



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 225 OF 2011

UBORA HOUSING CO-OPERATIVE SOCIETY LTD.....PLAINTIFF

VERSUS

TRIPPEL TWO PROPERTIES LIMITED1ST DEFENDANT

GEOFFREY MAKANA ASANYO.....2ND DEFENDANT

MISORI CONSTRUCTION COMPANY LIMITED.....3RD DEFENDANT

ZABLON MABEA4TH DEFENDANT

THE NATIONAL LAND COMMISSION OF LANDS

(Formerly the Commissioner of Lands)5TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....6TH DEFENDANT

AND

ANGUT MUUMBI MUNYAO1ST INTERESTED PARTY

PETER NZYIMI MUTUA

(On his behalf & on behalf of 82 Others.....2ND INTERESTED PARTY

(AS CONSOLIDATED WITH ELC 277 OF 2010 MISORI CONSTRUCTION

COMPANY LIMITED VS UBORA HOUSING CO-OPERATIVE SOCIETY LIMITED)

JUDGEMENT

Introduction:

1. The Plaintiff is a Co-operative Society incorporated under the Co-operative Societies Act (the society) whose members are mainly workers of the Kenya Bureau of Standards. The 1st Defendant is a limited liability Company (Tripple Two) which is incorporated under the Companies Act. The 2nd Defendant is a male adult (Asanyo) who is associated with the directors of Tripple Two. The 3rd Defendant is a limited liability Company (Misori) which is incorporated under the Companies Act. The 4th Defendant is a male adult (Mabea) who used to be a Commissioner of Lands. The National Land Commission (NLC) is the Successor of the office of the Commissioner of Lands and among its functions is custody of government land on behalf of the National Government and the County Governments. The 6th Defendant is the Chief Government legal adviser. The 1st interested party is a male adult individual who purchased a portion of the suit property from a member of the Society. The 2nd interested party is a member of Society who together with 81 others had purchased portions of the suit property from the Society.

Background

2. This Judgement relates to two suits which were consolidated. The dispute in these suits relate to LR No. 337 /1631 which measures 4.0 hectares which is about 10 acres (suit property). The suit property is situate within Mavoko Municipality in Machakos County. The suit property is being claimed by the Society on the basis of a transfer registered in its favour on 1st September 2009. The Society purchased the suit property from Jena Agencies limited (Jena) which claims to have been given grant number IR 74968 which was registered on 7th September 1994.

3. The suit property is also claimed by Tripple Two whose grant number is IR 130163 which was registered on 17th June 2011. The suit property is also claimed by Misori based on grant number IR 72197 which was registered on 20th August 1998. The 1st interested party claims a portion of the suit property which he purchased from Lincoln Mutisya Nyamai who had been allocated the portion in his capacity as a member of the Society. The 2nd interested party who represents 81 other members of the Society claim their individual portions which they were allocated by the Society which had purchased the suit property on their behalf.

4. Before the Society filed ELC 225 of 2011, Misori had sued it in ELC 277 of 2010. In the case by Misori , against the Society Misori was claiming the following reliefs:-

a) A permanent injunction restraining the defendant either by itself, its agents and or servants from trespassing into the Plaintiff's property, selling, alienating or in whatever manner disrupting the Plaintiffs peaceful enjoyment of the properties land Reference Numbers 337/4287 to 337/ 4317 situated in Mavoko Municipality in Machakos District.

b) A declaration that the Defendant's act of trespass into the Plaintiff's property aforesaid is unlawful and the Plaintiffs pray for an order for general damages.

c) Costs of the suit and interests at court rates.

5. In ELC 225 of 2011, the Society is seeking the following reliefs: -

a) An order of mandatory injunction to restrain the Defendants by itself, themselves, their agents, servants, employees and or anyone claiming under them from trespassing, selling entering, encroaching, alienating, destroying and or trespassing upon the property L.R NO.337/163(I.R No. 74968) situate in Mavoko Municipality Machakos County.

b) A declaration that the 1st 2nd and 3rd Defendants acts of trespass are unlawful and the plaintiff prays for an order of general damages.

c) A declaration that the certificates of title L R No. 337/1631 (I.R 13063) Deed Plan No.183593 and L.R No. 337/1631 (I.R No. 72197) issued to the 1st and 3rd Defendants respectively are null and void and be cancelled from the register of the 5th Defendant.

d) An order cancelling the titles issued to the 2nd and 3rd Defendants in respect of L.R No.337/1631 (I.R No.74968).

e) An order directing the 5th Defendants to rectify the register to reflect the Plaintiff as the only registered proprietor of the suit property.

f) In the alternative a declaration that the Plaintiff is an innocent purchaser for a valuable consideration without notice of defect in the seller's title.

g) Costs of the suit

h) Any other relief that the court deems fit and just to grant.

6. In ELC 225 of 2011 Misori raised a counter-claim in which it seeks the following reliefs:-

1) A declaration that the 3rd Defendant's Title Deed number I.R No.72197 / L.R No.337/1631 was and is validly registered and a genuine Title.

2) An order directing the 5th Defendant to rectify the register by cancelling the Title Deed issued to the Plaintiff and 1st Defendant.

3) A declaration that the Plaintiff's Title Deed Number I.R No.130163/L. R No.337/1631 and 1st Defendant's Title Deeds Number I.R No.74968 are null and void and should be deregistered.

4) A mandatory injunction ordering the demolition of the building constructed on the property by the interested parties.

5) An order that the Plaintiff, 1st, 2nd Defendants and the Interested parties do hand over vacant possession of the property to the 3rd Defendant.

6) An order for costs of the suit to be paid by the 3rd Defendant.

7. The 1st Interested party seeks the following reliefs: -

a) A declaration that the 1st Interested party is the proprietor of Plot No.8 (337/4377), a subdivision of LR No. 337/1631 as shown on the Deed Plan No.308971 dated 18th May 2010.

b) An order directing the Commissioner of Lands/Registrar of titles and/or the National Land Commission to issue a title Deed to the Interested over plot No.8 (337/4377), measuring approximately 0.0385 Ha, a subdivision of LR No.337/1631 to the 1st Interested Party.

c) A permanent injunction to restrain the Defendants herein, their agents, servants, employees and/ or anyone claiming them from trespassing, selling, entering, encroaching, alienating, destroying and/or claiming any interest over Plot No.8 (L.R No. 337/43377).

d) Damages for trespass and demolition of property against the 1st, 2nd and 6th Defendants.

e) Costs of the suit.

8. The 2nd interested party seeks the following reliefs: -

a) Permanent injunction against the 1st and 2nd Defendants by itself/themselves, its agents, servants and / or employees from entering and/or in any manner disturb or interfere with quiet possession of the interested parties of all that land known as LR No.337 /1631 Mavoko Municipality.

b) The certificate of title issued to and in the name of the 1st Defendant in respect of LR No.337 /1631 Mavoko Municipality and title certificate issued to and in the name of the 3rd Defendant in respect of LR No.337 /1631 Mavoko Municipality both be cancelled.

c) Titles to be issued to the 2nd Interested parties based on deed plans issued by the Director of surveys in terms contained in paragraph 7 hereinabove.

d) Costs of the 2nd Interested parties in this suit be provided for.

Plaintiff's case.

9. The Society through its Chairman PW7 Paul Nyerere Ogori testified that the Society is registered under the Co-operative Societies Act. The Society is a land buying Society which buys huge parcels of land which it subdivides before it allocates the portion to its members. In 2009, the Society decided to buy the suit property which was being sold by Jena. The Society instructed its Advocate Eboso of Ebosos & Wandago Advocates to act for it in the transaction.

10. The Society's lawyer carried out a search which confirmed that the suit property belonged to Jena. An agreement for sale was then signed whereby the Society paid Jena 45,000,000/=. The Society's lawyer then embarked on the process of subdivision. The suit property was subdivided into 83 portions one of which was surrendered to the government and the rest given to its members who took possession. Some of the Society's members started constructing on their portions.

11. In the year 2010, Misori sued the Society in ELC 277 of 2010 claiming that it was the owner of the suit property. Later on in the year 2011, Asanyo went to the suit property in the company of police officers from Mlolongo Police Station who were in three Land Cruisers. There was a bulldozer which started demolishing the structures which had been erected on the suit property. When PW 7 Paul Nyerere Ogori was called to the scene, he found the demolition going on under supervision of the OCS Mlolongo Police Station in the presence of Asanyo.

12. When PW 7 sought to know on what basis the demolition was being carried out and whether there was a court order, the OCS Mlolongo Police Station told the PW7 that there was no court order but that he was protecting the rightful owner of the suit property. It is out of this act that the society filed this suit which was later amended to include the 2nd to 6th Defendants. The 1st and 2nd interested parties were also enjoined as interested parties.

1st and 2nd Defendants Case.

13. The case of Tripple Two and Asanyo was presented by Caroline Nyakiambori Makana who is one of the Directors of Tripple Two. She testified that Tripple Two was incorporated on 14th October 2010. In the year 2011, the Directors of Tripple Two were informed by an agent that there was land available for allocation in Mavoko Municipality area. Tripple Two then applied for allocation of the suit property. The suit property was allocated to Tripple Two vide a letter of allotment dated 28th May 2011.

14. The Directors of Tripple Two paid stand premium, rent and other charges amounting to Kshs. 3,594,848.50 as demanded in the allotment letter. When the officials of Tripple Two later went to the ground to fence the suit property, they found that some people had trespassed on to the suit property and had started constructing houses on the same. There was resistance by those in occupation who prevented the officials of Tripple Two from carrying on the fencing.

15. The Directors of Tripple Two sought to know the basis upon which the trespassers were claiming ownership of the suit property. It is at this time that they were informed that Jena which sold the suit property to the Society had forged title documents. They were further informed that Misori was also claiming the suit property based on forged documents.

16. It was found out that IR number 74968 which was in the title held by Jena was assigned to some two properties which had been amalgamated and assigned IR No.74968. These two properties were titles Nos. 48657 and 48870 which titles were in respect of LR Nos. 14270/6 and LR No/14270/7 which were in the name of Francis Kimani Muchiri . All the persons who are alleged to have signed the registration and correspondence leading to the registration of title held by Jena denied having done so.

17. The alleged signatures attributed to the officials from the Ministry of Lands were subjected to examination by a document examiner who found that the said signatures were not made by the officers who are alleged to have signed the documents. The Directors of Jena were charged in a criminal case in Kiambu Chief Magistrates' Court. The Director of Misori was also charged in Criminal case in Kiambu Chief Magistrates' Court after it turned out that the IR number on the grant purportedly issued to Misori belonged to land which was in Nakuru.

18. It also turned out that when Jena was purportedly allocated the suit property, the company had not been incorporated. The allotment is said to have been made on 21st January 1992 whereas the company was incorporated on 4th May 1998. It was further discovered that there were two companies which had been registered which bore the name of Jena. One company was incorporated on 29th November 1996, under registration number C 73908. The other company was registered on 4th May 1998 under registration number C 80836.

19. The Director of Tripple Two stated that the Society was aware that the suit property had issues but it went ahead to purchase the same and that therefore the society cannot claim to be an innocent purchaser for value without notice.

3rd Defendant's Case.

20. The third Defendant which is Misori in this case presented its case through its director Samuel Louis Karanja who testified that he was informed of the availability of the suit property by his nephew who lived near the suit property. In 1995, he applied for allocation of the suit property. He was successful and an allotment was given to him. He paid for the suit property in 1996. He took possession of the suit property after which he applied for subdivision. The subdivision scheme was allowed. He subdivided the suit property into 31 plots. He transferred 12 plots to a third party.

21. In 2009, the Society's members who claimed to have purchased the suit property trespassed into the suit property and started constructing. The society started harassing him by reporting him to police. He was forced to file Machakos ELC Case No. 277 of 2010 against the Society. Orders restraining the Society from interfering with the suit property were granted but the Society members defied the orders by proceeding to construct. He stated that he was asked to surrender the documents in support of Misori's title. The documents are still with the Criminal Investigation Department. He was later charged in court and the subdivisions which he had carried out were cancelled. He was later informed that the IR number which had been assigned to the title held by Misori was in respect of a property in Nakuru .

4th 5th and 6th Defendants Case.

22. It is the 4th , 5th and 6th Defendants case that the titles which were held by Jena and Misori were forgeries. The titles were never registered by the Lands officials who are alleged to have registered them. The searches which the society obtained were forged as the person who is said to have issued them denied doing so. Though her stamp number 025 was used, the stamp and the signatures on the search were found to have been forged by a document examiner. This evidence came out during the hearing of the criminal case against the directors of Jena.

23. The witnesses of the 4th, 5th and 6th Defendant stated that the IR No which was used in the title held by Jena belonged to two properties which had been amalgamated and had been assigned I R No. 74968 upon amalgamation. The I R No. on the title held by Misori that is IR No. 72197 belongs to LR No.1317/603 which is a plot in Nakuru which had been surrendered.

24. The deed plan which was used to generate title held by Jena was found to have been forged as it did not exist in the records at survey of Kenya. The witnesses of the 4th, 5th and 6th Defendants stated that the only genuine title which exists in their records is the one held by Tripple Two. The witnesses stated that Tripple Two applied for the suit property which was available and it was allocated the same after paying all the requisite monies which were required under the letter of allotment.

25. The witnesses stated that two Directors of Jena and one Director of Misori were charged with various criminal charges in Kiambu Chief Magistrates Court. The forged titles have since been expunged from the file at the lands office and as matters stand, the only title in the Lands Office is the one held by Tripple Two.

1st Interested Party's Case.

26. The 1st Interested party testified that he has a brother who was working at Kenya Bureau of Standards. His brother told him that a colleague of his who had purchased a plot which was part of the suit property was selling his portion. He went and entered into a sale agreement with the seller but the arrangement was that he pays the purchase money directly to the Society. There were subdivisions done and his plot was LR No.337/4377. He paid Kshs.583,000/= .

27. The sale agreement was dated 3rd February 2010. He took possession and obtained building approvals after which he started putting up a maisonnette which he completed and he is staying in it. On 24th August 2011, the OCS Mlolongo Police Station led a group of persons who came and demolished the perimeter wall around his house and other structures. He stated that the properties which were demolished are

valued at Kshs.1,000,000/= for which he seeks compensation from the Tripple Two, Asanyo and 6th Defendants.

2nd Interested party's case.

28. The 2nd Interested Party Peter Nzyimi Mutua testified on behalf of all members of the society who purchased their plots within the suit property. He testified that the Society members contributed money towards purchase of plots where they could put up houses for themselves. The Society purchased the suit property and allocated them their respective plots. They were taken to the ground where they were shown their plots. Some members started putting up their houses upon getting approval from Mavoko Municipal Council.

29. In August 2011, they were informed that the Tripple Two was claiming the land based on a title which they were issued with in 2011. This witness contends that the society purchased the suit property upon carrying out due diligence and confirming that Jena was the registered owner of the suit property. It is on the basis this evidence that they pray for the reliefs in their claim.

Analysis of evidence.

30. The Society filed its submissions dated 10th November 2020. Tripple Two and Asanyo filed submissions their dated 25th November 2020. The 4th, 5th and 6th Defendants filed their submissions dated 23rd November 2020. The 1st Interested Party filed submissions dated 25th November 2020. The 2nd Interested Party filed submissions dated 24th November 2020. Misori did not file any submissions. I have carefully gone through the evidence adduced by the parties herein as well as the submissions filed by the parties to this suit. The issues which emerge for determination are firstly who among the The Society, Tripple Two, and Misori holds a genuine title. Secondly, did Asanyo trespass into the suit property. Thirdly is the society an innocent purchaser for value without notice? Fourthly is the Society, Tripple Two, Misori, the 1st and 2nd interested parties entitled to their respective reliefs which they claim. Lastly which orders should be made on costs.

31. In my journey to determine which of the three titles are genuine, I am entirely in agreement with the reasoning of my brother Justice Munyao in the case of **Hubert L Martin and 2 Others Vs Margaret J.Kamar & 5 Others (2016) e KLR** where he stated as follows:-

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld”.

32. The title which was allegedly transferred to the Society was allegedly given to Jena which sold the suit property to the Society through a sale agreement dated 11th August 2009. The suit property was allegedly transferred to the Society on 1st September 2009. There is evidence on record that the title held by Jena which it transferred to the society was fraudulent. The parties who are alleged to have signed and registered the title denied doing so. The person who is alleged to have registered Jena's title is Roselinah Ndile Mule. This witness gave evidence and denied ever registering the title which Jena purported to transfer to the society.

33. The transfer which was allegedly registered by Mr Gachihi in favour of the society on 1st September 2009 was denounced by the said witness as a forgery. The signatures of M/s Mule and Mr Gachihi were subjected to analysis by a document examiner and were found to be forgeries. The examined signatures of those two witnesses were used in Kiambu Chief Magistrates' Court Criminal Case Number 2294 of 2011 wherein the directors of Jena were charged with various offences relating to the forged title held by Jena which was allegedly transferred to the society.

34. The signatures of M/s Mule and Mr Gachihi were also examined by Antipus Nyanjwa who was called by the society as a witness. Though this witness found that the signatures by M/s Mule and Mr Gachihi appearing on the title held by Jena were made by these two officers who were then working in the Ministry of Lands, he was categorical that his findings were not conclusive as he was only given photocopies of the title document. He stated that his findings would have been conclusive had he been given the original of the title document. He observed that a photocopy can be manipulated.

35. The suit property was allegedly allotted to Jena on 21st January 1992. As at 21st January 1992 when Jena purports to have been allocated the suit property, the company had not been incorporated. The company was incorporated on 4th May 1998. It is therefore not possible that a company which had not been incorporated would be allocated land in 1992 before being incorporated. One of Jena's directors Mr. Willy Kimutai Chepkwony while testifying tried to state that he and a friend of his had registered a business name called Jena Agencies and that it is this business name which was later converted to Jena. The evidence of this witness cannot be true because the allotment which was given to Jena clearly indicated that the allotment was to Jena Agencies Limited. In his recorded statement, this witness claimed that he had registered the business name of Jena Agencies in 1990. In his evidence before court, he claimed that he had reserved the name in 1990 and that incorporation was made pursuant to the reserved name on 4th May 1998.

36. The evidence by Mr Chepkwony was contradictory and cannot be believed. There was another company bearing the same name. This company was incorporated on 29th November 1996. Though one may not rule out a mistake in registration of the two names, it is clear that Mr Chepkwony was aware of the existence of the other Jena. Whereas the physical address of Jena of Mr Chepkwony is indicated as being on LR No.209/618 Kimathi Street, Victor House 4th Floor the company according to Mr Chepkwony has offices at Development House on

LR No.209/1292, Tom Mboya Street. It is curious that whereas the directors of the company incorporated in 1996 are different, the two companies operate from the same building that is Development House. This is a strong indication that Mr Chepkwony knew about the other Jena Agencies Limited.

37. The title held by Jena was registered on 7th September 1994. As at the time of registration, Jena had not been incorporated. It was incorporated on 4th May 1998. It is therefore no possible that a company which had not been incorporated could hold land in its name. In the case of **Charles Karaithe Kiarie & 2 Others Vs Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others (2013) eKLR**, the court of Appeal stated as follows: -

“Further, having found as a fact that the company did not exist when it was purportedly registered as owner of the property, we think the learned trial judge was right in holding that a non-existent company could not hold title”.

38. There is also evidence on record that the grant number in respect of the title purportedly held by Jena is in respect of two plots belonging to Francis Kimani Muchiri which were amalgamated and given IR No. 74968. The two plots which were amalgamated are LR Nos 14270/7 and LR No.14270/6. There cannot be two IR numbers in respect of two different properties. It is therefore clear that the title held by Jena which it transferred to the society was fraudulent.

39. The title does not exist in the Lands office. The title by Jena was placed in the file at the lands office clandestinely and when this was discovered, the fraudulent title together with the other fraudulent documents accompanying it were expunged from the file but were kept for use in evidence as was the case before the criminal case which faced the two directors of Jena and the evidence before this court.

40. There is evidence that the title held by Misoro is also a fraudulent title. The title did not emanate from the lands office. The grant number that is IR 72197 under which Misoro claims to own the suit property is in respect to LR No.1317/603 which is a plot in Nakuru which was surrendered. Mr Karanja who is the director of Misoro did not have a letter of allotment. He did not even have the alleged original title. He attempted to subdivide the suit property into 31 plots but this did not work. It was found out that he had processed fraudulent sub-divisions which were allegedly sanctioned by the Ministry of Lands but which were denounced by the Ministry of Lands officials. As in the case with title held by Jena, the forged title by Misoro was expunged from the file at the Ministry of Lands. The director of Misoro is facing a criminal case in Kiambu Chief Magistrates Court arising from the fraudulent title.

41. During the hearing, the director of Misoro, Mr Karanja conceded while being cross examined that he was aware that the IR No. on the grant of the title he claims to hold was for a property in Nakuru. He further stated that he was aware that Misoro's title together with the accompanying documents including the fraudulent subdivisions were expunged from the file at the Lands Office.

42. The evidence which was adduced by the witnesses who were working at the lands office is that the suit property had been allotted to a Mr Chepserem who did not accept the allotment. The said Chepserem is said to have died. As the suit property was available for allocation, the same was allotted to Tripple Two which went ahead to pay for the allotment which was given to it on 26th May 2011. The Company proceeded to pay Kshs.3,594,248.50 being stand premium and rent as well as other charges. The Company thereafter processed title which was issued to it on 17th June 2011. This is the only title which is in the records at the lands office as it was processed from the Lands Office.

43. The Society in its submissions urged the court to find that the titles which was held by Jena which sold the property to the Society be held to be the first in time and therefore the lawful one. The question of which title was the first to be registered does not arise. The title held by Jena and Misoro are forgeries. They are not registered in the lands office. It is therefore clear that this is not a case of double or triple registration which will call upon the court to hold that the first in time prevails. There is only one title which was properly registered. This is the title held by Tripple Two.

44. The deed plan which Jena purported to have was said to be non-existent at the survey offices. This is the deed plan in the title purportedly held by Jena which transferred their interest to the society upon purchase. There is a letter dated 28th July 2009 which was allegedly written by E O Otworu on behalf of the Commissioner of Lands. This letter was disowned by the alleged author. This is a letter which was addressed to the CID Athi River. The letter purported to confirm that the suit property belonged to Jena. This witness gave evidence in criminal case No2294 of 2011 as prosecution witness number nine. This letter was written before the society entered into a sale agreement with Jena.

45. There is yet another letter dated 17th July 2009 which is purported to have been written by EO Otworu and was addressed to the Town Clerk Mavoko Municipal Council. This letter purported to confirm that the suit property belonged to Jena. This letter was disowned by the alleged author. This goes to confirm the fact that Jena's directors were engaged in fraudulent activities. Aware that they did not have title to the suit property, which property was being claimed by Misoro as well, Jena decided to enter into a sale agreement with the society.

46. There is yet another letter which was alleged to have been written by Onyino Mukobe addressed to the Town Clerk Mavoko Municipal Council dated 21st October 2009. The letter purported to confirm that the suit property was owned by Jena and that it had been transferred to the society. This letter was disowned by the alleged author. Based on the letters which had been disowned, the CID Athi River purported to suggest that Jena was the true owner of the suit property and that Misoro's title was questionable. This is clear from their letter of 20th August 2009 addressed to the Town Clerk of Mavoko Municipal Council.

47. It is therefore clear that the titles which were held by Jena and Misoro were fraudulent. The only title which was genuine and emanated from the Lands Office is the one held by Tripple Two. The argument by the society, the interested parties as well as Misoro that the title held by Tripple Two was obtained contrary to the law has no basis. Processing title within a short time is not an indicator that the title is fraudulent. The suit property was available for allocation and it was allocated to Tripple Two which paid all the requisite fee required before title was processed in its name.

48. On the second issue as to whether Asanyo trespassed on to the suit property, there is no doubt that Asanyo went to the suit property in the company of Police from Mlolongo Police Station. There is no contention that Asanyo is related to either all or some of the directors of Tripple Two. Mr Asanyo may have gone there in his capacity as chairman of Tripple Two as some witnesses have claimed. This being the position, Mr Asanyo cannot be held liable for trespass to a property which was legally owned by Tripple Two.

49. The fact that some of the society members and the 1st Interested Party were in possession of the portions of the suit property does not mean that whoever went there after them is a trespasser. One can only be a trespasser on a property when there is evidence that he/she has no interest recognizable in law in the property. It has been demonstrated hereinabove that the title which the society had upon transfer was not a good title. The society or its members including the 1st Interested party who purchased his portion from a member of the society cannot claim to have acquired a good title as will come out clearly when I deal with the issue of whether the society is an innocent purchaser for value without notice. It is therefore clear that Asanyo was not a trespasser in the suit property. He went there on behalf of Tripple Two which was the registered owner of the suit property.

50. The third issue for determination is whether the society was an innocent purchaser for value without notice. In the case of Katende V Haridar & Company Limited [2008] 2 E.A.173 the Court of Appeal of Uganda stated as follows: -

*“For the purposes of this appeal, it suffices to describe a **bona fide** purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the **bona fide** doctrine, ... (he) must prove that:*

- (a) he holds a certificate of title;*
- (b) he purchased the property in good faith;*
- (c) he had no knowledge of the fraud;*
- (d) he purchased for valuable consideration;*
- (e) the vendors had apparent valid title;*
- (f) he purchased without notice of any fraud;*
- (g) he was not party to any fraud.”*

51. In the case of Sir John Bagire vs Ausi Matovu, Ugandan Civil Appeal No.7 of 1996 which was cited in the Katende Vs Haridas Case (supra), the Court of Appeal stated as follows: -

“...lands are not vegetables that are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only of the land but also of the seller before purchase.”

52. In the same case of Katende Vs Haridas Case (supra), the following dictum in the case of Mpagazihe & Another vs Nchumisi (1992-93) HCB 148 was quoted as follows:-

“a purchaser who without investigating whether his predecessor had any title or Power of Attorney to sell the land could not be held as bona fide purchaser.

53. In the instant case the evidence which was adduced by the society’s lawyer Bernard Mweresa Eboso who is now a Judge is that as part of his due diligence, he wrote to the Registrar of Companies who responded to his letter and confirmed the directorship of Jena. Further evidence on behalf of the Society was given by the Chairman of the Society Paul Nyerere Ogori who testified that the Society carried out a search at the Registrar of Companies which showed that there were two companies bearing the name of Jena Agencies Limited but which had different directors. The Society then advised its advocate to carry out further investigations on the two companies. It is the society’s contention that its advocate called the directors of the two companies and when the directors of one of the Jena companies indicated that they had no interest in the suit property, the society decided to go ahead with the purchase from the Jena group whose directors were Willy Kimutai Chepkwony and Abdalla Kako Manani who was later replaced by William Ochieng Ogotu.

54. I doubt whether there was due diligence done as the Society’s witness Mr Paul Nyerere Ogori claims. If due diligence was done as he claims, it would have raised doubts since the incorporation of Jena was after the company had been registered as owner of the suit property. The only due diligence which appears to have been done is a search from the Lands Office which search later on turned out to have been a forgery. The person who is said to have signed the search denied doing so. This is Sarah Maina whose signature and stamp used in the search were subjected to forensic examination and were found to be forgeries. This evidence emerged from the criminal case against the directors of Jena at Kiambu Chief Magistrates’ Court.

55. The Society appears to have relied on the findings of the CID from Athi River Police Station who wrote and confirmed that the suit property belonged to Jena. This confirmation was before the society entered into a sale agreement with Jena. This shows that the society was aware that there were serious doubts on the title held by Jena but the society nevertheless went ahead to purchase the property.

56. What is surprising and which shows that the Society officials were closely working with the directors of Jena is that despite the directors

selling the suit property for Kshs.45,000,000/=, the society again went ahead to allocate the directors of Jena plots as per the society's letters to the two directors of Jena. Willy Kimutai Chepkwony was allocated Plot No. 22 (LR No.337/4354) whereas William Ochieng Ogutu was allocated Plot No.46 (LR No.337/4354). It is not known for what purpose they were being given plots yet they were the ones who had sold the larger land to the society.

57. The conduct of the officials of the society as shown through their actions point out to the possibility that the officials were in the picture of the fraudulent actions of the directors of Jena. The society cannot therefore claim to be an innocent purchaser for value without notice. There was every reason to doubt the title held by Jena, which title was registered in Jena's name even before Jena was incorporated. Paul Nyerere Ogori testified that he did not deal with Mr Otworu but that he met him in town once. The question then is how or why were the two meeting if there was nothing unusual going on.

58. Even when the Directors of Jena were charged in Court, the society officials who testified maintained that the Society did not have anything against them as they had given them possession of the land which they purchased and that the society was not the complaint in the criminal case.

Conclusion.

59. From the analysis hereinabove, it is clear that none of the reliefs being claimed by the society can be granted. There can be no injunction against an owner of a property. The suit property belongs to Tripple Two. The suit property does not belong to the society. There is therefore no basis upon which this court can make a finding of trespass or Misori. The title to Tripple Two cannot be cancelled as the same was obtained in a legal way. On the other hand, there is no title held by Misori. What Misori has just like the society are mere paper titles which are forged. The title by Misori is not in the records of the Lands Office and there cannot be any order to cancel that which is not in the Lands Office. There can be no order directed against the 5th Defendant to issue title to the society as the society did not get any good title from Jena because Jena had no title to pass. What Jena had is a forged title which does not exist in the records at the Ministry of Lands. The Society cannot even retain the suit property as it has no title and was not an innocent purchaser of the suit property.

60. The evidence which was adduced shows that the title held by Misori was a forgery. The said title does not exist in the records at the Lands Office. The forged title which found its way into the records was expunged and does not exist. There is no basis upon which the title held by Tripple two can be cancelled. The society has no title capable of being cancelled. What the society holds is a piece of forged paper in the form of a title. Tripple Two and Asanyo cannot hand over land which lawfully belongs to Tripple Two to Misori.

61. The 1st Interested Party obtained his land from a member of the society. The society which allocated portions of the suit property to its members has been found to have had no good title. There is therefore no basis upon which this court can grant the reliefs claimed by the 1st Interested Party. The society did not pass any good title to the person who sold the portion to the 1st Interested Party. There is therefore no basis upon which the 1st Interested party can claim damages for trespass. The sum of Kshs.1,000,000/= which the 1st Interested Party claims as damages for a demolished perimeter wall was not proved as required.

62. The 2nd Interested Party who sued on behalf of the members of the Society who had been given plots in the suit property sought for an injunction against Tripple Two and Asanyo . The suit property belongs to Tripple Two and there is therefore no way Tripple Two or even Asanyo can be enjoined from a property which belongs to Tripple Two. Equally there is no basis upon which the title held by Tripple Two can be cancelled. Tripple Two obtained its title in a lawful manner. The title held by Misori is a forgery. It does not exist in the records at the Lands Office. There is therefore nothing to cancel and in any case just as Misori, the title which the members of the society derived from the society was a forged title. The subdivisions which were carried out were illegally carried out and they cannot form a basis for issue of titles in favour of the members of society who are being represented by the 2nd Interested Party.

63. In ELC 227 of 2010, Misori sought for a permanent injunction against the society and for a declaration that the society's acts of trespass into the suit property were unlawful. As has been demonstrated hereinabove, Misori did not have title capable of conferring any interest on it as to be the basis of any order of injunction or claim for damages for trespass.

Disposition.

64. From the analysis hereinabove, it is clear that the Plaintiff's case is misconceived. The same is dismissed with costs to the Defendants. The 3rd Defendant's claim by way of counter-claim is also dismissed with costs to the Defendants. The Plaintiff's suit against the Defendant in ELC 277 of 2010 is dismissed with costs to the Defendant. The 1st Interested Party's claim is dismissed with costs to the 1st and 2nd Defendants. The second Interested Party's claim is dismissed with costs to the 1st and 2nd Defendants. The suit property is lawfully owned by 1st Defendant in ELC 225 of 2011.

Dated, Signed and Delivered at **Nairobi** on this **16th** day of **June 2021**.

E. O. OBAGA

JUDGE

In the Virtual presence of:-

Mr Anyoka for Plaintiff

Mr Munyalo and M/s Mukami for 1st and 2nd Defendants

Mr Kamau for 4th, 5th and 6th Defendants

M/s Ngode for 1st Interested Party

Court Assistant: Okumu

E. O. OBAGA

JUDGE