant and not the owner and could not pass any interest in the land to anyone else. It was further submitted that there was no evidence of how Ravji Ramji Manji got Land from his father when the latter was merely a tenant. The defendant questioned why Ravji Ramji Manji did not defend himself in HCCC NO. 346 of 1993 by showing his ownership. The defendant submitted that the court would make an order of interlocutory judgment against Ravji Ramji Manji and that the plaintiff's claim that Ravji Ramji Manji sold him the land be rejected. The defendant submitted that the Registrar of Titles ignored very many requirements in registering title even by transmission and since the Registrar of Lands did not give evidence to deny alleged collusion or irregularity in his conduct or negligently ignoring the requirements of the law in registering the proprietor, the allegations stand unchallenged in this case. The defendant submitted that the Registrar of Titles be adjudged complicit to the fraud and that the title deed in the name of the plaintiff is fake and void. The defendant submitted that the Registrar of Lands was negligent or acted fraudulently in registering the plaintiff without evidence of Land Control Board Consent. The defendant's counsel relied on the case of **BBT Insurance Agencies Limited –v- Nitin Shah and Others (2006)2 EA 26; Simiyu –v- Watambamala (1985)KLR 852 and Ngobit Estate Ltd –v- Violet Mabel Carnegie (1985)KLR 437**. The defendant further submitted that the plaintiff's suit herein is *res judicata* because of

HCCC No. 346 of 1993. The defendant submitted that the plaintiff's suit should be dismissed and judgment be entered for the defendant as prayed in the counter-claim with costs.

ANALYSIS AND DETERMINATION

25. From the pleadings filed, the evidence tendered during the trial and the submissions made, the issues for determination are:

- i. Who is the registered owner of the suit property known as PLOT SUBDIVISION NUMBER MN/III/890?**
- ii. Whether the plaintiff's title was obtained fraudulently, illegally and through unprocedural means**
- iii. Whether the plaintiff is entitled to the reliefs sought in the plaint**
- iv. Whether the defendant is entitled to the reliefs sought in the counter-claim.**

26. From the evidence on record and the documents produced, it is evident that the suit property known as SUBDIVISION NUMBER MN/III/890 (ORIGINAL NUMBER 284/99) is registered in the name of Janendra Raichand Shah, the plaintiff in this case. It is also evident that originally, the property was known as PLOT NO. MN/III/284 before the same was subdivided. It is further evident that upon subdivisions, PLOT NO MN/III/284 gave rise to various plots, including the suit property PLOT NO. MN/III/890. Whereas the plaintiff contends that he purchased SUBDIVISION NUMBER MN/III/890 (ORIG.284/99) under CERTIFICATE NUMBER CR. 39208 and that he is legally registered as owner and therefore entitled to vacant possession thereof, the defendant contends that the title in the name of the plaintiff was procured fraudulently and or unprocedurally. The defendant contends that when the original land PLOT NO. MN/III/284 was subdivided, the deed plan for PLOT NO.MN/III/890 was misplaced, lost or stolen.

27. In this case, the plaintiff's evidence is that he purchased the suit property from Ravji Ramji Manji. The plaintiff produced documents showing that Ramji Manji Arjan had purchased undivided share in PLOT NO.284/SECTION III/MN. Among the documents produced by the plaintiff (p.exhibit 2) was a Grant of Probate in P & A Cause No. 87 of 1986 in respect the estate of Ramji Manji Arjan which was granted to Ravji Ramji Manji, the 2nd defendant in the counter-claim herein and the person whom the plaintiff alleged sold him the suit land. PW2, Bartholomew Mwanyungu who is a licensed land surveyor produced a report confirming that PARCEL NUMBER 284/99 was subdivided into several plots, including PARCEL PLOT NO. MN/III/890. He stated that following the excision, PARCEL NO.284/99 ceased to exist. That PLOT NO. MN/III/890 was created on the excision that was done on PARCEL NUMBER 284/99 on 19.5.1988. He confirmed that the registered owner of PARCEL NO.MN/III/890 according to the title is Janendra Shah, the plaintiff herein. The witness also confirmed that the survey plans were done by Philip Zimmerlin Surveyor. He stated that Zimmerlin Surveyor did the excision in 1988 and PLOT NO MN/III/890 came as a result of survey done by the said surveyor. The witness who testified on behalf of the defendant confirmed that the plan attached to Mr. Mwanyungu's report relates to PLOT NO. MN/III/890. DW1 confirmed that Mohammed Ahmed Nahdy, uncle to Nasser Mohammed instructed Zimmerlin Surveyors in the 1980s to do a survey on several plots, including PLOT NO.MN/III/890, and that he was to do some subdivisions. That Zimmerlin carried out the exercise and took out the deed plans to the Director of Surveys. He stated that Mohammed Ahmed Nahdy collected the deed plans from the office of the Director of Surveys and took them including deed plan for PLOT MN/III/890 to Nasser Mohammed who got titles for the other plots, except PLOT MN/III/890. DW2 also confirmed that he instructed Zimmerlin Surveyors to conduct survey on the original parcel. He further confirmed that Zimmerlin surveyors in 1988 conducted survey on the plot and subdivided the land and got deed plans for plots, including PLOT NO.MN/III/890.

28. Although the defendant's case was that there was no sale to Mr. Ravji Ramji Manji or to anybody else, Munir Mohammed Sketty (DW1), in his witness statement filed on 17th January, 2017 stated that he knew that on or about November, 1969, his deceased grandfather Mohammed Ali agreed to sell to Ramji a portion of the plot, but added that the sale did not materialize. From this evidence it is clear that there was a sale over a portion of PARCEL MN/III/284 between Mohameed Ali and Ramji. Even though the defendant's witness states that the sale did not materialize, there was no explanation given as to why the said transaction did not materialize to conclusion.

29. In this case, the plaintiff holds title that he produced in respect to PARCEL NUMBER MN/III/890 (orig.284/99). The said plot is a portion that was exercised from NO.284/99. The plaintiff's evidence was that he purchased the suit land from Ravji Ramji Manji. From the defendant's evidence, it is admitted that there was a transaction between Mr. Ramji and the previous owner over a portion of the original title. The assertion that there was a transaction that did not materialize to conclusion was not supported by any evidence. It is evident from the material on record that there was subdivision of the original parcel giving rise to several other portions including PARCEL NUMBER MN/III/890. The Plaintiff is holding an indefeasible title and is deemed to be the absolute and indefeasible proprietor of the said parcel of land. Section 23 of the Registration of Titles Act, Cap 281, (now repealed) provided:

“The certificate of title issued by the registrar to a purchaser of land upon transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner thereof subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon.”

30. The Land Registration Act 2012 at Section 26 (1)(a) & (b) provides:

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except: -

- a. On the ground of fraud or misrepresentation to which the person is proved to be party; or**

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ”

31. In this case, the defendant has alleged fraud against the plaintiff and the other defendants in the counter claim. However, the defendant did not avail evidence on the alleged fraud. On the contrary, the evidence given by the defendant’s witness support the plaintiff’s case that there was a sale of a portion of the original parcel of land following a successful subdivision of that land. The evidence on record confirms the sequence of how the plaintiff came into possession and acquired the suit premises. As already stated, the assertion that the transaction took place but was not completed is not supported by the evidence on record. Fraud is a serious allegation. Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required. In the case of **Davy –v- Garette (1878)** 7 Ch. 473 at page 489, it was held that:

“In the common law courts, no rule was more clearly settled than that fraud must be distinctly proved and that it was not allowable to leave fraud to be inferred from the facts...”

32. Though the defendant alleged fraud on the part of the plaintiff herein (together with the other defendants in the counter-claim), the defendant failed to discharge his duty through his witnesses. Section 107 of the Evidence Act provides:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist?”

Section 109 of the Evidence Act provides:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact lie on any particular person.”

It is trite law that any allegations of fraud must be pleaded. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.

33. The defendant has also relied on the judgment in Mombasa HCCC No.346 of 1993 Mohammed **Nahdy –v- Ravji Ramji Manji** to support his case. It is the defendant’s contention that since the judgment in HCCC No. 346 of 1996 determined that Manji did not have good title he was therefore incapable of passing a good title, to the plaintiff herein. The defendant’s reliance of HCCC NO 346 of 1993 to show that the plaintiff is not the owner of the suit property is in my view misconceived. The orders that the court was deciding in that case were the eviction of Manji from PARCEL NO. 284 SECTION III; mesne profits from Manji, and costs of the suit. Manji did not offer evidence in his defence and the court granted orders of eviction and mesne profits against him in favour of the defendant herein. That judgment therefore did not determine ownership of the suit property being SUBDIVISION NO.890 (ORIGINAL NO.284/99) SECTION III MAINLAND NORTH under certificate no. 39208. Further, the plaintiff herein was not party to that suit.

34. The defendant has also argued that the plaintiff in his land transaction over the suit property did not obtain consent from the Land Control Board in line with Section 6 of the Land Control Act. I however note that this allegation did not form part of the defendant’s pleadings but was only introduced through submissions. In my view, the issue of consent was an afterthought. In this case, the plaintiff produced a transfer of land document, a memorandum of sale agreement as well as evidence of payment of the purchase price. Given the facts and circumstances of this case, in my view, the equitable doctrine of constructive trust and proprietary estopped are applicable and would override the requirements for land control board consent in the controlled land transaction between the plaintiff and Mr. Ramji as was held by the Court of Appeal in the case of **Willy Kimutai Kitilit –v-Michael Kibet (2018)eKLR** and in **William Kipsoi Sigei –v- Kipkoech Arusei & Another (2019)eKLR**.

35. The court has examined the evidence on record and is not satisfied that fraud or misrepresentation on the part of the plaintiff and the other defendants in the counter-claim has been proved. The defendant has not sufficiently discharged the legal burden of proof placed on him in such a case. On the other hand, this court is satisfied that the plaintiff has proved his case against the defendant on a balance of probabilities. The defendant has however, not proved his counter-claim.

36. Accordingly, and in light of the above findings, I hereby enter judgment as follows:

1. A mandatory injunction is hereby issued to order the defendant to forthwith and not later than 30 days from this date and at his cost pull down and remove from the suit land known as SUBDIVISION NUMBER 890 (ORIGIN. NO. 284/99) SECTION III MAINLAND NORTH under certificate number 39208 any construction and remove all his properties of whatever nature as well as his workmen, servants, or agents from the plaintiff’s said property, and to deliver vacant possession to the plaintiff.

2. An injunction is hereby issued to restrain the defendant by himself, his servants or agents or otherwise howsoever from preventing the plaintiff from accessing his land known as subdivision NUMBER 890 (ORIGIN. 284/99) SECTION III MAINLAND NORTH under certificate number 39208 and the defendant should desist from trespassing on the plaintiff’s said property.

3. An injunction is hereby issued to retrain the defendant by himself, his servants or agents or otherwise howsoever from remaining on or continuing in occupation of the said land in default, eviction order to issue.

4. Demolition of all illegal structures and buildings erected on the plaintiff’ suit premises, at the defendant’s cost.

5. The defendant's counter-claim is dismissed with costs.

6. Costs of the suit together with interest thereon are awarded to the plaintiff against the defendant.

37. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 9th day of March, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE