



**Majestic Security Systems Limited v Magnate Ventures Limited & 4 others (Environment & Land Case 212 of 2018) [2024] KEELC 559 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 559 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 212 OF 2018  
OA ANGOTE, J  
FEBRUARY 8, 2024**

**BETWEEN**

**MAJESTIC SECURITY SYSTEMS LIMITED ..... PLAINTIFF**

**AND**

**MAGNATE VENTURES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**RAHAB KAREI MUKIAMA ..... 2<sup>ND</sup> DEFENDANT**

**TITUS KURAUKA MUKIAMA ..... 3<sup>RD</sup> DEFENDANT**

**REGISTRAR OF TITLES, NAIROBI ..... 4<sup>TH</sup> DEFENDANT**

**REGISTRAR OF COMPANIES ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. Vide an Amended Plaint dated 11<sup>th</sup> October, 2019, the Plaintiff seeks the following reliefs against the Defendants jointly and severally;
  - a. A declaration that the Plaintiff herein is the legal owner of all that piece and parcel of land known as L.R No 21069 under Grant No I.R 78032 situate in Loresho, Nairobi.
  - b. A declaration that the sale and transfer of L.R No 21069, Grant No I.R 78032 from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the 1<sup>st</sup> Defendant was unlawful and fraudulent.
  - c. A declaration that the sale and transfer of L.R No 21069, Grant No I.R 78032 from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the 1<sup>st</sup> Defendant was un-procedural and illegal.
  - d. An order to cancel the title to the 1<sup>st</sup> Defendant and removal of the 1<sup>st</sup> Defendants' name as proprietor of the suit land parcel No L. R 21069, Grant No I.R 78032 and an order directing



the Chief Land Registrar/Registrar of Titles that the Plaintiff be reinstated and registered as the proprietor of the suit land, parcel L.R No 21069(I.R 78032).

- e. An order of eviction to be issued against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
  - f. General Damages on the footing of exemplary and aggravated damages on the basis of the matters pleaded in paragraph 37 herein above.
  - g. Such other of further relief that this Honourable Court shall deem fit and proper to grant.
  - h. Costs of this Application be provided for. [Costs of suit]
2. It is the Plaintiff's case that it is and has at all material times been the registered proprietor of all that property known as L.R 21069, under Grant No 78032 (hereinafter the suit property) pursuant to a letter of allotment issued by the Nairobi County Council on 25<sup>th</sup> July, 1995; that it was allocated the suit property after applying for the same through Eric Naibei(now deceased), its Director, on 2<sup>nd</sup> March, 1995 and that the application was made to the Commissioner of Lands through the Permanent Secretary in the Ministry of Agriculture and Livestock.
  3. According to the Plaintiff, it was issued with the title to the suit property on 29<sup>th</sup> July, 1995; that it proceeded to pay the requisite fees of Kshs 461,000, evinced by a receipt dated 23<sup>rd</sup> April, 1997; that it was issued with the title for a term of 99 years from 1<sup>st</sup> July, 1995 and enjoyed quiet possession of the property for about 10 years and that on 17<sup>th</sup> October, 2005, the 2<sup>nd</sup> Defendant requested and was given the suit property's original title ostensibly for the purpose of sub-dividing the suit property.
  4. The Plaintiff averred that thereafter, the 2<sup>nd</sup> Defendant disappeared with the title refusing to return the same despite demands and that together with the 3<sup>rd</sup> Defendant, they subsequently fraudulently purported to sell and transfer the suit property to the 1<sup>st</sup> Defendant on the 21<sup>st</sup> December, 2009.
  5. The Plaintiff avers that sometime on 3<sup>rd</sup> May, 2012, its Director, Eric Naibei, discovered fraud while conducting a search at the Lands and Companies registries; that through Counsel, they wrote to the 5<sup>th</sup> Defendant on 28<sup>th</sup> May, 2012 alerting them of the fraudulent activities and that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had prepared a fake, unsealed and unregistered Power of Attorney dated 1<sup>st</sup> December, 2005 in favour of their company, Metra Investments granting, themselves powers to deal with the property.
  6. It was averred by the Plaintiff that the aforesaid Power of Attorney was discovered by the DCI to be fraudulent vide their report of 22<sup>nd</sup> October, 2013 and that they thereafter made a formal complaint to the Land Fraud Unit of the Director of Criminal Investigations on 17<sup>th</sup> August, 2012.
  7. It was averred that the firm of Areba & Company Advocates who were allegedly involved in the sale and transfer of the property denied their participation vide a statement and letter written to the Land Fraud Unit dated 17<sup>th</sup> August, 2012 and that the Defendants are guilty of fraud, the particulars of which include, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants forging the Power of Attorney dated 1<sup>st</sup> December, 2005 and unlawfully transferring the suit property to the 1<sup>st</sup> Defendant vide the Sale Agreement of 19<sup>th</sup> August, 2009.
  8. According to the Plaintiff, vide the transfer instrument dated 11<sup>th</sup> December, 2009 for Kshs 48,000,000, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants held themselves out as the Plaintiff's Directors in the sale and the subsequent transfer of the suit property to the 1<sup>st</sup> Defendant.
  9. The Plaintiff stated that as a result of the foregoing, it lodged, through its Directors, a formal complaint with the National Land Commission; that upon receipt of the complaint, the National



- Land Commission on 12<sup>th</sup> November, 2014 directed the Chief Land Registrar to place restrictions on the suit property until resolution of the matter; that subsequently, the Chief Land Registrar placed a caveat on the property on 25<sup>th</sup> February, 2015 and that the National Land Commission conducted hearings on numerous dates in 2014, 2015 and 2016; and thereafter rendered its decision on 4<sup>th</sup> August, 2016.
10. It was averred that vide its decision aforesaid, the NLC declared that the transfer of the suit property to the 1<sup>st</sup> Defendant stood cancelled and the title ought to revert to the Plaintiff which was communicated vide Kenya Gazette Notice Volume CXIX-No 97 on 17<sup>th</sup> July, 2017; that the 1<sup>st</sup> Defendant instituted Judicial Review Proceedings contesting the determination by the National Land Commission and that the Court found that the NLC had no jurisdiction to entertain the matter.
  11. The 1<sup>st</sup> Defendant responded by way of a Defence and Counterclaim. Vide its Defence, the 1<sup>st</sup> Defendant denied the Plaintiff's assertions stating that it is the registered owner of the suit property having acquired the same for valuable consideration from the Plaintiff on 19<sup>th</sup> August, 2008 and 21<sup>st</sup> December, 2009 respectively.
  12. According to the 1<sup>st</sup> Defendant, at all times material to the sale and transfer of the suit property, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were the Plaintiff's Directors having been appointed on 8<sup>th</sup> January, 2009; that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had the express, implied and ostensible authority of the Plaintiff to sell and transfer to it the suit property; that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were unlawfully removed as Directors of the Plaintiff at the instance of Eric Naibei on or about 3<sup>rd</sup> May, 2012 and that their removal aforesaid was after the transfer of the suit property to the 1<sup>st</sup> Defendant.
  13. The 1<sup>st</sup> Defendant maintained that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants removal as Directors did not invalidate their actions even if their appointment was defective; that the allegations of fraud are untrue and if there was any fraud, it was not a party to the same and that the Power of Attorney dated 1<sup>st</sup> December, 2005 was not the basis of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' assumption to office of Directorship of the Plaintiff and/or authority to sell and transfer the property.
  14. According to the 1<sup>st</sup> Defendant, sometime in August, 2012, it received a notice of investigations on the Plaintiff and the suit property from the DCI instigated by the complaints of Eric Naibei and that from the investigations, it transpired that on 3<sup>rd</sup> May, 2012, the Registrar of Companies wrote to the Plaintiff confirming that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were appointed Directors of the Plaintiff on 8<sup>th</sup> January, 2009.
  15. It was averred in the Defence that on 17<sup>th</sup> May, 2012, the Registrar of Companies listed Eric Naibei and Jack Kimkung as the Plaintiff's Directors altering its previous position; that the scheme by the late Eric Naibei to dispossess the 1<sup>st</sup> Defendant of the suit property began with the aforesaid changes and that investigations revealed that by a letter dated 17<sup>th</sup> May, 2012, Wetangula, Adan, Makokha & Co Advocates requested the Registrar of companies to alter the particulars of the Directors.
  16. It was averred by the 1<sup>st</sup> Defendant that the agreement dated 29<sup>th</sup> October, 2004 and the Power of Attorney dated 1<sup>st</sup> December, 2005 were executed by the late Eric Naibei and that on the basis of the foregoing, the DCI concluded that there was no criminal culpability on the part of the 1<sup>st</sup> -3<sup>rd</sup> Defendants, a position affirmed by the DPP.
  17. The 1<sup>st</sup> Defendant averred that it is improbable that Eric Naibei gave the 2<sup>nd</sup> Defendant an original copy of the title in 2005 for sub-division and never followed up on the same; that the complaints by Eric Naibei were made on his own behalf and not on behalf of the company and that any claim of fraud in respect of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants assumption of office is barred by limitation in as far as the same



was not instituted within 3 years from 3<sup>rd</sup> May, 2012 when notice thereof was communicated by the Registrar of Companies.

18. In the Counter claim, the 1<sup>st</sup> Defendant seeks as against the Plaintiff the following reliefs:
  - i. The Claim in the Plaint dated 3<sup>rd</sup> May, 2018 be dismissed with costs to the 1<sup>st</sup> Defendant in the main suit.
  - ii. The Defendant in the Counterclaim be and is hereby directed to remove the caveat registered on the property L.R No 21069 on 25<sup>th</sup> February, 2015 as entry No 78032/3 and
  - iii. The costs of the Counterclaim be paid to the Plaintiff in the Counterclaim by the Defendants in the Counterclaim.
19. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed a Defence and Counterclaim on 10<sup>th</sup> July, 2018. In the Defence, they denied the assertions by the Plaintiff stating that they are the legitimate Directors and Shareholders of the Plaintiff and that Ms Ngenyi is an imposter.
20. It was averred by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that they are well known to the 1<sup>st</sup> Defendant to whom they sold the suit property and passed title and possession thereto on 21<sup>st</sup> December, 2009 and that the acquisition of the suit property is admitted, the same having been handed over to them by Eric Naibei as compensation for loss of L.R No 209/12744.
21. According to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, this suit was filed by Esther Ngenye in an attempt to defraud them; that the particulars of fraud against Esther include illegally and unlawfully procuring a CR 12 purporting to be a non-shareholding director of the Plaintiff after the demise of the two original Directors and claiming to be the owner of the suit property whereas she is a person of straw.
22. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the Plaintiff is guilty of fraud, the particulars of which include colluding to hide the Plaintiff's original file and preparing a CR 12 dated 9<sup>th</sup> November, 2016 after the demise of the original two directors in an attempt to take over the Plaintiff from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
23. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants sought by way of Counterclaim the following orders:
  - i. Reinstatement of 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as Directors of the Plaintiff.
  - ii. A declaration that the 2<sup>nd</sup> Defendant (in the counter claim – Esther Ngenyi) has never been a Director of the 1<sup>st</sup> Defendant.
  - iii. General damages including the torts of nuisance and punitive and exemplary damages;
  - iv. Costs and Interests
24. The 4<sup>th</sup> Defendant filed its Defence on 14<sup>th</sup> September, 2021. It denied the assertions set out in Amended Plaintiff save for the fact that the Plaintiff was issued with a Grant I.R 78032, L.R 21069 and registered as I.R 78032/1 on 24<sup>th</sup> September, 1998.
25. The 4<sup>th</sup> Defendant stated that it has no knowledge of the occupation of the suit property and that in any event, no cause of action can be instituted against the Government premised on possession; that the registration of the transfer of the suit property to the 1<sup>st</sup> Defendant for Kshs 48,000,000 under presentation No 2342 on 21<sup>st</sup> December, 2009 was in compliance with the law and procedure obtaining for land registration.



26. The 5<sup>th</sup> Defendant filed its Defence on 12<sup>th</sup> February, 2020. It denied the assertions in the Amended Plaintiff and stated that the Plaintiff's original file went missing; that in such circumstances, the 5<sup>th</sup> Defendant asked the Directors of the Plaintiff to supply it with copies of their records for purposes of reconstruction of the company file and that from the provided records, it was noted that the Plaintiff was incorporated on 15<sup>th</sup> June, 1993.
27. The 5<sup>th</sup> Defendant averred that as at the time of registration, the initial subscribers to its MEMOARTS were Eric Naibei, a Director with 850 ordinary shares and Jack Kimkung, a Director with 150 ordinary shares.
28. The 5<sup>th</sup> Defendant stated that from the records supplied to him by the Plaintiff's Directors, the Plaintiff filed its annual returns for the years 1994, 1995, 1996 and 1997 depicting the aforesaid director/ shareholding position; that on 26<sup>th</sup> May, 1998, the company filed a notification for change of Directors vide Form 203A indicating that Mr Jack Kimkung resigned with effect from 26<sup>th</sup> May, 1998 and that Esther Ngenyi was appointed as a new Director.
29. The 5<sup>th</sup> Defendant averred that from the documents supplied to him, they showed that on 9<sup>th</sup> November, 2016, the company delivered annual returns from the year 1990 to 2015 for filing by the Directors of the Company signed by Esther Ngenyi indicating Eric Naibei, as a Director, with 850 ordinary shares, Mr Jack Kimkung, as a non-Director with 150 shares and Esther Ngenyi as a Director with nil shares which formed the basis of the company's status report issued on 9<sup>th</sup> November, 2016.
30. According to the 5<sup>th</sup> Defendant, on 6<sup>th</sup> April, 2017, he received a complaint letter from the 2<sup>nd</sup> Defendant on behalf of the Plaintiff stating that a CR12 had been issued to strangers and contested the filed annual returns and CR12 issued on 9<sup>th</sup> November, 2016 and that she alleged that the company had been transferred to her sometime in 2003. It was averred that the 2<sup>nd</sup> Defendant did not have any documents proving the said changes nor affirming her Directorship of the Plaintiff as claimed.

### **Hearing and Evidence**

31. The matter proceeded for hearing on 6<sup>th</sup> June, 2022. Ms Esther Ngenye, PW1, adopted her witness statement dated 11<sup>th</sup> October, 2019 as her evidence in chief, and produced the bundle of documents filed on 3<sup>rd</sup> May, 2015.
32. It was her testimony that the Plaintiff was registered in 1993 under the Directorship of her late husband Eric Naibei and Jack Kimkung; that after the death of Mr. Kimkung in 1998, she was appointed as a Director and no other Directors have been appointed since then; that she does not know the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and that the said Defendants have never been Directors of the Plaintiff.
33. According to PW, her late husband wanted to sell the suit property and gave the 2<sup>nd</sup> Defendant the original title to the land; that he thereafter could not trace the 2<sup>nd</sup> Defendant and learned that the property had fraudulently changed ownership and that she has never had any interest to sell the land and is not aware of any agreement to sell the land by the Plaintiff. According to PW1, the Plaintiff has never received Kshs 48,000,000.
34. On cross-examination, PW1 admitted that she did not have an Affidavit proving she was customarily married to Eric Naibei; that she has not produced any notice of Directorship of the Company and that the CR 12 of 17<sup>th</sup> August, 2012 indicates the directorship of the Plaintiff as consisting of Eric Naibei and Jack Kimkung.



35. PW1 further stated that at the time of the purported sale and transfer of the suit property on 19<sup>th</sup> August, 2009, she was a Director without shares; that the transfer shows signatures by representatives of the Plaintiff which she is unaware of and that at the time of the transfer of the land on 21<sup>st</sup> December, 2009 she was a Director.
36. On further cross-examination, Ms Ngenye stated that the decision by the NLC in finding in their favor after complaints by her late husband was set aside by the Court; that the property was fenced by the 1<sup>st</sup> Defendant; that initially, she was a Director without shares and that she does not know in which capacity the late Eric Naibei gave the 2<sup>nd</sup> Defendant the original title.
37. On cross-examination by the Court, PW1 stated that Jack Kimkung pre-deceased Eric Naibei; that Eric Naibei died in 2016 and that she is unaware of what happened to Mr Kimkungs' Directorship after his death.
38. DW1 was Stanley Kinyanjui, the Managing Director of the 1<sup>st</sup> Defendant. DW1 adopted his witness statement dated 4<sup>th</sup> July, 2018 and produced in evidence the bundle of documents of an even date.
39. DW1 stated that the 1<sup>st</sup> Defendant is the registered proprietor of the suit property pursuant to a purchase for valuable consideration being Kshs 48,000,000 and that he executed an offer for the purchase of the suit property on behalf of the 1<sup>st</sup> Defendant on 6<sup>th</sup> August, 2009 upon introduction to the Plaintiff's Directors, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by Landmark Agencies.
40. It was the evidence of DW1 that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants took him to the suit property, affirmed that they were the Directors of the Plaintiff and produced the original title and certificate of incorporation.
41. It was his evidence that sometime in June, 2012, he received an email from one Keter Rono who indicated to him that certain documents concerning the property were not in order and that in August, 2012, he received a notice of investigations of the Plaintiff and the suit property by the DCI instigated by the complaint of Eric Naibei.
42. It was the evidence of DW1 that the DCI conducted forensic investigations which revealed that the Sale Agreement dated 20<sup>th</sup> October, 2004 and the Power of Attorney dated 1<sup>st</sup> December, 2005 had been executed by Eric Naibei and that based on the foregoing, the DCI found that the 1<sup>st</sup> -3<sup>rd</sup> Defendants were not criminally culpable, a position affirmed by the DPP who proceeded to close the file.
43. It was his evidence that during his lifetime, Eric Naibei never directly or indirectly approached him requesting payment for the suit property; that Esther Ngenyi has not demonstrated how she became a Director of the Plaintiff; that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were the bona-fide Directors and that Eric Naibei procured the removal of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as Directors of the Plaintiff and attempted to use the DCI and NLC to deprive the 1<sup>st</sup> Defendant of the suit property
44. On cross-examination, DW1 stated that he interacted with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who executed the agreement as Directors of the Plaintiff; that he did not conduct a search because he was introduced by an agent to them and that he did not need to conduct a search of the Plaintiff at the company registry because he relied on the documents given to him, including the original title and certificate of incorporation.
45. The 2<sup>nd</sup> Defendant, DW2, adopted her witness statement dated 10<sup>th</sup> July, 2018 as her evidence in chief and produced the bundle of documents filed on the same date.
46. It was her testimony that her, together with her husband, are the Directors of the Plaintiff; that the Plaintiff was the registered lessee from the Government of the suit property before selling and



transferring the same to the 1<sup>st</sup> Defendant and that Eric Naibei sold to them a parcel of land known as L.R No 209/12744 but was unable to transfer it.

47. According to DW2, sometime in 2003, when she went to Eric Naibei to demand for a refund, Eric proposed to transfer to them the Plaintiff's company and the suit property because the suit property was the only asset owned by the Plaintiff and that he (Eric) thereafter surrendered the original title deed, the certificate of incorporation, the MEMOARTS and PIN Certificate to facilitate the transfer of the shares of the Plaintiff at the Registrar of Companies and that none of the company documents bore the name of Esther Ngenyi.
48. DW2 averred that after they received the aforesaid documents from Eric Naibei, her Advocates drew a Power of Attorney that was forwarded to Eric Naibei's Advocates which he duly signed and that Eric Naibei knew where their offices were and never made any effort to contact or visit them regarding the alleged disappearance of his documents.
49. DW2 stated that her, together with her husband, have endured malicious allegations of fraud all of which have been found to be unfounded in law and in fact by the Directorate of Criminal Investigations; that the determination by the NLC was overturned and that thereafter, her efforts to access the company file at the company registry proved futile.
50. It was her evidence on cross-examination that she has no documents showing her and the 3<sup>rd</sup> Defendant's Directorship of the Plaintiff; that she did not register the Power of Attorney given to her by Eric Naibei and that by way of a letter of 3<sup>rd</sup> May, 2012, the Registrar of companies confirmed that they were the Directors of the Plaintiff.
51. In re-examination, DW2 stated that she signed the transfer because she is a Director of the Plaintiff; that she was paid 48million as a Director; that it is Eric Naibei who gave her the documents; that she does not have any documents because she took them to Sheria House after she was informed that the original file was missing; that she complained to the DCI and that they had office copies but their office was broken into and all their documents were stolen.
52. DW3 was Charles Ngetich, a Deputy Lands Registrar with the Ministry of Lands. He adopted his witness statement dated 14<sup>th</sup> September, 2021. He produced the documents in his bundle of documents as exhibits.
53. It was the evidence of DW3 that he is a Deputy Chief Land Registrar whose duties include registration of documents, providing instructions to the Attorney General in civil suits and any other duties assigned by the Chief Land Registrar.
54. He explained that a Deed File is usual maintained by the Chief Land Registrar and contains copies of documents relating to any transaction on land registered under the Registration of Titles Act(now repealed); that the registration status of the suit land is that grant I.R 78032, L.R 21069 was executed by the then Commissioner of Lands on 24<sup>th</sup> September, 1998; that the suit property measures 1.647Ha and was allocated to the Plaintiff; that the grant is for 99 years from 1<sup>st</sup> July, 1995 at an annual rent of Kshs 80,000 and that vide entry no I.R 78032/2, the property was transferred to the 1<sup>st</sup> Defendant for Kshs 48,000,000 on 21<sup>st</sup> December, 2009.
55. According to DW3, he did not have a Power of Attorney among his documents; that for the transfer of land to a company, the requisite documents include a PIN Certificate of the Company, names, personal pins and identity cards of the Directors; that they usually trust the Advocates who present these documents; that they would not know if fraud was undertaken in respect the Directorship and that a transfer without all the necessary documents will be rejected.



56. In re-examination, he stated that the transfer did not have any problem; that the Directors' signatures were attested to by the Advocates; that they do not confirm the issue of Directorship before registering a transfer; that as an office, they rely on the PINs and the duly executed documents; and that the parties' IDs were attached on the documents that were presented for registration.
57. DW4 was Sarah Wainaina, an assistant Registrar of Companies at the Business Registration Service. She adopted her witness statement dated 24<sup>th</sup> April, 2023 as her evidence in Chief and produced the bundle of documents as exhibits.
58. It was her evidence that the Plaintiff's original file could not be traced and the records in their possession are based on the reconstructed documents provided by to them by M/S Kandie Advocates in November, 2016; that as per the records presented to them, the Plaintiff was incorporated on 15<sup>th</sup> June, 1993; that the Directors at the time were Eric Naibei and Jack Kimkung and that according to the Plaintiff's MEMOARTS, its initial subscribers were Eric Naibei and Jack Kimkung as per the filed annual returns for the years 1994-1997.
59. It was the evidence of DW4 that the company structure was made up of Eric Naibei as a Director/Shareholder with 850 shares and Jack Kimkung as a Director/Shareholder with 150 shares and that vide a notification of change of Directors received on 4<sup>th</sup> August, 1998, the Registrar was informed that Jack Kimkung had resigned as a Director of the company effective 26<sup>th</sup> May, 1998 and Esther Ngenyi appointed as a Director.
60. It was stated by DW4 that the amended annual returns for the year 1998-2015 filed on 9<sup>th</sup> November, 2018 indicated the structure of the Plaintiff as Eric Naibei-Director/Shareholder-850 shares, Jack Kimkung-Shareholder-150 shares and Esther Ngenyi -Director.
61. In cross-examination, DW1 stated that in the event of a change in Directorship, the resigning Director writes a resignation letter and swears an Affidavit; that minutes are also prepared showing the resolution and if he has shares and that there will be a share transfer form and annual returns showing how the shares have been transferred.
62. It was the evidence of DW4 that both Eric Naibei and Jack Kimkung were deceased at the time of the reconstruction of the file in 2016; that the letter dated 3<sup>rd</sup> May, 2012 from the Assistant Registrar to the Plaintiff states that no returns had been filed since 1993 and that this creates doubt as to when Esther Ngenye became a Director.
63. DW 4 conceded on cross-examination that the letter of 17<sup>th</sup> May, 2012 gave a position contrary to what Ms Ngenye (PW1) was alleging with respect to her Directorship; that the letters of 3<sup>rd</sup> May, 2012 and 28<sup>th</sup> May, 2012 lead to the conclusion that Rahab K Mukiare was at one-time a Director of the Company and that the complaints of fraud by Eric Naibei were dismissed by the DCI.

## Submissions

64. The Plaintiff's Counsel submitted that the Plaintiff legally acquired the suit property and that the Power of Attorney relied on by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not comply with the provisions of the Registered *Land Act* (now repealed) not having been executed by the Plaintiff's Directors nor registered contrary to Section 110 of the *Land Registration Act*.
65. It was submitted by counsel that the Advocates who were purportedly involved in the transaction denied the same and consequently the Power of Attorney was null and of no legal effect.



66. Counsel submitted that the Courts have severally held that mere possession of a title does not imply that the same cannot be challenged. that apart from introducing Esther Ngenyi, as a Director on 26<sup>th</sup> May, 1998, no other changes were made to the Directorship of the company as affirmed by the 5<sup>th</sup> Defendant, the custodian of company records and that Section 26 of the [Land Registration Act](#) protects owners of property from losing the properties through fraud.
67. The 1<sup>st</sup> Defendant's counsel submitted that it is undisputed that the 1<sup>st</sup> Defendant acquired title and possession of the suit property pursuant to an agreement for sale and transfer upon payment of Kshs 48,000,000 and that the evidence shows that on a balance of probabilities, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were Directors of the Plaintiff in 2009 when they signed the sale agreement for sale and transfer of the suit property.
68. It was submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were further in possession of the suit property and had the original title thereto; that there was no credible documented explanation of when Esther Ngenyi was a Director of the Plaintiff and that the 4<sup>th</sup> Defendant vide his evidence affirmed that the law was followed in the sale and transfer of the suit property.
69. Counsel urged that even if fraud was proved as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the same would not affect the interests of the 1<sup>st</sup> Defendant in the property. Reliance was placed on Section 26(1)(a) and Section 80(1) and (2) of the [Land Registration Act](#) and that the Courts have held that the title of a purchaser for value cannot be impeached if the purchaser did not commit any fraud.
70. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' counsel submitted that the burden on the question of how the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants acquired custody of the original grant for the suit property lay with Esther Ngenyi; that on the contrary, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants gave unassailable testimony and evidence of their acquisition of the suit property and that the Plaintiff's claim cannot be sustained on the alleged assertions of invalidity and/or forgery as neither the Power of Attorney nor the agreement for sale were used in the impugned registration of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as Directors of the Plaintiff or the sale and transfer of the suit property.
71. According to Counsel, the plea of fraud has no basis having been found to be unsustainable by the DCI and DPP; that it is clear that the pleadings and evidence tendered in respect of the plea of fraud fell short of the requisite standards and that the Plaintiff's suit should be dismissed and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants counterclaim upheld.
72. The 4<sup>th</sup> and 5<sup>th</sup> Defendants did not file submissions.

### **Analysis and Determination**

73. Having carefully considered the pleadings, testimonies and submissions herein, the only issue that arise for determination is;
  - i. Whether the transfer of L.R No 21069, Grant No I.R 78032 from the Plaintiff to the 1<sup>st</sup> Defendant was un-procedural and illegal.
74. The Plaintiff instituted this suit seeking, inter-alia, a declaration that it is the lawful proprietor of the suit property and that the sale of the same to the 1<sup>st</sup> Defendant was fraudulent, unlawful, unprocedural and illegal.
75. The Plaintiff has also sought for an order of cancellation of the 1<sup>st</sup> Defendant's name as proprietor of the suit property; reinstatement of the property in its names; eviction against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and general, exemplary and aggravated damages.



76. It is not in dispute that the Plaintiff was at some point the registered owner of the suit property having acquired the same from the Government through allotment. According to Ms Esther Ngenyi, PW1, who claims to be one of the Directors of the Plaintiff, in the year 2012, the Plaintiff through its Director discovered that the suit property had been fraudulently transferred to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants vide a Sale Agreement dated 19<sup>th</sup> August, 2009.
77. It is the Plaintiff's case that the sale of the suit property had been precipitated by fraudulent activities at both the lands registry and the company registry by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
78. On its part, the 1<sup>st</sup> Defendant asserts that it is the lawfully registered proprietor of the suit property having acquired it by way of sale from the Plaintiff through the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants; that paid valuable consideration for the suit property and did not collude with nor was it involved in any fraud with respect to the sale and purchase of the suit property and that it was given peaceful possession of the suit property upon completion of the sale.
79. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on their part do not dispute that the property initially belonged to the Plaintiff. They contend that sometime in 2003, Eric Naibei, one of the Directors of the Plaintiff, handed to them possession and ownership of the Plaintiff, in compensation of L.R No 209/12744 and surrendered to them the original certificate of title of the suit property, the PIN Certificate and the Memoarts of the Company to facilitate the transfer of the same.
80. It is the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's case that they thereafter sold the suit property to the 1<sup>st</sup> Defendant; that their efforts to access the Plaintiff's file at the Companies Registry have been futile and that they should be reinstated as Directors of the Plaintiff and be paid the antecedent damages for tort and nuisance.
81. According to the 4<sup>th</sup> Defendant, their records indicate that the Plaintiff was issued with a grant over the property on 24<sup>th</sup> September, 1998 and a transfer to the 1<sup>st</sup> Defendant was registered on 21<sup>st</sup> December, 2009. The 4<sup>th</sup> Defendant maintains that the transfer to the 1<sup>st</sup> Defendant was lawful and procedural.
82. The 5<sup>th</sup> Defendant contends that the original file in respect of the Plaintiff went missing and they reconstructed the file on the basis of the documents provided to them by Counsel for the Plaintiff in 2016; that according to the said documents, the Plaintiff was incorporated in 1993 and its original directorship and shareholding structure consisted of Eric Naibei and Jack Kimkung as Directors/ Shareholders; that the company's structure changed in 1998 comprising of Eric Naibei as Director/ Shareholder; Jack Kimkung as Shareholder and Esther Ngenyi as Director.
83. It is trite that he who alleges must prove. This principle is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 provides as follows:
- “(1) 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”



84. And Sections 109 and 112 of the same Act states as follows:

“ 109. 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 shall lie on any particular person.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

85. That being the case, it was upon the Plaintiff's witness (PW1) to proof that firstly, she is a Director of the Plaintiff and secondly, that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants (on behalf of the Plaintiff) fraudulently transferred the suit property to the 1<sup>st</sup> Defendant.

86. To begin with, it is not disputed that the title to the suit property is currently registered in the name of the 1<sup>st</sup> Defendant, pursuant to a transfer of 21<sup>st</sup> December, 2009. The Title was registered under the Registration of Titles Act (repealed) which provides as follows with respect to proprietorship;

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

87. It is trite law that any allegations of fraud must be pleaded and strictly proved. As expressed by the Court of Appeal in case of Kuria Kiarie & 2 Others vs Sammy Magera [2018] eKLR:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

88. The dispute herein would not have posed any difficult if the Plaintiff's file was available at the Companies Registry. Indeed, all that the court was required to do was to peruse the said file and ascertain if indeed the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were Directors of the Plaintiff as at 19<sup>th</sup> August, 2009 when they sold the suit property to the 1<sup>st</sup> Defendant for Kshs. 48,000,000.

89. The availability of the said file would have also shown at what particular point in time did Esther Ngenye, PW1, become a Director of the Plaintiff, if at all. However, as it often happens wherever a party wants to pull a rug under the feet of his opponent, and as confirmed by the 5<sup>th</sup> Defendant, the custodian of the company records, the Plaintiff's file has been missing, and no one knows for sure what happened pertaining to the Directorship of the Plaintiff for the period under review.



90. PW1 did admit that the Plaintiff's Director, Mr. Eric Naibei, handed to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants the original grant for the suit property on 17<sup>th</sup> October, 2005 for sub division. According to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the title to the suit property was handed to them by the then Director of the Plaintiff in compensation for the loss of L.R. No. 209/12744 in the year 2003, together with all the other relevant documents relating to the transfer of directorship.
91. PW1 averred both in her evidence in chief and the Plaintiff that it was not until 2012 that they discovered that the land had been fraudulently been transferred to the 1<sup>st</sup> Defendant. This, according to the Plaintiff in the Plaintiff, was after "conducting a search at the Company's Registry on or about 3<sup>rd</sup> May, 2012."
92. According to the 5<sup>th</sup> Defendant, it was not until November, 2016 that the firm of Kandie Advocates sought for the reconstruction of the Plaintiff's file and provided the 5<sup>th</sup> Defendant with copies of documents to assist in the reconstruction of the file. The documents that the Plaintiff's advocate provided to the 5<sup>th</sup> Defendant for the reconstruction of the Plaintiff's file included: Form 203, being particulars of Directors, being Eric Naibei and Jack Kimkung with a shareholding of 850 and 150 shares respectively. The MEMORTS also had those two Directors.
93. The other documents that were supplied to the 5<sup>th</sup> Defendant by the Plaintiff's advocate in 2016 were annual returns forms for the year 1994-1997 which showed that the company had only two Directors already mentioned above who took up the entire shareholding of the company.
94. PW1 informed the court that she is the wife of Eric Naibei, and that when Jack Kimkung died in 1998, she was appointed Director of the Plaintiff. She supplied to the 5<sup>th</sup> Defendant, through her advocate, who is also the Plaintiff's advocate in this matter, Form 203 A, Notification of Change of Directors, which shows that " (1) Mr. Jack Kimkung (Director) resigned with effect from 26/5/98, (2) Esther Ngenyi Jeanet was appointed as a new Director."
95. The other document that was produced by the 5<sup>th</sup> Defendant's witness, and which was supplied to the 5<sup>th</sup> Defendant by the Plaintiff's advocate, is the CR12 dated 9<sup>th</sup> November, 2016 which shows that the Directors of the Plaintiff are:
- Eric Naibei 850 shares
- Esther Ngenyi Jeanet NIL shares
- Jack Kimkung 150 shares.
96. The CR 12 of 9<sup>th</sup> November, 2016 completely contradicts Form 203 A, Notification of Change of Directors, which shows that "Mr. Jack Kimkung (Director) resigned with effect from 26/5/98 and Esther Ngenyi Jeanet was appointed as a new Director." Indeed, no resolution was produced to show that indeed the said Jack Kimkung resigned and that Esther Ngenyi was appointed as a director of the Plaintiff in the year 1998 as alleged.
97. The inconsistency and contradiction of the documents that were supplied to the 5<sup>th</sup> Defendant by the Plaintiff's advocate, especially on when, if at all, Esther Ngenyi Jeanet (PW1) was appointed the Plaintiff's Director and whether Jack Kimkung resigned as a director or not casts doubt on the authenticity and completeness of the record that the Plaintiff's advocate supplied to the 5<sup>th</sup> Defendant.
98. Indeed, the inconsistency of the said documents, coupled with the fact that the Plaintiff's initial directors voluntarily released the original title document to the 2<sup>nd</sup> Defendant in the year 2005, as pleaded in the Amended Plaintiff, and the assertion by PW1 that it was not until 2012 that they discovered that the suit property had been transferred to the 1<sup>st</sup> Defendant, goes along way to show



- that the Plaintiff's initial directors did transfer the Company and the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as pleaded in the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Defence.
99. Further, although PW1 stated that the title document in respect of the suit property was handed over to the 2<sup>nd</sup> Defendant for purposes of sub division, no evidence was called to support that allegation. Indeed, PW1 did not explain why the property was being sub divided in the first place, and how the 2<sup>nd</sup> Defendant, who is not a surveyor, was to be involved in the alleged sub-division of the suit property, if at all.
  100. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' position is that they were given the Plaintiff's registration documents, including the MEMOART, the PIN, the certificate of registration and the original title by the only surviving director of the Plaintiff, Mr. Eric Naibei, in the year 2003 in compensation for the loss of L.R No. 209/12744 which Eric.
  101. This position is supported by the demand letter dated 24<sup>th</sup> August, 2001 issued by the firm of Namada and Company Advocates on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to Eric Naibei, demanding for a refund of Kshs. 6,895, 350 being the purchase price paid to him for L.R No. 209/12744, which land Eric was to sell to Ratim Realtors, a company associated with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
  102. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants also produced in evidence the sale agreement that was entered into between the Plaintiff and the 2<sup>nd</sup> Defendant, T/A Metra Realters, dated 29<sup>th</sup> October, 2004, in respect of the sale of the suit property in lieu of L.R No. 209/12744.
  103. Indeed, the documents produced by Esther Ngenye, PW1, lend credence to the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were Directors of the Plaintiff when they sold the suit property in the year 2009, more than four years after the title and the Plaintiff's documents were handed over to them.
  104. I say so because in the letter of 3<sup>rd</sup> May, 2012, the 5<sup>th</sup> Defendant informed the Plaintiff that a letter would be done to the Criminal Investigation Department to show how the 2<sup>nd</sup> Defendant was appointed a Director of the Plaintiff on 8<sup>th</sup> January, 2009 fraudulently. However, when the 5<sup>th</sup> Defendant's witness testified, he informed the court that he did not have the record that informed his opinion in the said letter.
  105. Further, PW1 informed the court that when they conducted a search on the Plaintiff at the company registry in 2012, they discovered about the fraudulent dealings. However, the documents evidencing the alleged fraudulent dealings were not produced in evidence.
  106. On the basis of the above analysis of the court, it is the finding of the court that Esther Jeanet Ngenyi has not proved that she was lawfully appointed as a director of the Plaintiff in 1998, or at all, to entitle her to bring this suit on behalf of the Plaintiff.
  107. Secondly, the Plaintiff, and by extension PW1, has not proved on the required standard that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants acquired the suit property unlawfully. That being the case, it is the finding of the court that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants lawfully sold and transferred the suit property to the 1<sup>st</sup> Defendant.
  108. Finally, it is the finding of this court that the prayers in the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Counter claim can only be issued by the High Court and not this court. The said Counter claim is therefore struck out with no order as to costs.
  109. For those reasons, the Plaintiff's suit is dismissed. However, in view of the finding of this court on the issue of directorship of the Plaintiff, I decline to condemn the Plaintiff to pay the costs of the suit.
  110. Consequently, the 1<sup>st</sup> Defendant's Counter claim is allowed as follows:



- a. The Chief Land Registrar and/or the Registrar of Titles be and is hereby directed to remove the caveat registered on the register of property Land Reference Number 21069 on 25<sup>th</sup> February, 2015 as entry number 78032/3.
- b. Each party to pay hers/his/its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Mr. Kandie for Plaintiff

Mr. Nelson Havi for 1<sup>st</sup> Defendant

Mr. Havi for Oloo for 2<sup>nd</sup> and 3<sup>rd</sup> Defendant

Mr. Allan Kamau for Odhiambo for 5<sup>th</sup> Defendant

Court Assistant - Tracy

