



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 581 OF 2017**

**STELCO PROPERTIES LIMITED.....1<sup>ST</sup> PLAINTIFF**

**M-ORIENTAL COMMERCIAL BANK LIMITED.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

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

**CHIEF LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction.**

1. The 1<sup>st</sup> plaintiff brought this suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 14<sup>th</sup> September 2017 through a plaint of the same date. The plaint was amended on 3<sup>rd</sup> August, 2018 to add the 2<sup>nd</sup> plaintiff to the suit. In their amended plaint dated 26<sup>th</sup> July, 2018, the plaintiffs sought the following reliefs against the defendants;

- a) A declaration that all that parcel of land known as L.R No. 21/1/37 measuring approximately 6.5 acres (hereinafter referred to as “the suit property”) legally belongs to Stelco Properties Limited, the plaintiff herein.
- b) A declaration that the conduct of the defendants and in particular the impugned instruments of transfer and/or conveyance in respect of the suit property are fraudulent and illegal hence void *ab initio*.
- c) An order for the rectification of the conveyance of the indenture in respect of the suit property and/or the register thereof by cancelation of the impugned Deed of Conveyance in the name of the 1<sup>st</sup> defendant, if at all and the restoration of the plaintiff as the duly registered owner of the suit property.
- d) A declaration that the eviction of the plaintiff’s employees, agents, officers, and/or directors from the suit property as well as the demolition of the developments therein and the construction of the perimeter wall or any other form of trespass and/or encroachment of the suit property by the defendants and/or whosoever is unlawful, wrongful, arbitrary, without a colour of right, malicious, fraudulent and amounts to trespass.
- e) A permanent injunction restraining the defendants or whosoever whether by themselves, their directors, agents, assignees, nominees, employees, servants, officers and/or whosoever from trespassing, encroaching, advertising selling alienating disposing of, charging, entering, constructing, evicting, demolishing and/or interfering with the plaintiff’s right of quiet possession of the suit property.
- f) General Damages for fraudulent transfer and dealings with the suit property.
- g) General Damages for wrongful and unlawful eviction of the plaintiff and/or its employees, officers and/or directors and damages for unlawful demolition of the plaintiff’s property and developments on the suit property as well as trespass.
- h) Punitive and exemplary damages for the said fraudulent dealings in the plaintiff’s property, unlawful eviction and demolition against the plaintiff on the suit property.
- i) An order in favour of the 2<sup>nd</sup> plaintiff nullifying the partial re-conveyance of the mortgage dated 21<sup>st</sup> August, 2016 and a further order re-instating the mortgage over L.R No. 336/11 and L.R 21/1/37(the suit property) and a declaration that the conveyance dated 2<sup>nd</sup> August, 2016 and the partial re-conveyance dated 12<sup>th</sup> August 2016 are null and void and of no effect and the same be

deregistered by the 2<sup>nd</sup> defendant.

j) Cost of this suit.

k) Any such other or further relief as this Honourable Court may deem appropriate.

2. In the amended plaint, the plaintiffs averred that the 1<sup>st</sup> plaintiff was the absolute legal owner of the suit property which it purchased for value without notice of any defect in its title in 1978 and was issued with a registered Indenture as conclusive evidence of ownership.

3. The plaintiffs averred that through a mortgage dated 12<sup>th</sup> September, 1998, the 1<sup>st</sup> plaintiff mortgaged the suit property to Bank of Credit and Commerce International(Overseas) Limited. The plaintiffs averred that by a transfer of mortgage dated 31<sup>st</sup> December, 1992, the said mortgage was transferred to Delphis Bank Limited which is now known as M-Oriental Bank Limited (the 2<sup>nd</sup> plaintiff).

4. The plaintiffs averred that the suit property had never been partially or fully discharged or re-conveyed and as such the property was never available for sale to the 1<sup>st</sup> defendant or to any other party. The plaintiffs averred that the said mortgage was the subject matter of a suit between the plaintiffs namely, HCCC No. 920 of 2002.

5. The plaintiffs averred that the 1<sup>st</sup> plaintiff had been in occupation and had enjoyed quiet possession of the suit property since 1978 and had carried out substantive developments on the property.

6. The plaintiffs averred that on or about 31<sup>st</sup> August, 2017, goons contracted by the 1<sup>st</sup> defendant descended on the suit property armed with bulldozers, chased away the 1<sup>st</sup> plaintiff's employees from the property, demolished the developments thereon and commenced construction of a perimeter wall around the property. The plaintiffs averred that upon being confronted by the police from Gigiri Police Station, the said goons produced a transfer instrument and/or conveyance dated 2<sup>nd</sup> August, 2016 as well as re-conveyance of Mortgage in respect of the suit property as evidence of the 1<sup>st</sup> defendant's ownership of the suit property.

7. The plaintiffs averred that the said documents of title held by the 1<sup>st</sup> defendant were fraudulent, illegal and were procured through deceit and misrepresentation. The plaintiffs averred that the 1<sup>st</sup> defendant procured the alleged transfer of the suit property by impersonating and forging the names and signatures of the 1<sup>st</sup> plaintiff's directors.

8. The plaintiffs averred further that the 1<sup>st</sup> defendant fraudulently obtained a re-conveyance of mortgage (discharge) by purporting that the 2<sup>nd</sup> plaintiff had executed the same. The plaintiffs averred that the 1<sup>st</sup> defendant; forged a partial re-conveyance of mortgage, prepared and forged a deed of re-conveyance, impersonated an advocate of the High Court and forged his signature and uttered forged and false documents to the Chief Land Registrar.

9. The plaintiffs averred that one of the purported signatory of the partial re-conveyance CJB Larby had been dead for 10 years by the time he was purported to have signed the document. The plaintiff averred that the 1<sup>st</sup> defendant's actions aforesaid amount to trespass, unlawful acquisition, land grabbing, encroachment and/or illegal dealing with the 1<sup>st</sup> plaintiff's land.

10. The plaintiffs averred that they were not aware of the purported sale of the suit property to the 1<sup>st</sup> defendant and that the same was the work of fraudsters intended to disenfranchise the 1<sup>st</sup> plaintiff of the ownership and occupation of the suit property.

11. The plaintiffs averred that the 1<sup>st</sup> plaintiff had suffered and continued to suffer immense prejudice, astronomical damages and irreparable harm as a consequence of the said conduct of the 1<sup>st</sup> defendant.

12. The 1<sup>st</sup> defendant did not file a defence to the plaintiffs' claim. The 2<sup>nd</sup> defendant filed its statement of defence on 9<sup>th</sup> April, 2018. The 2<sup>nd</sup> defendant denied the plaintiffs' claims in their entirety. The 2<sup>nd</sup> defendant averred that it was a stranger to the averments in the plaint and contended that the plaintiffs were not entitled to the reliefs sought.

#### The plaintiffs' case.

13. At the trial, the plaintiffs called two witnesses while the defendants did not adduce evidence. The 1<sup>st</sup> plaintiff called its director, KHATIB ASHRAF(PW1) as its witness. PW1 adopted his witness statement dated 14<sup>th</sup> September, 2017 as his evidence in chief and produced as exhibit the 1<sup>st</sup> plaintiff's index of documents dated 14<sup>th</sup> September, 2017.

14. In his witness statement, PW1 reiterated the contents of the amended plaint. PW1 stated that when the agents of the 1<sup>st</sup> defendant invaded the suit property, their leader produced a purported instrument of transfer and/or conveyance dated 2<sup>nd</sup> August, 2016 said to have been executed by the 1<sup>st</sup> plaintiff in favour of the 1<sup>st</sup> defendant in respect of the suit property.

15. PW1 stated that those who were purported to have executed the said instrument of transfer/conveyance in favour of the 1<sup>st</sup> defendant from their names and photographs were not the directors of the 1<sup>st</sup> plaintiff.

16. PW1 stated that according to the records held at the Companies Registry, the 1<sup>st</sup> plaintiff had only two directors and shareholders namely;

Mohamed Ashraf who was his father and he.

17. PW1 stated that the purported instrument of transfer/conveyance was the work of fraudsters aimed at dispossessing the 1<sup>st</sup> plaintiff of the suit property. PW1 stated that the 1<sup>st</sup> plaintiff was not aware of the purported transfer of the suit property by it to the 1<sup>st</sup> defendant.

18. PW1 stated that the 1<sup>st</sup> defendant through its agents had unlawfully and with impunity continued through its agents to demolish the structures on the suit property and to construct a perimeter wall around the property.

19. PW1 stated that the 1<sup>st</sup> defendant's conduct exhibited impropriety, unconstitutionality, fraud, arbitrariness, illegality, corrupt scheme, manifest injustice and impunity.

20. PW1 stated that no person should benefit from fraud and that the reliefs sought were necessary to curtail the 1<sup>st</sup> defendant's fraudulent acts complained of.

21. The 2<sup>nd</sup> plaintiff called Wilfred Kenneth Machini (PW2) as its witness. PW2 told the court that the 2<sup>nd</sup> defendant was previously known by the names, Bank of Credit & Commerce International(overseas) Limited (BCCI) and Delphis Bank. He adopted his witness statement filed in court on 3<sup>rd</sup> August, 2018 as his evidence in chief. He also produced the affidavits he had sworn on 10<sup>th</sup> October, 2017, 26<sup>th</sup> January, 2018 and 25<sup>th</sup> May, 2018 together with the attachments thereto as exhibits.

22. PW2 testified that in 1986, 1987 and 1988, the 2<sup>nd</sup> plaintiff then known as Bank of Credit & Commerce International (Overseas) Limited (BCCI) granted to Crescent Construction Co. Limited loan facilities that were guaranteed by the 1<sup>st</sup> plaintiff and secured by a mortgage dated 12<sup>th</sup> September 1988 over the suit property. The said mortgage was transferred to Delphis Bank Limited currently known as M-Oriental Commercial Bank, the 2<sup>nd</sup> plaintiff in 1992.

23. PW2 testified that the said mortgage was still registered against the title of the suit property. He stated that the 2<sup>nd</sup> plaintiff still had in its possession the original title for the suit property in the form of an indenture dated 20<sup>th</sup> November, 1952. He stated that the 2<sup>nd</sup> plaintiff also had in its possession the original transfer of mortgage dated 3<sup>rd</sup> December, 1992.

24. PW2 stated that the last entries made in the title for the suit property were made on 10<sup>th</sup> October, 1988 and 10<sup>th</sup> December, 1992. PW2 stated that the 2<sup>nd</sup> plaintiff had not re-conveyed the suit property to the 1<sup>st</sup> plaintiff because the 1<sup>st</sup> plaintiff had not repaid the loan. PW2 stated that the 2<sup>nd</sup> plaintiff attempted to sell the suit property in exercise of statutory power of sale but it was sued by the borrower in HCCC No.4082 of 1994 to forestall the realization of the 2<sup>nd</sup> plaintiff's security. PW2 stated that in view of this development, the 2<sup>nd</sup> plaintiff also filed a suit against the guarantor which is the 1<sup>st</sup> plaintiff herein in HCCC No.920 of 2001. PW2 stated that the two suits were consolidated and were pending hearing in the Commercial Division of the High Court.

25. PW2 stated that the 2<sup>nd</sup> plaintiff learnt that someone had purported to re-convey the suit property to the 1<sup>st</sup> plaintiff. He stated that the 2<sup>nd</sup> plaintiff had not been paid its debt owed by the 1<sup>st</sup> plaintiff and as such the 2<sup>nd</sup> plaintiff did not partially re-convey the suit property to the 1<sup>st</sup> plaintiff. PW2 stated that the amount owed to the 2<sup>nd</sup> plaintiff had risen to over Kshs. 1.2billion.

26. PW2 stated that the 2<sup>nd</sup> plaintiff did not have an advocate by the name Ramesh Patel in its panel of advocates. He stated further that Delphis Bank changed its name to M-Oriental Commercial Bank in 2003 and as such there was no bank known as Delphis Bank as at the time of the purported execution of the re-conveyance of mortgage by the 2<sup>nd</sup> plaintiff in 2014.

27. PW2 stated that the 1<sup>st</sup> defendant's claim over the suit property was based on fraudulent and illegal instrument of partial re-conveyance of mortgage dated 2<sup>nd</sup> August, 2016. PW2 stated that under the law, the purported transfer of the suit property to the 1<sup>st</sup> defendant could not be effected without the authority or consent of the 2<sup>nd</sup> plaintiff who had security over the property.

28. PW2 stated that neither the 2<sup>nd</sup> plaintiff nor its successors executed the purported partial re-conveyance through which the mortgage over the suit property was purportedly discharged. PW2 stated that the purported transfer of the suit property was a forgery and as such could not transfer any interest in the suit property to the 1<sup>st</sup> defendant. He urged the court to grant the reliefs sought by the 2<sup>nd</sup> plaintiff in the amended plaint.

#### The 1<sup>st</sup> and 2<sup>nd</sup> defendants' cases

29. As I mentioned earlier in the judgment, the 1<sup>st</sup> and 2<sup>nd</sup> defendants did not adduce any evidence at the trial. The 1<sup>st</sup> defendant did not also file a defence. The defendants did not therefore rebut the evidence that was adduced by the plaintiffs in proof of their cases.

#### The submissions

30. After the close of evidence, the parties were directed to make closing submissions in writing. The plaintiffs filed joint submissions on 22<sup>nd</sup> June, 2020 while the 2<sup>nd</sup> defendant filed its submissions dated 15<sup>th</sup> October, 2020. The 1<sup>st</sup> defendant did not file submissions.

31. In their submissions, the plaintiffs submitted that the suit was undefended. The plaintiffs reiterated that the 1<sup>st</sup> defendant's claim over the

suit property was based on fraudulent and illegal instrument of partial re-conveyance of mortgage dated 2<sup>nd</sup> August, 2016. The plaintiffs submitted that since no transfer of a mortgaged property could be effected without the authority or consent of the mortgagee, the purported transfer of the suit property to the 1<sup>st</sup> defendant was illegal and fraudulent and as such could not pass a good title in respect of the suit property to the 1<sup>st</sup> defendant. The plaintiffs submitted that the 1<sup>st</sup> plaintiff did not transfer the suit property to the 1<sup>st</sup> defendant and that Geoffrey Kinyanjui Mungai and Peter Maina Mungai who purported to execute the alleged instrument of transfer in favour of the 1<sup>st</sup> defendant had never been directors of the 1<sup>st</sup> plaintiff.

32. The plaintiffs submitted that the 1<sup>st</sup> defendant being well aware that it had acquired the suit property fraudulently and illegally went ahead to demolish the developments on the suit property on 31<sup>st</sup> August, 2017 with the aid of hundreds of rowdy armed goons using a bulldozer. The plaintiffs submitted that they were entitled to damages for the destruction that was caused by the 1<sup>st</sup> defendant and for trespass.

33. The plaintiffs submitted that the 1<sup>st</sup> defendant had admitted in a Constitutional Petition No. 454 of 2017 that it had filed and subsequently withdrawn that it had destroyed the developments that were on the suit property. The plaintiffs submitted that they had lost the value of the suit property and the security. The plaintiffs submitted that the structures on the suit property that were destroyed by the 1<sup>st</sup> defendant were valued at over Kshs. 3,000,000/- and that they were entitled to damages in respect thereof. In support of this submission, the plaintiffs cited Nakuru Industries Limited v S.S.Mehta & Sons [2016]eKLR.

34. The plaintiffs submitted that the 2<sup>nd</sup> plaintiff was yet to discharge the suit property and that it was in the process of exercising its statutory power of sale when the fraudulent and illegal transfer of the suit property took place. The plaintiffs submitted that the suit property should revert to the same position in which it was prior to the fraudulent transfer which should include the reinstatement of the encumbrances that were existing on the property. The plaintiffs urged the court to grant the prayers sought in the plaint.

35. In its submissions, the 2<sup>nd</sup> defendant submitted that the plaintiffs had proved their cases against the 1<sup>st</sup> defendant to the required standard since the 1<sup>st</sup> defendant did not rebut the evidence that was adduced by the plaintiffs in proof of their interests in the suit property. The 2<sup>nd</sup> defendant submitted further that the plaintiffs did not prove that the 2<sup>nd</sup> defendant was involved in the fraudulent and illegal acts leading to the purported transfer of the suit property to the 1<sup>st</sup> defendant.

36. The 2<sup>nd</sup> defendants submitted that it did not participate in any illegality in the registration of the 1<sup>st</sup> defendant as the owner of the suit property. The 2<sup>nd</sup> defendant submitted that it merely acted on the documents that were lodged by the 1<sup>st</sup> defendant at the registry which it was not aware were forged. The 2<sup>nd</sup> defendant submitted that it was unnecessarily joined in this suit as a party.

37. On the issue of costs, the 2<sup>nd</sup> defendant submitted that since it was not served with a notice prior to the filing of the suit, it was not liable to pay the plaintiffs' costs of the suit. The 2<sup>nd</sup> defendant urged the court to dismiss the plaintiffs' suit as against the 2<sup>nd</sup> defendant with costs.

#### Determination

From the pleadings, the following in my view are the issues that arise for determination in this suit;

- a. Whether the suit property was lawfully transferred to the 1<sup>st</sup> defendant and whether the 1<sup>st</sup> defendant acquired any lawful interest in respect thereof.
- b. Whether the 1<sup>st</sup> defendant trespassed on the suit property.
- c. Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.
- d. Who is liable for the costs of the suit?

Whether the suit property was lawfully transferred to the 1<sup>st</sup> defendant and whether the 1<sup>st</sup> defendant acquired any lawful interest in respect thereof.

38. It is common ground that at all material times, the 1<sup>st</sup> plaintiff was the registered proprietor of the suit property. This is clear from the Indenture dated 15<sup>th</sup> August, 1978 and a certificate of postal search dated 7<sup>th</sup> June, 2016 that were produced in evidence by the plaintiffs. It is also common ground that through a mortgage dated 12<sup>th</sup> September, 1988, the 1<sup>st</sup> plaintiff mortgaged the suit property to BCCI to secure a loan of Kshs. 20,000,000/-. It is also common ground that the said mortgage was transferred to Dephis Bank Limited on 10<sup>th</sup> December, 1992. It is also common ground that Dephis Bank Limited changed its name to M-Oriental Bank Limited. What is in dispute is whether the said mortgage over the suit property was discharged by the 2<sup>nd</sup> plaintiff and the property subsequently transferred to the 1<sup>st</sup> defendant by the 1<sup>st</sup> plaintiff.

39. The 2<sup>nd</sup> plaintiff has denied that it discharged the said mortgage. The 2<sup>nd</sup> plaintiff contended that it is still owed over Kshs. 1.2 billion that was secured by the said mortgage and as such it is inconceivable that it could have discharged the mortgage before the debt was repaid. The 2<sup>nd</sup> plaintiff led evidence that the purported partial re-conveyance of mortgage over the suit property dated 2<sup>nd</sup> August, 2016(2014) purportedly executed by the 2<sup>nd</sup> plaintiff in favour of the 1<sup>st</sup> plaintiff was the work fraudsters. It termed the document a forgery. The 2<sup>nd</sup> plaintiff led evidence that as at 2014/2016, it had changed its name to M-Oriental Bank Limited and was not using the name Dephis Bank

Limited that purportedly executed the instrument of re-conveyance. The 2<sup>nd</sup> plaintiff also led evidence that it did not have in its panel of advocates an advocate by the name Ramesh Patel who purportedly drew the document and that one, C.J.B Larby who allegedly executed the document on behalf of the 2<sup>nd</sup> plaintiff had died 10 years earlier. This evidence was not rebutted by the 1<sup>st</sup> defendant who did not even file a defence to the plaintiffs' claim.

40. With regard to the purported instrument of transfer/conveyance dated 2<sup>nd</sup> August, 2016 purported to have been executed by the 1<sup>st</sup> plaintiff in favour of the 1<sup>st</sup> defendant, both the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> plaintiff disowned the same. The 1<sup>st</sup> plaintiff led evidence that Geoffrey Kinyanjui Mungai and Peter Maina Murage who are alleged to have executed the purported instrument of transfer/conveyance dated 2<sup>nd</sup> August, 2016 have never been directors of the 1<sup>st</sup> plaintiff. The plaintiffs produced in evidence Form CR 12 in respect of the 1<sup>st</sup> plaintiff to confirm this position. They also produced filed annual returns. Like the evidence that was adduced by the 2<sup>nd</sup> plaintiff, the evidence by the 1<sup>st</sup> plaintiff was not reverted.

41. I am satisfied from the evidence on record that the partial re-conveyance of the suit property dated 2<sup>nd</sup> August, 2016 and the instrument of transfer/conveyance of the suit property dated 2<sup>nd</sup> August, 2016 are forgeries and that the same were created by fraudsters with the intention of dispossessing the 1<sup>st</sup> plaintiff of the suit property and the 2<sup>nd</sup> plaintiff of its security. Since the said documents were sham, they were not capable of transferring any interest in the suit property to the 1<sup>st</sup> defendant. In **Alberta Mae Gacie v Attorney General & 4 Others [2006] eKLR** the court stated as follows:

**“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor.”**

In Macfoy v United Africa Co. Ltd. (1961)3 All ER 1169, Lord Denning stated as follows at page 1172:

**“If an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”**

In Daudi Kiptugen v Commissioner of Lands & 4 Others [2015] eKLR the court stated that:

**“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”**

In Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another, the court stated as follows:

**“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.**

42. From the foregoing, it is my finding that the suit property was not lawfully transferred to the 1<sup>st</sup> defendant and that the 1<sup>st</sup> defendant did not acquire any proprietary interest in respect thereof.

Whether the 1<sup>st</sup> defendant trespassed on the suit property.

43. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, page 923, paragraph, 18-01. In the case of Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR, it was held that title to land carries with it legal possession. I have already made a finding that the 1<sup>st</sup> plaintiff is the lawful owner of the suit property the purported acquisition of the property by the 1<sup>st</sup> defendant having been fraudulent and unlawful. As the owner of the suit property, the 1<sup>st</sup> plaintiff was entitled to possession thereof. From the evidence before the court, I am satisfied that the 1<sup>st</sup> defendant entered the suit property through its agents or servants without the permission of the 1<sup>st</sup> plaintiff and destroyed a number of structures that had been erected thereon by the 1<sup>st</sup> plaintiff and commenced the construction of a perimeter wall. Since the 1<sup>st</sup> defendant had no lawful interest in the suit property, it had no right to enter thereon. The 1<sup>st</sup> defendant's entry onto the suit property was therefore without any lawful cause and as such amounted to trespass.

Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.

44. From my findings above, I am satisfied that the plaintiffs have established their claims against the defendants. The 2<sup>nd</sup> defendant had submitted that the case against it had not been proved. The plaintiffs may not have demonstrated explicitly that the 2<sup>nd</sup> defendant was involved in the fraudulent transfer of the suit property to the 1<sup>st</sup> defendant. However, the conduct of the 2<sup>nd</sup> defendant in the whole

transaction smacks of fraud and collusion. How did the 1<sup>st</sup> defendant manage to get registered as the owner of the suit property without the original Indenture that is still in the possession of the 2<sup>nd</sup> plaintiff? I am in agreement with the 2<sup>nd</sup> defendant that there would have been no way in which it could have known that the documents that were presented to it for registration by the 1<sup>st</sup> defendant were forged. The 2<sup>nd</sup> defendant however had a responsibility to ensure that the normal procedure in the registration of documents was followed. The 2<sup>nd</sup> defendant had a duty to explain to the court under what circumstances the 1<sup>st</sup> defendant was registered as the owner of the suit property without the production of the original indenture which was the title for the suit property. Due to the foregoing, the plaintiffs have made a case for the grant of the various declaratory and injunctive reliefs sought against the defendants. The plaintiffs are also entitled to the other orders and damages sought. I am satisfied that a basis has been laid for the grant of both general and exemplary damages against the 1<sup>st</sup> defendant.

45. In Halsbury's Laws of England 4<sup>th</sup> Edition Volume 45 para. 26 1503 the authors have stated as follows on computation of damages in an action for trespass:

- a) **If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.**
- b) **If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.**
- c) **Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.**
- d) **Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.**

46. The principles applied by the court in awarding exemplary damages were summarized in Godfrey Julius Ndumba Mbogori & Another v Nairobi City County [2018] eKLR as follows:

**The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard [1964] AC 1129* where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are:**

- i) **in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,**
- ii) **cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and**
- iii) **where exemplary damages are expressly authorized by statute.**

47. The plaintiffs did not demonstrate that they had suffered any specific loss as a result of the 1<sup>st</sup> defendant's acts of trespass. The plaintiffs had submitted that the structures that were destroyed by the 1<sup>st</sup> defendant during the trespass were valued at Kshs. 3,000,000/-. No evidence was placed before the court in proof of this allegation. In any event, such claim is in the nature of special damages and such ought to have been pleaded with the necessary particulars and specifically proved. The loss was neither pleaded nor proved at the trial. The plaintiffs however proved that the 1<sup>st</sup> defendant entered the suit property forcefully having obtained a fraudulent title and threw out the 1<sup>st</sup> plaintiff's employees who were in occupation. The 1<sup>st</sup> defendant's actions were arbitrary, oppressive and were carried out with impunity with the aim of achieving pecuniary benefit for the 1<sup>st</sup> defendant. This in my view is an appropriate case in which exemplary damages should be awarded.

Who is liable for the costs of the suit?

48. Under section 27 of the Civil Procedure Act, Chapter 21 costs of an incidental to a suit is at the discretion of the court and as a general rule, costs follow the event. In this case, the plaintiffs have succeeded in their claim against the defendants. As the architect of the fraud that led to the filing of the suit, the 1<sup>st</sup> defendant will bear the costs of the suit.

Conclusion:

49. In conclusion, I hereby enter judgment for the plaintiffs against the defendants for;

- a) A declaration that all that parcel of land known as L.R No. 21/1/37 measuring approximately 6.5 acres (hereinafter referred to as "the suit property") is legally owned by the 1<sup>st</sup> plaintiff.
- b) A declaration that the conduct of the 1<sup>st</sup> defendant in making the impugned instrument of transfer and/or conveyance dated 2<sup>nd</sup> August, 2016 in respect of the suit property was fraudulent and illegal and as such the said instrument is null and void.
- c) An order for the rectification of the indenture in respect of the suit property and/or the register thereof by the cancelation of the impugned conveyance of the suit property in the name of the 1<sup>st</sup> defendant, if at all and the restoration of the 1<sup>st</sup> plaintiff as the duly registered owner of the suit property.

d) A declaration that the eviction of the 1<sup>st</sup> plaintiff's employees, agents, officers, and/or directors from the suit property as well as the demolition of the developments thereon and the construction of a perimeter wall or any other form of trespass and/or encroachment on the suit property by the 1<sup>st</sup> defendant was unlawful and amounted to trespass.

e) A permanent injunction restraining the 1<sup>st</sup> defendant whether by itself, its directors, agents, assignees, nominees, employees, servants, officers and/or whosoever acting on its behalf from trespassing, encroaching, advertising, selling, alienating disposing of, charging, entering, constructing, evicting, demolishing and/or interfering with the 1<sup>st</sup> plaintiff's right of quiet possession of the suit property.

f) An order nullifying the partial re-conveyance of mortgage dated 2<sup>nd</sup> August, 2016 and re-instating the mortgage dated 12<sup>th</sup> September, 1988 over L.R No. 336/11 and L.R No. 21/1/37(the suit property).

g) A declaration that the said partial re-conveyance dated 2<sup>th</sup> August 2016 is null and void and of no legal effect and should be deregistered by the 2<sup>nd</sup> defendant forthwith.

h) Kshs. 2,000,000/- as general damages for trespass payable by the 1<sup>st</sup> defendant to the 1<sup>st</sup> plaintiff.

i) Kshs. 10,000,000/- as exemplary damages payable by the 1<sup>st</sup> defendant to the 1<sup>st</sup> plaintiff.

j) The costs of the suit to be paid by the 1<sup>st</sup> defendant to the plaintiffs.

**DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL 2021**

**S. OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. Kago for the 1<sup>st</sup> Plaintiff

Mr. Kingara for the 2<sup>nd</sup> Plaintiff

N/A for the 1<sup>st</sup> Defendant

Mr. Kamau h/b for Ms. Ndundu for the 2<sup>nd</sup> Defendant

Ms. C. Nyokabi - Court Assistant