



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 37 OF 2002

ALI MOHAMED ALI.....PLAINTIFF

VERSUS

ABDULHAMID MOHAMMED ALI SAID.....1ST DEFENDANT

ABDUL MAJID FARAJ SAID BARAK.....2ND DEFENDANT

FATHIYA HADI AHMED SALIM.....3RD DEFENDANT

NASSIR ALI ABDALA.....4TH DEFENDANT

AISHA OMAR ABDALLA.....5TH DEFENDANT

THE REGISTRAR OF TITLES.....6TH DEFENDANT

JUDGMENT

(Plaintiff and 1st defendant being jointly registered as proprietors of land; parties executing powers of attorney to allow the other party to sell and account for the proceeds; plaintiff claiming that 1st defendant sold plots but did not account; no pleadings and evidence tendered of what was sold and not accounted for while the power of attorney was still in force; plaintiff further claiming that the sale to the 2nd and 3rd, and 4th and 5th, defendants was done after the revocation of the power of attorney and thus fraudulent; 2nd and 3rd, and 4th and 5th, defendants claiming that their dealings were before the revocation of the power of attorney and that they are innocent purchasers for value; evidence produced showing that the transfers were done after the revocation of the power of attorney; Section 51 Registration of Titles Act, barring registration of instruments after revocation of power of attorney; Registrar of Titles and the 1st, 2nd and 3rd, and 4th and 5th, defendants, acted fraudulently by proceeding to register the transfer instruments after the revocation of the power of attorney; plaintiff entitled to prayer for cancellation of the titles of the 2nd and 3rd, and 4th and 5th, defendants and to have titles restored in the previous name; costs awarded to the plaintiff jointly and/or severally)

A. Introduction and Pleadings

1. This is now an old suit that was commenced through a plaint filed on 8 February 2002. That plaint was amended twice, resting with the further amended plaint dated 22 October 2005 and filed on 25 October 2005. In the further amended plaint, the plaintiff pleaded that he and the defendant are brothers and heirs of the estate of Ahmed Mahamood Bin Ali, which estate comprised of the land parcels identified as Subdivision Nos. 453 and 866 of Section I Mainland North. It is pleaded that upon completion of the succession procedure, the parties became registered as owners in equal shares of 15 subdivisions arising from the estate, being the land parcels identified as Subdivisions No. 9082, 9083, 9084, 9085, 9086, 9087, 9088, 9089, 9094, 9098, 9099, 9103, 9104, 9105, and 9106 (all original No. 453/1 Section I Mainland North). It is pleaded that by mutual agreement the parties decided to rent and sell the said parcels of land to willing third party purchasers, and that to facilitate the sale during the absence of either party, each party registered a power of attorney giving the other unlimited powers to sell and receive the proceeds of sale, and transfer what was sold to the purchaser/s, on the understanding that the proceeds of sale less expenses will be held in trust for either party in his absence. It is pleaded that pursuant to the above understanding, the plaintiff registered a power of attorney dated 12 July 1996 in favour of the defendant allowing the defendant to deal with the suit properties. It is pleaded that between 15 July 1996 and 28 May 1997, the plaintiff was away in Yemen and that using the donated power of attorney, the defendant sold some plots which were not specified, and put the money to his exclusive use. The plaintiff further pleaded that while the power of attorney had been revoked, the 2nd and 3rd defendants bought from the 1st defendant the Plot No. 9084, and the 4th and 5th defendants bought the Plot No. 9086, and that the 6th defendant (the Registrar of Titles) in complete disregard of the revoked power of attorney gave effect to the transfers. The plaintiff contends that the transfer of the plots to the 2nd and 3rd, and 4th and 5th defendants, were fraudulent, inter alia by

disregarding the revocation of the power of attorney. In the further amended plaint, the plaintiff has asked for the following orders :-

(a) An order that the 1st defendant does deliver a true account of the proceeds of sale of the parcel of land mentioned in paragraph 8 (of the plaint) and pay the plaintiff such money as shall be due and payable together with interest thereon at court rates from the dates of sale to date of payment in full.

(b) An order directing rectification of the register by cancellation of the title deeds issued to 2nd, 3rd, 4th and 5th defendants in respect of subdivision No. 9084/I/MN (Original No. 453/1) and subdivision No. 9086 (Original No. 9081/6) Sec I MN.

(c) A permanent order of injunction restraining the 1st defendant either by himself, his servants, and/or agents from selling, transferring or in any other way disposing off the land Subdivision No. 9084 9087 (Original NO. 453/1) Section I Mainland North or any part thereof or at all.

Further and in the alternative

(d) The 1st defendant does transfer the remaining parcels of land known as Subdivision No. 9084 (original NO. 453/1) Sec I Mainland North and Subdivision No. 9087 (Original No. 453/1) Section I Mainland North, and subdivision No. 9086 (Original No. 9081/6) Sec I MN absolutely to the plaintiff failing to which the Deputy Registrar of this Honourable Court does execute all necessary documents leading to such transfer.

(e) Any other or further orders as the court may deem fit and just in the circumstances.

(f) Costs of the suit and interest thereon at court rates.

2. The 1st defendant entered appearance and filed defence. In it, he pleaded that if any plots of land were sold, the same were sold with full knowledge and disclosure of the consideration thereof to the plaintiff. The 1st defendant denied the allegations of non-disclosure and conversion of the consideration. He further pleaded that the suit is misconceived as the power of attorney is revoked.

3. The 2nd and 3rd defendants, Abdulmajib Faraj Said Barak and Fathiya Hadi Ahmed Salim, entered appearance and filed defence. In it, they pleaded inter alia that the 1st defendant with full power and authority of the plaintiff sold and transferred the Plot No. 9084 to them for a consideration of Kshs. 200,000/=. They denied that they purchased the land when the power of attorney had been revoked and they denied any knowledge that such power of attorney had been revoked. They pleaded that if there was any revocation, then it was done after the plot No. 9084 had been sold and transferred to them. They further pleaded that the plaintiff never registered the revocation of the power of attorney against the title as required by law or at all. They closed their pleading by contending to be innocent purchasers for valuable consideration without notice and that they hold good title to the Plot No. 9084.

4. The 4th and 5th defendants appointed counsel and filed a joint statement of defence. I have actually seen two defences filed on behalf of the 4th and 5th defendants. The first was filed on 13 February 2006. In it, the 4th and 5th defendants confirm purchasing the Plot No. 9086 for a consideration of Kshs. 150,000/=. They denied that the purchase was done after the revocation of the power of attorney and denied any knowledge of it. The second defence was filed on 22 August 2010. In it, the 4th and 5th defendants aver that through a sale agreement dated 18 March 1997, the plaintiff and the 1st defendant sold to the 4th and 5th defendants the Plot No. 9086 with vacant possession. It is pleaded that there were some tenants in occupation and that the 4th and 5th defendants paid a sum of Kshs. 500,000/= to negotiate with the said tenants to give vacant possession. In total therefore, they paid the 1st defendant Kshs. 650,000/= towards the purchase of the land and obtaining vacant possession. They similarly pleaded that they purchased the land before the revocation of the power of attorney and that they were not aware of any alleged revocation, and further, that any such revocation was not registered against the title.

5. It is not regular to file two defences but I will waive the technicality and consider the two as the combined defence of the 4th and 5th defendants.

6. On behalf of the 6th defendant, a defence was filed on 16 July 2018, interestingly, about 16 years since the suit was filed. In it, the 6th defendant denied any fraud or taking part in any fraudulent exercise.

B. Plaintiff's Evidence

7. The plaintiff adopted his witness statement as his evidence in chief. In it, he stated inter alia that he and the 1st defendant are brothers and heirs of the estate of Ahmed Mahmood Bin Ali. He stated that on 3 November 1995, he and the 1st defendant became registered as proprietors of the Plots No. 9082, 9083, 9084, 9085, 9086, 9087, 9088, 9089, 9094, 9098, 9099, 9103, 9104, 9105, 9106 all being subdivisions of the Plot No. 453/I/MN. He reiterated what was pleaded in the plaint, that they had a mutual agreement to sell and registered powers of attorney to facilitate the sale with the proceeds of sale being held in trust for either party in his absence. On his part, he registered a power of attorney dated 12 July 1996 in favour of the 1st defendant which was registered as PA No. 8174 on 29 August 1996. He stated that while he was in Yemen, between 15 July 1996 and 28 May 1997, the 1st defendant sold the land but did not put the money into their joint account in Barclays Bank Mombasa. Instead, he put it in his sole account. On 17 September 1997, he revoked the Power of Attorney. He stated that at that time, the Plots Nos. 9084, 9086, and 9087 had not been sold. He continued to state that subsequently on 2 March 1998, the 1st defendant sold the Plot No. 9084 to the 2nd and 3rd defendants, and executed the transfer on the strength of the power of attorney already revoked. He stated that he (1st defendant) also fraudulently sold the Plot No. 9086 to the 4th and 5th defendants, and that on 10 March 1998, the application (for transfer) was rejected for registration. He claimed that the 4th and 5th defendants colluded with the 6th defendant to back

date the transfer and had it registered on 6 July 1998. He stated that a postal search done on 24 July 2001, showed that he and the 1st defendant were still the registered owners. He wished to have all the plots of land sold after he had revoked the power of attorney returned to him and the 1st defendant and the titles of the 2nd to 5th defendants cancelled. The plaintiff also orally testified in court along the same lines as provided in his statement.

8. Cross-examined by counsel for the 4th and 5th defendants, he stated that the 1st defendant is his younger brother. He affirmed that they owned the plots jointly and that they had agreed that either party could sell. He affirmed that the 1st defendant had his authority to sell while he was out of the country. He however revoked the power of attorney on 17 September 1997. He stated that the revocation was registered on 22 September 1997. He did not have a search to show that the revocation was noted in the title to Plot No. 9086. He did not get any order from court to bar the registration of transfers signed before the revocation of the power of attorney. Neither did he give notice of revocation of the power of attorney to the 4th and 5th defendants. Cross-examined by counsel for the 6th defendant (Registrar of Titles), he testified that he had nothing to show that the 6th defendant fraudulently registered the suit properties.

9. With the above evidence, the plaintiff closed his case.

C. Defence Evidence

10. The 1st defendant in his evidence in chief affirmed that the plaintiff is his brother. He claimed not to know why the plaintiff has sued him. When the case was explained to him, he alleged that in the year 2004, the plaintiff broke into his house and took all his things and files. He swore that he gave the plaintiff all his money. Cross-examined by counsel for the plaintiff, he agreed that the understanding was that the sale proceeds be shared equally. He contended that he did give the plaintiff his share but he had no document to demonstrate that he gave him any money. He stated that they were operating on trust. He claimed that the plaintiff did not inform him that he had revoked the power of attorney.

11. DW-2 was the 2nd defendant who testified on his own behalf and on behalf of the 3rd defendant who is his wife. He also adopted his witness statement as his evidence in chief. In it, he stated that the 1st defendant sold to them the Plot No. 9084 at Kshs. 200,000/=. He stated that the sale was done while the power of attorney was still in force and no power of attorney was registered against the title. Cross-examined by counsel for the plaintiff, he testified that the transaction was in 1998. With the above evidence, the 2nd and 3rd defendants closed their case.

12. DW-3 was Nassir Ali Abdalla, the 4th defendant. He gave evidence on his own behalf and on behalf of the 5th defendant (his wife). He also had a witness statement which he relied upon as his evidence in chief. In it, he stated inter alia that on 18 March 1997, they purchased the Plot No. 9086 from the 1st defendant and the property was transferred vide a transfer dated 19 March 1997. He stated that if the power of attorney was revoked on 22 September 1997, then this was long after the sale agreement and registration of the transfer on 19 March 1997. He stated that in total he paid Kshs. 650,000/= for the sale and for removal of tenants on the land. He got vacant possession in June 1998. Cross-examined by counsel for the plaintiff, he testified that he paid the money in full at once but he got receipts dated 14 April 1997 and 11 June 1998 later. With that evidence, the 4th and 5th defendants closed their case.

13. The 6th defendant did not call any witness.

14. I invited counsel to file written submissions but only counsel for the plaintiff and counsel for the 2nd and 3rd defendants filed submissions. I have taken note of these before arriving at my decision.

D. Analysis and Decision

15. I will start by saying that parties are bound by their pleadings. I have looked at the further amended plaint filed on 25 November 2005 which is now the basis of the plaintiff's case. I already set out the prayers in that further amended plaint in the introduction part of this judgment. The first prayer is for an order directed at the 1st defendant for him to deliver a true account of the proceeds of sale of the parcel of land mentioned in paragraph 8 of the plaint and to pay the plaintiff such money as shall be due and payable together with interest from the date of sale to the date of payment. Paragraph 8 of the Further Amended Plaint states as follows :- *8. For the period between 15th July, 1996 and 28th May, 1997 or thereabouts while the plaintiff had travelled to Yemen the 1st defendant did sell and put to his exclusive use the proceeds thereof the following parcels of land for an undisclosed amount of money using the powers donated by the plaintiff in the said power of attorney.*

16. Paragraph 8 of the Further Amended Plaint does not specify nor give any particulars of the parcels of land said to have been sold for an undisclosed amount of money and for which the plaintiff is seeking accounts from the 1st defendant. In addition, the plaintiff did not lead any evidence of any sales of plots other than the sales of the plots Nos. 9084 and 9086 to the 2nd and 3rd defendant, and to the 4th and 5th defendant, respectively. It is not for the court to fill in gaps for a litigant. If the plaintiff wished to have a statement of accounts from the 1st defendant, then he needed to specify the particular sales, and for which plots that he needed to have a statement of account. Further, he ought to have brought some evidence that these plots were sold, and indeed, the selling price of the plots would have been easily obtainable from the Land Registry. The court cannot simply tell a party, "give a statement of account" without knowing what sort of accounts are to be tabled, for if no statement is provided, the court cannot speculate on the amount of money lost, and cannot appoint an arbitrary figure to cover the undisclosed accounts. If the plaintiff is to succeed, he needed to provide a basis for his claim, and this would have been provided by him stating what has been sold, and for how much, and then seek accounts based on that. I repeat, that without being particular as to the plots claimed to have been sold, and for which accounts are required, and without demonstrating what plots were sold and for how much, or even their value, I am unable to make any order of accounts as against the 1st defendant. The plaintiff cannot therefore succeed in prayer (a) of the plaint.

17. Prayer (b) of the plaint seeks orders for the cancellation of the titles issued to the 2nd, 3rd, 4th and 5th defendants in respect of the Plots No. 9084 and 9086. It is not in contention, and it is in fact common ground, that these two plots were owned by the plaintiff and 1st defendant jointly. There is also consensus that the two agreed to have the plots sold and they were to share the proceeds thereof. To facilitate this, the plaintiff did donate to the 1st defendant a power of attorney which is dated 12 July 1996 and registered on 27 August 1996. The power of attorney was revoked on 17 September 1997 and the revocation instrument registered on 22 September 1997. It therefore means that the 1st defendant could deal with the properties only up to 22 September 1997. The defence of the 2nd and 3rd, and the 4th and 5th, defendants, is that their dealings were before the revocation of the power of attorney. They also argue that the revocation of the power of attorney was not registered in the title and they therefore dealt with the 1st defendant in good faith as innocent purchasers for value and thus have good title to the land.

18. My first task will be to analyse and determine whether the 2nd and 3rd, and the 4th and 5th defendants, have demonstrated that their dealings were within the time that the power of attorney was still in force. I will start with the position of the 2nd and 3rd defendants who purchased the Plot No. 9084. I have looked at their evidence from the witness statement to the oral evidence given in court. All that they say is that they purchased the land whilst the power of attorney was in force and that they were duly issued with a certificate of title. That certificate of title was not produced in evidence and that would have shown exactly when the transfer in their favour was done. Neither did the 2nd and 3rd defendants produce the sale agreement or the transfer instrument to show that these were done before the revocation of the power of attorney. So too, no proof of payment was given and no date provided on when payment of the purchase price was ever made. In his evidence in court, DW-2 (the 2nd defendant) stated, without giving any specific date, that their transaction was in the year 1998. Well, if the transaction was in the year 1998, then it was certainly after the revocation of the power of attorney which was done on 22 September 1997. In other words, in the year 1998, the 1st defendant had no power to deal on behalf of the plaintiff, and any dealings needed to be done directly with the plaintiff and the 1st defendant, and not solely with the 1st defendant. The plaintiff in his evidence, produced the transfer instrument which transferred the Plot No. 9084 to the 2nd and 3rd defendants. I can see that the transfer is dated 2 March 1998 and was registered on 3 March 1998. This is a date coming after the revocation of the power of attorney. This bit of evidence was not controverted by the 2nd and 3rd defendants. It is therefore apparent that the dealings between the 1st defendant and the 2nd and 3rd defendants were done after the revocation of the power of attorney.

19. Let me now turn to the case of the 4th and 5th defendants. They also claim that their transactions were done before the revocation of the power of attorney. To support their position, they produced a sale agreement which bears the date 18 March 1997, two receipts dated 14 April 1997 (for Kshs. 500,000) and 11 June 1998 (for Kshs. 150,000), a cheque of Kshs. 300,000/= dated 18 March 1997, a transfer instrument dated 19 March 1997, a copy of the certificate of title, and a copy of search. I have scrutinised all these documents. I cannot tell for sure whether the date of 18 March 1997 in the sale agreement is correct for a sale agreement is capable of being back-dated. But let us assume that the sale was actually entered into on 18 March 1997. The completion date noted in the said agreement is 27 March 1997 and the purchase price is said to be of Kshs. 150,000/=. I have no evidence of payment of the purchase price on or before 27 March 1997. What the 4th and 5th defendants have produced are receipts dated 14 April 1997 and 11 June 1998. The receipt of 14 April 1997 is for Kshs. 500,000/= and it says that it is payment of "soled (sic) Plot No. 9086." It is not very clear why an amount of Kshs 500,000/= and not Kshs. 150,000/=:, which is what is in the sale agreement, is being paid. There was explanation in the statement of defence that Kshs. 500,000/= was paid for tenants to vacate but this does not quite wash with me. This amount of money was far much more than the purchase price. If at all such a significant amount of money was to be expended, then you would expect that this be incorporated in the agreement of sale, or there be a subsequent separate agreement addressing the issue. In any event, why is one paying for tenants to vacate? One would imagine that tenants are an investment and they bring income so you wouldn't be paying them to vacate. Indeed, the 4th defendant stated that he does not live on this land, so it doesn't make sense to me, and it was not explained, why he would pay, more than three times the value of the land, to have tenants vacate, and what advantage he would have received by having tenants vacate the land. It just doesn't add up for me. But let me leave that aside for the moment and return to the receipts. The other receipt as I have mentioned is dated 11 June 1998 for Kshs. 150,000/=. This payment is certainly coming after the revocation of the power of attorney. There was a copy of cheque produced of Kshs. 300,000/= dated 18 March 1997 but there is no proof that this cheque was cashed and it could very well just be a dummy cheque. There would have been nothing easier than to provide a statement of account to show that this cheque was actually cashed. In any event, there is no receipt issued that is dated 18 March 1997.

20. Apart from the above there are serious question marks as to the actual time of the transfer. Although DW-3 in his evidence claimed that the transfer was done on 19 March 1997, this cannot be true. I have looked at the transfer instrument. It clearly shows that it was registered on 11 March 1998 at 10.30am as entry No. 27927/2. This document speaks for itself and overrides the oral evidence of DW-3 that the transfer was effected on 19 March 1997. There are a few other issues with that transfer that vindicates the plaintiff's claim that the same is a fraud and that there were attempts to have it back-dated. The instrument is stamped as received on 6 July 1998 which again differs with the entry of 11 March 1998. The title produced by the 4th defendant shows that the registration in their favour was on 6 July 1998. The dates of 19 March 1998 and 6 July 1998 do not tally. However, for our purposes, it doesn't matter, for whatever the case, the instrument of transfer was certainly registered after the revocation of the power of attorney and not before. In any event, I do not see how the 1st defendant would have transferred the property on 19 March 1997, one day after the sale agreement of 18 March 1997, and without having been paid a cent, for the payments were made way after this date. It wouldn't make sense for a seller to transfer property without first having been paid.

21. Both 2nd and 3rd, and 4th and 5th defendants, have tried to make heavy weather of a claim that the power of attorney was not registered against the title and therefore they are protected. I do not buy that argument. First, I have no evidence that the power of attorney was ever registered against the title in the first place so that the 2nd – 5th defendants can have a basis to argue that whatever was registered in the title had not been deregistered by the time they were lodging their transfer instruments and that the entry was there and that they relied on it. On my part, I see nothing wrong with the revocation of the power of attorney and that revocation bound the whole world. The power of attorney was registered as a general power of attorney. There is registration of the revocation meaning that any person exercising due diligence would have found out that the power of attorney was revoked on 22 September 1997. If anybody went to the office of the Registrar of Titles to find out whether the power of attorney was still valid, they would have discovered that it had already been deregistered and would not proceed to transact. In fact, it appears as if the 4th and 5th defendants were aware of the deregistration for I have seen evidence of an endorsement by the Land Registrar on the transfer of the Plot No. 9086, stating as follows :-

“I’m unable to register the transfer because the said power of attorney CRP/A 8174 has already been revoked under revocation of power CRP/A8539.”

Given that position, how can the 4th and 5th defendants claim that they were not aware of the revocation of the power of attorney?

22. The 2nd – 5th defendants were aware that the power of attorney had been revoked, and even if they were not aware, due diligence would have provided them with evidence that the power of attorney had been revoked.

23. In my view, Section 51 of the Registration of Titles Act (repealed) applies. It was drawn as follows :-

51. A power of attorney may be revoked by an instrument of revocation in form N in the First Schedule, and after the registration of revocation of the power the registrar shall not give effect to any transfer or other instrument signed pursuant to that power.

24. It goes without saying that once the power of attorney was revoked, then it could not be acted upon, and in fact, Section 51 above is explicit, that after the registration of revocation of the power, the registrar shall not give effect to any transfer or other instrument signed pursuant to that power. It therefore doesn’t help the 2nd – 5th defendants to argue that the documents had been signed prior to the registration of the power of attorney, and as I have demonstrated above, the 2nd – 5th defendants cannot plead in their favour that they were ignorant of the revocation of the power of attorney. I will reiterate, that simple due diligence would have disclosed that the power of attorney was already revoked. Neither can the 2nd – 5th defendants try to argue that the plaintiff did not obtain a court order to bar registration of instruments after the revocation of the power of attorney for Section 51 above is self-executing. It doesn’t need a court order to stop the Registrar from registering dealings based on a revoked power of attorney. The Registrar of Titles was the one who registered the power of attorney and was aware that he could not register any instrument based on the revoked power of attorney. He thus acted in clear breach of the provisions of Section 51 of the Registration of Titles Act, Cap 281 (repealed) above. That act, of registering an instrument, when he knew that the instrument was based on a power of attorney that had been revoked, was a clear act of fraud.

25. In his submissions, counsel for the 2nd and 3rd defendants submitted that the threshold of proving fraud is high and referred me to the case of *Benson Wandera Okuku vs Israel Were Wakho (2020) Eklr*. I have no issue with the dictum that allegations of fraud need to be strictly proved, but in the case at hand, I am persuaded that fraud has been duly proved to the required standard as I have demonstrated above.

26. There was argument that the 2nd – 3rd, and 4th and 5th defendants, are innocent purchasers for value and need thus to be protected. Ms. Kariuki, learned counsel for the plaintiff, in her submissions, referred me to the case of *Francis Mburu Kamau vs Methi & Swani Farmers Cooperative Society Limited & 5 Others (2019) Eklr*, where the court (Kemei J) gave an exposition on the question of an innocent purchaser for value. The court referred inter alia to the case of *Samuel Kamere vs Land Registrar (2015) eKLR* where the Court of Appeal stated as follows :-

“in order to be considered a bona fide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.”

27. Going by the above dictum, the 2nd and 3rd, and the 4th and 5th defendants, do not meet the test of bona fide purchaser for value, for I have pointed out, and I will repeat, that simple due diligence would have shown that they were relying on a power of attorney that has already been revoked. They are thus not protected under the doctrine of innocent purchaser for value.

28. The long and short of the above is that the transfers in favour of the 2nd and 3rd, and 4th and 5th, defendants, to the Plots Nos. 9084 and 9086, were done illegally and fraudulently. These transfers have to be revoked following the provisions of Section 23 of the Registration of Titles Act (repealed) which was in force at the time the transactions took place and the time this suit was filed. It provided as follows :-

23. (1) 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.

29. The 2nd and 3rd, and 4th and 5th defendants, cannot escape the tag of being parties to the fraud. I have shown that they were purportedly relying on a power of attorney which they knew, or ought to have known, was revoked, and could not transfer any interest in the properties that they were purchasing. Their titles are thus impeachable.

30. Given the foregoing, I am persuaded that the plaintiff has demonstrated that he deserves the order for the cancellation of the titles of the 2nd and 3rd, and the 4th and 5th defendants, to the Plots No. 9084 and 9086. I thus proceed to make the order that the register of the titles to the Plots No. 9084 and 9086 be rectified by cancelling the registration of the 2nd and 3rd, and 4th and 5th defendants as proprietors thereof, and title be restored into the names of the plaintiff and the 1st defendant as the position was before the registration of the 2nd and 3rd and 4th and 5th defendants. The 2nd and 3rd, and the 4th and 5th defendants, now no longer having any interest in the land, and must forthwith vacate and give vacant possession of those two properties to the plaintiff within 30 days from the date hereof. The plaintiff was deprived of the use of this land for a considerable amount of time and I would have readily awarded the plaintiff mesne profits, or general or special damages, if he had pleaded the same. But he neither pleaded the same, nor gave any evidence of such. I started my analysis by saying that parties are bound by their pleadings, and in absence of pleading and proof, I am afraid that I am unable to make any award for mesne profits or

damages, and the plaintiff will thus need to be content with the order of restoration of title. It will be seen that I have granted prayer (b) of the plaint.

31. Prayer (c) of the plaint seeks an order of permanent injunction to restrain the 1st defendant from selling or transferring or disposing the Plots Nos. 9084, and 9087. I have already made orders in respect of the Plot No. 9084. On the plot No. 9087, I have no evidence of any disposition having been entered into in respect of this plot. In fact, I was not shown any evidence of the title or what is registered in that title. I am unable to make orders in a vacuum and I will disregard prayer (c) of the plaint. In any event, the power of attorney is already revoked and pursuant thereto the 1st defendant has no mandate to sell without the authority or involvement of the plaintiff. I will leave it at that.

32. Prayer (d) is drawn in the alternative, and seeks transfer of the Plots No. 9084, 9087, and 9086. I don't see the basis of this prayer for I have already dealt with the registration of the plots No. 9084 and 9086, and already mentioned that I have nothing on the Plot No. 9087.

33. There is a prayer for other further orders but none are specified and counsel for the plaintiff in her submissions did not ask for any additional orders. I am also unable to see what other orders to issue in addition to the above.

34. The only issue left is costs. The plaintiff deserves costs against all defendants jointly and/or severally, and I make that order.

35. Judgment accordingly.

DATED AND DELIVERED THIS 10TH DAY OF JUNE 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA