



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 97 OF 2012

(FORMERLY HCC NO. 94 OF 2002)

SIGILAIN LIMITEDPLAINTIFF

VERSUS

HASHAM LALJI PROPERTIES LIMITEDDEFENDANT

JUDGMENT

By a plaint dated 10th May 2002 the plaintiff herein sued the defendant seeking for the following orders:

- a. Declaratory orders that the Defendant is not entitled to plot number ELDORET MUNICIPALITY BLOCK 7/7 and orders of permanent injunctions to restrain the Defendant and/or its agents from interfering with the plaintiff's enjoyment of the suit property and the Defendant's be barred from receiving rent and that the Defendant be compelled to pay rent received by themselves and return goods asset out in paragraph 5 of the plaint.
- b. Costs of the suit and interest at court rate.

The defendant filed a defense and counterclaim dated 2nd October 2002 wherein he denied the contents of the plaint and sought for the following orders:

- a. The registration in favour of the plaintiff as proprietor of ELDORET MUNICIPALITY BLOCK 7/7/2002 be cancelled.
- b. The register be duly rectified and the Defendant be registered as the Proprietor of ELDORET MUNICIPALITY/BLOCK 7/7.
- c. Costs.
- d. Such further or other which this court may grant.

On 8th May, 2019 counsel recorded a consent which the court adopted in the following terms:

- a. The documents contained in the Plaintiff's list of Documents dated 10th April, 2012 except item No. 3 (Copy of the Register)
- b. The documents contained in the Defendant's List of Documents dated 14th June, 2013 filed on 17th June, 2013 except item No. 8 (Valuation Report by Hectares and Associates), No. 9 (Affidavit sworn Kastaurben Lalji Nangpar on 17th June, 2002) and No. 10 (Affidavit sworn Shah Somchand Nangpar on 23rd July, 2002)
- c. The documents contained in the Defendant's List of Documents dated 20th March, 2019 filed on 21st March, 2019.

A brief background to this case is that Plaintiff and the Defendant filed applications dated 1st January 2002, 16th April 2002 and 10th June 2002 respectively. The Court heard and determined the applications vide a ruling dated 2nd June, 2004 directing the Plaintiff to deposit the rental income from Eldoret Municipality Block 7/7 to a joint account held in the names of the Advocates on record.

The Plaintiff failed to comply with the order prompting the Defendant to file a Notice of Motion dated 23rd January, 2007 which the court

heard and determined vide a ruling dated 24th September, 2008 ordered the Plaintiff to deposit the rental income to a joint account failing to which the Plaintiff suit stands dismissed.

When this matter came up for hearing on 23rd July, 2018, counsel for the Plaintiff sought to withdraw the suit since the lease upon which the suit was based had lapsed but the defendant's counsel opposed withdrawal on the ground that the Plaintiff's non-compliance with the order of the Court issued on 9th October, 2008 directing the Plaintiff to deposit the rental income of Kshs. 868,000/= into a joint account resulted in the dismissal of the Plaintiff's claim noting that the order had a default clause to the effect that non-compliance would result in the dismissal of the Plaintiff's claim. The court therefore marked the suit as dismissed and directed the parties to proceed with the Counter Claim.

DEFENDANT'S CASE

DW1 in the counterclaim Diamond Hasham Lalji the CEO of Hasham Lalji Properties Limited adopted his statement and stated that in the year 1972, Shah Somchand Nangpar & Shah Lalji Nangpar were the registered owners of LR Eldoret Municipality Block 7/7 located on Kenyatta Street in Eldoret which property was developed and its tenants paid rent to the Defendant/ Claimant.

It was his evidence that to date no transfer has been effected in the Defendant/ Claimant's favour and produced a copy of the official search. It was also his testimony that Thomas Bett was a former tenant on the suit property but in 2002 was served with a notice to vacate the suit premises.

DW1 stated that vide a letter dated 23rd November, 2002 the firm of Birech & Company Advocates issued a notice to the tenants on the suit land to pay rent to the Plaintiff since it was the new owner of the suit property. (See the Defendant's List of Documents dated 17th September, 2015).

DW 1 stated that neither the Defendant/ Claimant nor Shah Lalji had sold the suit property to the Plaintiff and produced the contents of the search conducted on the White Card of the suit property as follows:

- a. As at 30th April, 1979 Shah Somchand Nangpar & Shah Lalji Nangpar were the leasees of the suit property and a Certificate of Lease was issued to them. (Entry No. 1 & 2 of the White Card);
- b. On 10th November, 1999 the suit property was transferred to Lapkeyiet Trust Kenya Limited and a Certificate of Lease was issued to it. (Entry No. 3 & 4 on the White Card)
- c. On 10th May, 2000 the suit property was transferred from Lapkeyiet to Sigilain Limited and a certificate of Lease was issued to it. (Entry No. 5 & 6 on the White Card).
- d. A restriction was registered on the property following DCW1's report to the CID in 2002 (Entry No. 7 on the White Card).

It was DW1's evidence that vide a letter dated 14th July, 2003 the DW1's Advocate wrote to the Registrar of Business Registration in respect of the suit property and a response was issued vide a letter 26th October, 2000 contained on page 108 of the Defendant's Bundle of Documents dated 20th March, 2019 whose contents were as follows:

- a. Sigilain Limited was incorporated on 20th December 1999, its Directors are Thomas Kiplagat Bett and Milka Cheptum Bett, its address is P.O Box 100 Eldoret and its registered office is Eldoret Plot No. 472/9 on Nakuru Eldoret Road.
- b. Lapkeyiet Trust Kenya Limited was incorporated on 23rd September, 2000, its registered office is Plot No. 4748 Kisumu Road and its address of service is P.O Box 100 Eldoret. The directors file was missing thus it was not possible to tell who the directors of Lapkeyiet were.

DW 1 stated that Lapkeyiet was registered the proprietor of the suit property on 10th November, 1999 and it transferred the suit property to Sigilain Ltd on 10th May, 2000 and both transactions took place before Lapkeyiet was incorporated on 23rd September, 2000.

DW1 further stated that the transfer of the Lease over the suit property from Lapkeyiet to Sigilain is dated 14th January, 2000 and the two share a common postal address P.O Box 100 Eldoret. (See a copy of the Sale Agreement over the suit property dated 15th January, 2000 contained in the Plaintiff's List of Documents dated 10th April, 2012). DW1 produced a bundle of receipts as evidence of payment of land rates and rent. See the Defendant's Bundle of Documents dated 10th July, 2017.

It was DW1's further evidence that when this suit was filed in 2002 Shah Lalji Nangpar had passed on but Shah Somchand Nangpar was still alive. A copy of the Letters of Administration for the estate of the late Lalji is Item No. 3 of the Defendant's List of Documents dated 17th September, 2015. That the Late Lalji's executor swore an Affidavit filed in Court on 19th March, 2003 stating that her late husband sold the suit land to the Defendant/ Claimant. Shah Somchand Nangpar swore an Affidavit contained in the Defendant's List of Documents dated 17th September, 2015 confirming that the suit property was sold to the Defendant/ Claimant in 1972.

On cross examination, DW1 confirmed the following: that he had not sued Lapkeyiet, that he did not have any document from the Post Master General to show the ownership of the P.O Box 100 Eldoret, that he did not produce a consent to transfer the suit property in favour of the Defendant/ Claimant and that he is not aware of the outcome of the investigation by the CID but he knows that Thomas Bett was charged

with a criminal offence even though he had not been convicted of fraud.

DW1 further stated Sigilain Ltd was in possession of the suit property and they are receiving the rent due from the tenants. He confirmed that the Defendant/ Claimant has never been registered as the proprietor of the suit property. Further that a company resolution is required before a sale or purchase of property is undertaken and no such document was furnished to the Court.

DW1 stated that he discovered the fraudulent dealings in the suit property in the year 2000 which prompted him to sue his brother as the 4th Defendant in Nairobi HCC No. 2234 of 2001 since it was suspected that DW1's brother worked in cahoots with Sigilian Limited to defraud the Defendant/ Claimant by selling the suit property at a lower price. See the List of Documents at page 9 paragraph 4.

On re-examination DCW 1 stated that the transfer to Lapkeyiet was fraudulent since Lapkeyiet did not exist at the time when the transfer took place.

DW2 Wanderi Mark Muigai the Land Registrar Uasin Gishu County attended court and produced the register and parcel file of the suit land. He testified that he had a certified copy of the Certificate of Lease issued on 11th March, 1994 to Shah Somchand Nangpar and Shah Lalji Nangpar. He stated further that it was not possible to have the lease issued out since at the time Shah Lalji had already passed on, on 10th February, 1982.

DW 2 stated that there was no evidence for payment for the issuance of the Certificate of Lease in 1994 in the parcel file and that a certificate of lease must be surrendered for cancellation where a lessee wants to sell.

DW 2 further testified that according to the records in the parcel file, Shah Lalji transferred the suit land to Lapkeyiet using a transfer of land form that was corrected by hand to read transfer of lease. He stated that although practise demands that any correction by hand must be countersigned, such countersigning was not done in this instance.

DW2 also stated that although it is required that transfer forms should have been signed by the registered proprietors, in the instant case, the 2nd signature reads trustee of the estate of the late L.N. Shah. DW 2 observed that a trustee cannot execute a transfer where there is no grant of probate in the parcel file. The name of the trustee who signed the transfer is not indicated.

Further that the attestation of the transfer form is said to have been done before Advocate David Kiplagat Ruto but the same is not practicable noting that L.N. Shah died in 1982 and further that the Directors of Lapkeyiet would be required to appear before the Advocate but the name of the said Directors was omitted, it is unlikely that they were present before the Advocate. Further the attestation date was not indicated.

DW2 also testified that the transfer form conveying the suit land from Lapkeyiet to Sigilain Ltd was also not dated but it gave rise to a certificate of lease dated 10th November, 1999. Lapkeyiet's address on the transfer form is P.O Box 100 Eldoret. The transferor appeared before Advocate John Kirwa Birir for attestation on 14th January, 2000 but the space for inserting their identification was left blank. On the attestation page for the transferee there are two signatures but the names are not indicated. The transfer was registered on 10th May, 2000 but there is no rates clearance certificate in the file. DW2 produced a certified copy of the parcel file as Dex No. 15.

On cross examination DW 2 stated he was employed as a Land Registrar in 2008 and that the transfers in issue took place before he was employed. He stated that each parcel file contains all the documents in relations to a specific parcel of land but that he only had a certified copy and not the original parcel file.

He stated that the original lease document from L.N. Shah must have been availed because once a lease has been registered the registrar issues a certificate of lease. He stated that the original certificate of lease must be surrendered to facilitate a transfer and the Registrar makes a note of such a transfer on the entries in the register. No rates clearance certificate and no national identity cards have been filed together with transfer forms.

DW2 stated that where a certificate of title is issued payment for the same must have been made and that the transfer forms in the file convey the suit land from L.N. Shah to Lapkeyiet, the same is signed by the Land Registrar therefore the transfer must have been effected and payment must have been made. The aforesaid transfer form was not properly executed as it was signed by a trustee of the estate of the late L.N. Shah.

DW 2 stated that all the requirements for a proper transfer were not complied with as there was no consent from the Municipal Council which consent is obtained upon clearance of the rates.

On re-examination DW 2 stated that he did not have the parcel file because the practise instruction requires him to carry a certified copy of the parcel file. He also said that the two transfers should not have been registered since there were shortcomings in the documents furnished.

DW3 Alice Mwendwa a Senior State Counsel working in the AG's office testified and stated that the firm of Nyairo and Company Advocates made an enquiry on the status of Lapkeyiet vide a letter dated 11th May, 2019 (produced as Dex 16) which their office responded to vide a letter dated 20th June, 2019 (produced as Dex 17) to the effect that Lapkeyiet does not exist in the records held by the Registrar of Companies.

DW3 also outlined the contents of the search as relates to Sigilain Ltd as follows:

a. Sigilain's registration number is C 88126, the directors are Thomas Kiplagat Bett and Milka Cheptum Bett, each director holds One (1) share.

b. the registered office is on Nakuru Eldoret Road and the share capital is Kenya Shillings One Hundred Thousand (Kshs. 100,000.00). The CR 12 was produced as Dex 18.

On cross examination DW 3 stated that her duties are registration of companies, signing certificates, attending court and attending to any legal matters. Further that one needs to check the index at the Companies Registry to determine whether a company is registered or not and whether by extension it exists or not.

PLAINTIFF'S CASE

PW1 Thomas Bett testified in opposition to the counter claim and adopted his witness statement together with the documents contained in the Plaintiff's List of Documents dated 10th April, 2012. PW1 produced a Sale Agreement in respect of the suit land wherein the seller was Lapkeyiet while Sigilain was the buyer as Pex 1. Pex 2 was a transfer of lease from Lapkeyiet to Sigilain. Pex 3 is a bundle of rates clearance notes from Eldoret Municipality Council bearing the name of Sigilain.

PW1 stated that he has a certificate of official search of the suit property registered in favour of Sigilain Limited and stated that he did not transfer the suit property to the Plaintiff fraudulently.

PW1 stated that from the White Card the suit property was originally registered in the names of Shah Somchand Nangpar & Shah Lalji Nangpar, then later registered in the name of Lapkeyiet and the current owner is Sigilain Ltd. It was his evidence that the name of Hasham Lalji does not feature in the White Card and stated that he is one of the directors of Sigilain (see the Cr 12).

On cross examination, PW1 stated that the directors of Lapkeyiet are in the Sale Agreement but the lease dated 14th January, 2000 the names of the directors of Lapkeyiet are not indicated. PW1 testified that he does not have a copy of the incorporation certificate of Lapkeyiet and he is not aware of any details as relates to the registration of Lapkeyiet.

PW 1 reiterated that Sigilain Limited was registered on 10th May, 2000 and that he paid stamp duty and land rent but he did not produce receipts in Court. In Nairobi ELC No. 2234 of 2001, Sigilain and Lapkeyiet are Defendants and a judgment was delivered confirming that Lapkeyiet was a company incorporated on 23rd September, 2000, though an Appeal was filed.

It was his evidence that the postal address for Sigilain is P.O Box 100 Eldoret, the said address is a public address for people who do not have a personal address but Lapkeyiet's address is also P.O Box 100 Eldoret. PW 1 stated that when he bought the suit land it had no developments but he developed the same in 2001.

On re-examination PW 1 stated that the case filed in Nairobi was in respect of L.R NO. 209/4360/58 at Kijabe Street in Nairobi and not the suit land herein. He also stated that he does not know when Lapkeyiet was registered and how many directors Lapkeyiet has.

DEFENDANT'S SUBMISSIONS

Counsel for the defendant submitted and listed the following issues for determination by the court:

- a. Whether the suit property was illegally and/or fraudulently transferred to the Plaintiff
- b. Whether the Defendant is entitled to orders sought in the Counterclaim
- c. Who is to pay costs of this suit?

On the first issue as to whether the suit property was illegally and or fraudulently acquired by the plaintiff, counsel submitted that the Defendant adduced overwhelming evidence to show the fraudulent transactions in the transfer of the suit land from the original owners Shah Somchand Nangpar and Shah Lalji Nangpar to Lapkeyiet Trust (Kenya) Limited.

It was counsel's submission that the Copy of the Register held by the Lands office, land parcel number ELDORET MUNICIPALITY/BLOCK 7/7 was first registered in the name of Shah Somchand Nangpar and Shah Lalji Nangpar but it was subsequently registered in the name of Lapkeyiet Trust (Kenya) Limited on 10th November 1999. and at the time of the alleged transfer one of the original owners of the suit property, Shah Lalji Nangpar had already died (see the Grant of probate of written will contained in the in the Defendant's List of documents dated 14/6/2013

Mr Nyairo submitted that as such for any valid transfer to have occurred, the confirmed grant in respect of the estate of Shah Lalji Nangpar ought to have been registered as provided under Section 119 of the Registered Land Act, cap 300 (now repealed) as follows:

" If a sole proprietor or a proprietor in common dies, his personal representative, on application to the Registrar in the prescribed form and on production to him of the grant, shall be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after his name of the words "as executor of the will of deceased" or "as administrator of the estate of deceased", as the case may be."

Counsel submitted that this was not done as required by law as evidenced from the white card.

Counsel also submitted that the Affidavit sworn by Kasturben Lalji Nangpar Shah, an administrator of the estate of the Shah Lalji Nangpar on 17/7/2002, where she denied that she executed any transfer in favour of Lapkeiyet Trust (Kenya) Limited. According to Kasturben Lalji (now deceased), the property was owned by the Defendant having purchased it from Shah Lalji Nangpar and Shah Somchand Nangpar and had been utilizing it since 1972

Counsel submitted that this position was further corroborated by Shah Somchand Nangpar who is now deceased and who also swore an affidavit dated 23/7/2002 confirming that as the co-owner of the suit property, he never transferred the suit property to Lapkeiyet Trust(Kenya) Limited

Mr Nyairo stated that at the time of registration of Lapkeiyet Trust (Kenya) Limited as the owner of the suit property the said entity was nonexistent as it was only registered as a company on 23/9/2000. This position was confirmed by letter dated 26/10/2000 from the Company Registry contained at page 108 of the Defendant's Further list of documents dated 20/3/2019 and filed on 21/3/2019 and the judgment delivered in Nairobi HCCC No. 2234 of 2001

It was counsel's submission that the defendant was able to demonstrate through the evidence adduced that the transfer of the suit property to the Plaintiff was equally invalid based on the fraudulent activities as per the evidence on record.

Counsel relied on the case of **MUNYU MAINA V HIRAM GATHIHA MAINA [2013] eKLR** where the Court held thus:

"... when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register."

On the second issue as to whether the defendant is entitled to the orders sought counsel relied on Section 26 (1) of the Land Registration Act, 2012 which provides as follows:

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

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. "

Counsel submitted that once fraud has been established like in this case, then this Court has power to make an order for cancellation of the title and relied on section 80 (1) of the Land Registration Act, 2012 where the Court is empowered to order the rectification of the register by directing that any registration to be cancelled or amended if it is satisfied that any registration was obtained, made or committed by fraud or mistake.

Section 80 (1) of the Land Registration Act, 2021 provides as follows:

"Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or committed by fraud or mistake. "

Counsel also cited the case of **ELIJAH MAKERI NYANGW'RA v STEPHEN MUNGAI NJUGUNA & another [2013] eKLR** where the Court held as follows:

"Is the title impeachable by virtue of Section 26(1) (b) ? First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.

The evidence in this case puts no one in doubt that the title to the 1st defendant was obtained illegally, unprocedurally or through a corrupt scheme. The documents that conveyed title to him were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of Section 26 (1) (b) have been met and that the title of the 1st defendant is liable to be cancelled. I therefore proceed to cancel the title of the 1st defendant and his registration as proprietor of the suit land. The plaintiff should be registered as owner of the suit land. It is regretful that the 1st defendant was snared by the scheme perpetuated by the 2nd defendant. I sympathize with him but I must ensure that the real title holder is protected and that he is registered as the proper owner of the suit land"

Counsel therefore urged the court to find that the defendant has proved its counterclaim and allow the prayers with costs.

PLAINTIFF'S SUBMISSIONS

Counsel listed the following issues for determination

- a. Whether the defendant has proved fraud against the plaintiff.
- b. Whether the plaintiff is a bonafide purchaser of land parcel Eldoret Municipality Block 7/7.
- c. Who bears the costs of this suit.

On the first issue counsel relied on the definition of fraud in Black's Law Dictionary which states as follows:

"A knowing misrepresentation of the truth or concealment of material fact to induce another to act to his or her detriment".

Counsel submitted that from the definition, a person alleging fraud must prove that there was misrepresentation of truth or concealment of material fact and further that fraud must be specifically pleaded with particulars.

Counsel relied on the case of **RATILAL GORDHĀNBHAI PATER-VS- LALJI MAKANJI [19751EA 314,317** where the court stated.

"allegations of fraud must be strictly proved although the standard of proof may not be heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required."

Counsel further relied on the case of **ELIZABETH KAMENE NDOLO-VS- GEORGE MATAT NDOLO (19761e KLR** where the court stated as follows.

"We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegations lay squarely on him. Since the respondent was making a serious charge forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond reasonable doubt as in criminal case".

Counsel also submitted that at no time was DW1 registered as an owner of the suit land. Further that the plaintiff is a bona fide purchaser of the suit property since it holds a certificate of lease over the suit property having acquired it on 10th May, 2000 upon transfer and registration. Counsel urged the court to dismiss the defendant's counterclaim with costs to the plaintiff.

ANALYSIS AND DETERMINATION

I had given a brief background to this case whereby the plaintiff's case was dismissed with costs hence it is only the counterclaim that we are dealing with. It is unfortunate that this case has taken 21 years to be resolved.

The issues for determination in this case are whether the plaintiff acquired the suit titles fraudulently, whether the defendant has proved fraud, whether the defendant is entitled to the orders sought for cancellation and rectification of the register.

The documentary together with oral evidence by the defendant and the witnesses who testified as enumerated above explains how the plaintiff acquired the suit parcel. The evidence of DW2 the Land Registrar who is the custodian of land records confirmed that there were anomalies in the registration and transfer of the suit property from the late Shah Lalji Nangpar and Shah Somchand Nangparto Siglain Limited and later to Lapkeyit Trust.

Very pertinent steps for transfer and registration of lease were never adhered to as per the evidence of the Land Registrar. The anomalies were, the transfer forms should have been signed by the registered proprietors, in the instant case, the 2nd signature reads trustee of the estate of the late L.N. Shah, a trustee cannot execute a transfer where there is no grant of probate in the parcel file and the name of the trustee who signed the transfer is not indicated the attestation of the transfer form is said to have been done before Advocate David Kiplagat Ruto but the same is not practicable noting that L.N. Shah died in 1982 and further that the Directors of Lapkeyit would be required to appear before the Advocate but the name of the said Directors was omitted, it is unlikely that they were present before the Advocate. Further the attestation date was not indicated.

The other anomaly was that the transfer form conveying the suit land from Lapkeyit to Siglain Ltd was also not dated but it gave rise to a certificate of lease dated 10th November, 1999. Lapkeyit's address on the transfer form is P.O Box 100 Eldoret.

Further that the transferor appeared before Advocate John Kirwa Birir for attestation on 14th January, 2000 but the space for inserting their identification was left blank.

On the attestation page for the transferee there are two signatures but the names are not indicated. The transfer was registered on 10th May, 2000 but there is no rates clearance certificate in the file.

All these anomalies points towards fraud by the plaintiff to beat the system and register the suit land in their name. In the case of **KENYA NATIONAL HIGHWAY AUTHORITY – VS – SHALIEN MASOOD MUGHAL & 5 OTHERS [2017] eKLR, Maraga, J (as he then was)** expressed himself as follows: -

“Court should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...”

Similarly in the case of In the case of **Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR, Hon. Sila Munyao, J.** held as follows with respect to indefeasibility of title:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, procedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above dictum”

I have analyzed above the process the plaintiff used to register and transfer the suit land to itself and find that it fell short of the glory of the law and procedure of registration. I find the defendant has proved that the suit land was fraudulently transferred.

On the issue whether the defendant is entitled to an order of cancellation of the plaintiff’s title, the court is empowered under section 80 (1) of the Land Registration Act to order the rectification and cancellation of any title that is proven to have been fraudulently acquired. Section 80(1) provides as follows:

Rectification by order of Court

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

In the case of **Kenya Anti-Corruption Commission vs. Online Enterprise Limited Kisumu ELC number 708 of 2015** where this court stated that

“the court is also empowered under section 80 (1) of the Land Registration Act, to order the rectification of the register by directing that any registration be cancelled or amended if its satisfied that any registration was obtained, made or omitted by fraud or mistake. I find that the defendants irregularly, fraudulently and un-procedurally registered the suit land in their names and the same should not be allowed to stand.”

It should be noted that by the time the transfer was made to Lapkeyiet Limited the company was non-existent as was stated by DW3 a Senior Stae Counsel from the AGs Office Companies Registry.

In the case of **ETHICS & ANTI-CORRUPTION COMMISSION V ANN WANJIKU & 3 OTHERS [2021] eKLR** the Court allowed the cancellation of an RTA title that was conveyed to a non-existent entity and which was subsequently conveyed to two other parties. The court made the following observation:

“...The plaintiff has produced a letter from the Registrar of Companies dated 6 October 2017. That letter states that Mtamwini Enterprises Limited (the 2nd defendant) does not appear in its data base of registered businesses or companies. How it managed to obtain a lease to the suit land is therefore a mystery. The same letter further states that Ocean View Plaza Limited, the 3rd defendant, was registered on 16 November 2016. It will be recalled that a transfer to the 3rd defendant was registered on 25 October 1996, and this again begs the question how such transfer was effected to an entity that was non-existent at the time. A transfer would need to be accompanied by the proof of existence of the entity such as a certificate of incorporation, PIN, and signatures of directors. All these could not have been available as the company did not exist.

10. It is clear to me from the foregoing, that the title issued under the Registration of Titles Act (RTA), could not have been issued without elements of fraud and/or misrepresentation...”

I find that the defendant has proved its case and I hereby order the cancellation of the Plaintiff’s Certificate of Lease issued on 10th May, 2000 and the same be registered in the defendant’s name.

The plaintiff’s case having been dismissed and the defendant having proved its counterclaim against the plaintiff, I therefore give specific orders as follows:

- a. The registration in favour of the plaintiff as proprietor of ELDORET MUNICIPALITY BLOCK 7/7 be and is hereby be cancelled.
- b. An order is hereby granted for the rectification of the register and the Defendant be registered as the Proprietor of ELDORET MUNICIPALITY/BLOCK 7/7.
- c. Plaintiff to pay costs of this suit.

DATED AND DELIVERED AT ELDORET THIS 12TH DAY OF NOVEMBER, 2021

M. A. ODENY

JUDGE