



**THE REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 1167 OF 2013**

**TUSHAR SHAH ..... 1ST PLAINTIFF**

**BEEJAL SHAH ..... 2ND PLAINTIFF**

**VERSUS**

**JOHN MARIARA KINGO THO ..... 1ST DEFENDANT**

**TUMNGA LIMITED ..... 2ND DEFENDANT**

**AND**

**JOHN MUNGE ..... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The dispute in this suit is a manifestation of how monumental land fraud, as a criminal enterprise, has grown in Kenya's land sector. Three alleged certificates of title are waved by the parties to this suit. As it will emerge in this Judgment, the land fraudsters have become so audacious that they procure and boldly utter fraudulent "titles" to investors and to the justice sector players without much care about possible legal consequences. The victims of this criminal enterprise are investors who fall prey to the criminal schemes and part with large sums of money on account of the fraudulent documents.

2. In the present case, what would appear to have been an inadvertent duplication of a land reference number – **LR No 9104/137** - in relation to subdivision transfers registered as entry **Nos 38** and **39** on mother title number **IR 43455** belonging to **Wispers Estate Development Limited**, has turned out to have been part of a well orchestrated scheme that may have been hatched to ultimately defraud the legitimate proprietors of **Land Reference Number 9104/205** which is the correct survey number that should have been entered when registering the relevant subdivision transfer under entry **No 39**. What the fraudsters may not have realized is that every parcel of land has a history and every parcel title has traceable roots.

3. The 2nd defendant in this suit procured and uttered two different "titles" bearing an identical title number, - [IR 87402] - relating to Land Reference Number 9104/205, a subdivision out of **Land Reference Number 9104/14** comprised in **Title Number IR 43455**, a private parcel of land belonging to **Wispers Estate Development Limited**. In their defence, the 2nd defendant contended that they got the private land from the Government of the Republic of Kenya. The evidence in this suit does not support that contention.

**Plaintiffs' Case**

4. The two plaintiffs, **Tushar Shah** and **Beejal Shah**, initiated this suit on 27/9/2013 through a plaint dated 26/9/2013. They subsequently filed an amended plaint dated 6/2/2015. Their case was that, they were the registered and beneficial owners of Land Reference **Number 9104/205 [Original Number 9104/14/197]** situated in Gigiri, Nairobi, measuring approximately 0.2832 of a hectare, and comprised in **Title Number IR 46488 [the suit property]**. They purchased the suit property in 2006 from **John Munge [the Interested Party]** at a purchase price of **Kshs 8,000,000**. The interested party caused the land to be conveyed to them through a transfer dated 9/1/2006, registered at the Land Titles Registry at Nairobi on 25/1/2006. Upon purchasing the suit property, they took possession, fenced the land, and enjoyed quiet possession of the land until September 2013.

5. The plaintiffs contended that on or about 1/9/2013, the 1st defendant [**John Mariaria Kingotho**] together with his servants and agents, entered onto the suit property and started excavating, levelling and constructing on the suit property. On enquiring from the 1st defendant

why they had entered onto the suit property, the 1st defendant claimed to be the new owner of the suit property, having purchased it from a **Mr Ngatia**, a director and shareholder of the 2nd defendant [**Tumnga Limited**]. The 1st defendant reiterated through a letter by his advocates that he was a purchaser for value, of the suit property, from the 2nd defendant, Tumnga Limited. The plaintiffs reported the matter to the police and took further steps to secure the suit property by hiring security guards to guard the suit property. That did not deter the 1st defendant. The 1st defendant was determined to keep possession of the land.

6. Consequently, the plaintiffs brought this suit, seeking the following verbatim reliefs:-

a) *A permanent injunction to restrain the defendants herein, his agents, servants, employees or any person authorized by the defendants to act on their behalf from further trespassing, entering, accessing, excavating, levelling, undertaking any construction works or activities, taking possession, alienating or in any other way dealing with all the property known as LR No 9104/205 [Original Number 9104/14/197].*

b) *A declaration by this honourable court that the plaintiffs are the true and legal owners of the property and their title is absolute and indefeasible.*

c) *A declaration that the 2nd defendant purported certificate of title IR No 87402 is unlawful and untenable.*

d) *An order for delivery up and cancellation of the certificate of title IR No 87402 issued to the 2nd defendant.*

e) *A declaration that the defendants and/or their agents are trespassers.*

f) *General damages against the defendants for trespass.*

g) *Any other order this honourable court deems appropriate;and*

h) *Costs of the suit.*

#### **1st Defendant's Case**

7. The 1st defendant filed a statement of defence dated 4/6/2014. He subsequently filed an amended statement of defence dated 5/3/2015. He contested the plaintiffs' claim. His case was that, at all material times, he was aware that the suit property was registered in the name of the 2nd defendant. He entered into a sale agreement with the 2nd defendant, with the intention of purchasing the suit property from the second defendant. At the "*commencement of the sale agreement*," the 2nd defendant allowed him to enter onto the suit property. Prior to entering onto the suit property, the 2nd defendant had stationed one **David Mutiso Jason** on the suit property. He contended that he had entered onto the suit property legally with the express permission of the 2nd defendant who was the registered proprietor of the suit property. He added that as a beneficial owner who had entered into a binding sale agreement with the 2nd defendant, he was entitled to be on the suit property. He urged the court to dismiss the plaintiff's suit.

#### **2nd Defendant's Case**

8. The 2nd defendant filed a statement of defence dated 9/3/2015. They contested the plaintiff's claim. Their case was that the plaintiff had never been the registered proprietor of the suit property. They contended that they were "*the true and bonafide owner of the transfer registered as IR No 43455/232, Title Number IR 87402, Land Reference Number 9104/205 [Original Number 9104/14/197] from the Government of the Republic of Kenya having been issued with the grant on 1st November, 1987.*"

9. It was the case of the 2nd defendant that the details in the title held by the plaintiffs had been forged by either John Munge [the Interested Party] or by the plaintiffs, and that the title had been changed to read "*Transfer registered as Number IR No. 43455/39 Title Number IR 46488 Land Reference Number 9104/205 (Original Number 9104/14/197)*" with the date of issue being maintained as 1st November 1987.

10. The 2nd defendant added that the purported sale and transfer of the suit property to the plaintiffs by the interested party was nothing but a sham. They contended that the allegations of trespass had no basis because they [the 2nd defendant] had been "*the true and bonafide owner of the transfer registered as IR No 43455/232 Title Number IR 87402, Land Reference Number 9104/205 (Original Number 9104/14/197) from the Government of the Republic of Kenya having been issued with the grant on 1st November 1987.*"

11. The 2nd defendant contended that the plaintiffs had committed fraud. The 2nd defendant urged the court to dismiss the plaintiffs' claim.

#### **Plaintiffs' Evidence**

12. Hearing of the suit commenced before me on 5/7/2018. **Carolyn Kituyi**, Principal Land Registration Officer in the Ministry of Lands, then based at Ardhi House, testified as **PW1**. In summary, her evidence was that she was familiar with the dispute in this suit because she was delegated to attend to and respond to a letter dated 6/2/2015 written to the Chief Land Registrar by the plaintiffs' Advocates. The letter to the Chief Land Registrar forwarded two purported certificates of title bearing the name of the 2nd defendant as the registered proprietor of the suit property. Both certificates of title bore **IR No 87402** as the title number. The first purported certificate of title indicated that it was registered on 5/4/2001 in the name of the 2nd defendant and it had been issued pursuant to a transfer registered as **Number IR 43455/282**. Attached to the said purported certificate of title was deed plan number **133701** purported to have been authenticated and signed by the Director of Surveys on 2/9/2011 and annexed to a partial discharge purportedly registered as **IR 43455/281**. The second purported certificate of title indicated that it was registered on 4/12/2000 in the name of the 2nd defendant and it had been issued

pursuant to a transfer registered as number **IR 43455/232**. Attached to the second purported certificate of title was deed plan number **133701** purported to have been authenticated and signed by the Director of Surveys on **2/9/2011** and annexed to a partial discharge registered as **IR 43455/224**.

**13. PW1** added that she retrieved and perused Certificate of Title Number **IR 43455** [the mother title] out of which the two purported certificates were purported to be a subdivision. She established that purported certificate title number **IR 87402** for **LR No 9104/205** which was purported to have been registered pursuant to a transfer registered as number **IR 4455/282** and the deed plan annexed to the partial discharge registered as **IR 43455/281** did not exist in the records held in the Lands Registry. She further established that certificate of title number **IR 87402** for **LR No 9104/205** purported to have been registered pursuant to a transfer registered as number **IR 43455/232** and the deed plan annexed to partial discharge purportedly registered as **IR 43455/224** did not, similarly, exist in the records held in the Lands Registry. Thirdly, she established that **Land Reference Number 9104/205** was a subdivision excised from **Land Reference Number 9104/14**, comprised in **Grant Number IR 43455** and the relevant subdivision title was registered pursuant to a subdivision transfer registered as **IR 43455/39** and deed plan number 133701 annexed to a discharge registered as **IR No 43455/10**. She further established that the correct title number for the said subdivision was **IR 46488**. It was her evidence that she wrote to the plaintiffs' advocates on 29/4/2015 advising them accordingly.

**14.** PW1 further testified that the last entry on the mother title [Title Number IR 43455] was Entry **No 280** which related to a transfer in respect of **LR No 9104/178** to **Shabir Ahmed Fakhi and Tasneem Ashraf Shabir** as joint tenants. It was her evidence that the two titles bearing the same title number, **IR 87402**, and purported to have been issued in the name of the 2nd defendant, were not on the mother title, **IR 43455**. She added that the transfer registered as entry number **43455/232** related to a partial discharge in respect of **Land Reference Number 9104/195** and not **Land Reference Number 9104/205** [the suit property]. It was her evidence that, based on the above facts, the Office of the Chief Land Registrar advised that the authentic title was **No IR 46488** comprising of Land Reference Number **9104/205**, held by the plaintiffs.

**15.** PW1 added that she noted from the mother title that whereas the transfer of the suit property to **John Munge** had been properly captured as Entry No. 39, the entry was erroneously assigned Land Reference Number **9104/137** instead of the correct land reference number which was Land Reference Number **9104/205**. She asserted that **LR No 9104/137** was an error because the said land reference number in the survey plan attached to the discharge and transfer was a duplication of the parcel reference number captured under **Entry No 38** on the mother title, which related to a transfer to Dilip Keshavji Shah.

**16.** PW1 further testified that according to the records held by the Lands Registry, **John Munge** transferred the suit property (Land Reference Number 9104/205) to the plaintiffs on 25/1/2006 for a consideration of Kshs 8,000,000. She added that the suit property was subsequently charged to I & M Limited in 2010. She identified the documents referred to in the consolidated bundle.

**17. Mr Tushar Shah** [the 1st plaintiff] testified as **PW2**. He stated that the 2nd plaintiff was his wife. He adopted his two witness statements dated 18/5/2015 and 26/9/2013 as part of his sworn evidence-in-chief. He produced the 9 documents contained in their bundle dated 26/9/2013. He further produced the 18 documents contained in their supplementary bundle dated 18/5/2015.

**18.** In summary, PW2's evidence was that they owned the suit property. They purchased the suit property from **John Munge** in 2006 at Kshs 8,000,000. Upon purchase, the suit property was duly registered in their names. They subsequently charged the suit property to I & M Limited in 2010. They enjoyed peaceful possession of the suit property until September 2013 when the 1st defendant laid claim to it.

**19.** He added that the suit property was a subdivision out of **Land Reference Number 9104/14** comprised in **Title Number 43455**. At the time of buying the suit property, **John Munge** was the registered proprietor of the suit property and he (John Munge) had acquired it from **M/s Wispers Estate Development Limited** by an instrument of transfer registered as **Number IR 43455/39**. He further testified that since purchasing the suit property, they had dutifully paid land rates, initially in the name of **Wispers Estate Development Limited**, and subsequently in their own names.

#### **1st Defendant's Evidence**

**20.** The 1st defendant testified as DW1. He was the only defence witness. He adopted his witness statement filed on 13/5/2015 as part of his sworn evidence-in-chief. He produced a total of 11 exhibits. In summary, his evidence was that on 6/6/2013, he entered into a land sale agreement pursuant to which the 2nd defendant sold to him the suit property. Before entering into the sale agreement, he negotiated with a Mr **Geoffrey Ngatia Njoroge**, a director of the 2nd defendant, and they agreed on a purchase price of Kshs 31,000,000. As part of his due diligence, he visited the land and established that the vendor had stationed a **Mr David Mutiso Jason** on the suit property. Further, through his advocates, he obtained a search which showed that the 2nd defendant was the proprietor of the suit property. DW1 added that he paid the 2nd defendant a deposit of Kshs 10,000,000. He had agreed with the 2nd defendant that upon paying the deposit of Kshs 10,000,000, he would take possession of the suit property. Indeed, he entered the suit property in September 2013 upon paying the deposit.

**21.** DW1 added that while processing the transfer, he learnt that someone else was laying claim to the land. About three weeks after taking possession, guards were brought to the suit property by the plaintiffs. Soon after that, he saw a notice in the newspaper to the effect that he had been sued over the land.

**22.** After being granted several adjournments, the 1st defendant elected to close his case without leading further evidence. No evidence was led by the 2nd defendant, despite being accorded the opportunity to lead evidence. The 2nd defendant elected to close their case on 4/2/2021 without leading any evidence.

#### **Plaintiffs' Submissions**

**23.** The plaintiffs filed written submissions dated 3/5/2021 and supplementary written submissions dated 23/7/2021 through the firm of **Anjarwalla & Khanna LLP**. Counsel for the plaintiffs identified the following as the key issues falling for determination in the suit: (i)

*Whether the 1st and 2nd plaintiffs were the registered proprietors of the suit property; (ii) Whether the 1st and 2nd purported titles were legitimate titles with respect to the suit property; and (iii) Whether the 1st defendant had a right to enter into the suit property for purposes of clearing and excavating the property.*

24. On whether the 1st and 2nd plaintiffs were the registered proprietors of the suit property, counsel for the plaintiffs submitted that the suit property was a subdivision out of **Land Reference Number 9104/14** [Original Property] registered in the Land Titles Registry at Nairobi as Number **IR 43455/1** in the name of **Wispers Estate Development Limited**. Counsel added that the suit property was transferred to the interested party, John Munge, by M/s Wispers Estate Development Limited through a transfer registered as **IR 43455/39**. Counsel submitted that the plaintiffs purchased the suit property from the interested party in 2006 and the interested party transferred the suit property to the plaintiffs through a transfer dated 9/1/2006 and registered on 25/1/2006 as Entry No. IR 46488/4. Counsel further submitted that the plaintiffs had been faithfully paying land rates and in 2010 they charged the suit property to I & M Limited to secure a credit facility of Kshs 30,000,000. Counsel for the plaintiffs further argued that whereas the defendants had in their defence contended that the title held by the plaintiffs had been forged, they did not provide factual evidence to support that contention.

25. On whether the 1st and 2nd purported titles held by the two defendants were legitimate titles relating to the suit property, counsel for the plaintiffs submitted that the defendants had failed to provide any proof of any transfer registered in favour of the 2nd defendant to demonstrate that the suit property was transferred to the 2nd defendant by the original owner. Counsel added that the defendants had failed to produce any evidence to demonstrate that they had been paying land rates. Counsel further submitted that the defendants were holding two different purported titles in the name of the 2nd defendant, purportedly issued in relation to the suit property. Counsel contended that the two purported titles had glaring discrepancies. Counsel argued that it was impossible for one party to have two different title documents relating to the same land. Counsel added that the Chief Land Registrar had, through the letter dated 29/4/2014, disowned the two purported titles bearing the name of the 2nd defendant. Counsel made extensive reference to the evidence of PW1 and DW1 and submitted that the only logical conclusion from the evidence on record was that the two purported titles in the name of the 2nd defendant were not legitimate and did not relate to the suit property.

26. On whether the 1st defendant had a right to enter the suit property for the purpose of clearing and excavating the property, counsel cited the decision in **Ochako Obinchi v Zachary Oyoti Nyamongo [2018] eKLR** and argued that because the defendants did not have a valid title to the suit property, the plaintiffs as the legitimate proprietors of the suit property, were entitled to enjoy the rights and privileges appurtenant to the title they held. Counsel added that because the defendants had declined to heed the plaintiff's lawyer's letter dated 6/9/2013 in which the plaintiff required the defendants to cease works on the suit property and restore vacant possession to the plaintiffs, they were liable to pay general damages for trespass. Counsel urged the court to assess and award general damages at Kshs 4,000,000.

#### **1st Defendant's Submissions**

27. The 1st defendant filed written submissions dated 5/7/2021 through the firm of *K Macharia & Co Advocates*. Counsel for the 1st defendant submitted that the title held by the plaintiffs contained an alteration which had not been countersigned. Counsel added that **Entry No 39** which denoted the transfer registered in favour of Mr John Munge related to **Land Reference Number 9104/137 [Originally 9104/14/193]**. Counsel contended that the title held by the plaintiffs was not legitimate because: (i) it was tainted by actual error and modification made without countersigning; (ii) the details in the title and the "availed entry of title register under the interested party" did not tally; (iii) the details in the title register indicated that the property which the interested party claimed to have been registered in his name contrasted and was different from what was registered in his name; (iv) the Chief Land Registrar had "wrongly awarded" the suit property to the plaintiffs without due procedure or application of the law; (v) the plaintiffs had never had possession of the suit property; and (vi) the defendant had "clear and uncontroverted title" evidenced by the search on record. Counsel contended that the plaintiffs had failed to discharge their burden of proof. Counsel urged the court to dismiss the plaintiffs' suit.

#### **2nd Defendant's Submissions**

28. The 2nd defendant filed written submissions dated 18/6/2021 through the firm of *Kiarie Kamere & Co Advocates*. Counsel for the 2nd defendant identified the following as the four key issues falling for determination in this suit: (i) *Whether the 2nd defendant was legally registered as the proprietor of the suit property;* (ii) *Whether the 2nd defendant had capacity to pass good title to the 1st defendant;* (iii) *Whether the 1st defendant had a right to enter into the suit property;* and (iv) *Whether the plaintiffs are entitled to relief under the Limitation of Actions Act or Adverse Possession Doctrine.*

29. On whether the 2nd defendant was legally registered as the proprietor of the suit property, counsel of the 2nd defendant submitted that the 2nd defendant obtained the suit property from the original owners "Wispers Limited" who were the original owners pursuant to a transfer registered as IR Number 43455/232 and registered in the Land Titles Registry on the 4th December 2000. Counsel contended that the 2nd defendant had "produced before this court a certificate of title issued by the Registrar, duly signed and sealed with the seal of the Registrar and it therefore would suffice that the same was legally obtained and if there is an error apparent, it was not from the 2nd defendant's error or mistake but for the officers entrusted to ensure that irregularities are not apparent as it is the current case."

30. On whether the 2nd defendant had capacity to pass a good title to the 1st defendant, counsel submitted that it was the burden of the plaintiff to prove fraud on part of the defendant. Counsel contended that the plaintiffs had failed to discharge that burden. Counsel submitted that the 2nd defendant obtained a good title from "Wispers Limited in the year 2000 and subsequently passed the same to the 1st defendant." Counsel contended that the evidence of PW1 indicated that there was an entry in the lands records relating to the 2nd defendant's transfer but "it was registered in a different parcel of land." Counsel contended that the logical conclusion from the evidence of PW1 was that the 2nd defendant had made an application for registration but there was an error apparent from the actions of the land officials and not by his own actions." Counsel contended that the 2nd defendant had capacity to pass a good title to the 1st defendant.

31. On whether the 1st defendant had a right to enter into the suit property, counsel submitted that the 2nd defendant acquired good title to the suit property which he sold to the 1st defendant. On whether the plaintiffs were entitled to relief under the Limitation of Actions Act or under the doctrine of adverse possession, counsel submitted that the 2nd defendant had been in possession of the suit property for over 20 years hence the plaintiffs' rights over the suit property were extinguished.

## Analysis and Determination

32. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal framework and jurisprudence. Parties did not agree on a common statement of issues. Taking into account the parties' pleadings, evidence and submissions, the following are the key issues falling for determination in this suit:

*(i) Which of the following three titles being waved by the plaintiffs and the two defendants in this suit is valid?*

*a) Certificate of Title Number IR 46488 held in the names of the plaintiffs and expressed as having been issued pursuant to a transfer registered as Number IR 43455/39 and comprising of LR No. 9104/205 [Original Number 9104/14/197] as delineated on Land Survey Plan Number 133701 annexed to the discharge registered as IR No 43455/10;*

*b) Certificate of Title Number 87402 contended by the 1st defendant to have been the subject of a sale agreement between the two defendants and expressed as having been issued to the 2nd defendant pursuant to a transfer registered as Number IR 43455/282 and comprising of LR No 9104/205 [Original Number 9104/14/197] as delineated on Land Survey Plan Number 133701 annexed to Partial Discharge registered as IR 43455/281; and*

*c) Certificate of Title Number IR 87402 presented to the court by the 2nd defendant as evidence of proprietorship of the suit property by the 2nd defendant vide his notice of motion dated 21/10/2014 through which he sought to be made a party to this suit and expressed as having been issued to the 2nd defendant pursuant to a transfer registered as Number 43455/232 comprising of LR No 9104/205 [Original Number 9104/14/197] as delineated on Land Survey Plan Number 133701 annexed to the partial discharge registered as IR 43455/224.*

*(ii) Who is the legitimate owner of the suit property, Land Reference Number 9104/205 [Original Number 9104/14 /197] situated in Gigiri, Nairobi?*

*(iii) Are the plaintiffs entitled to any of the orders sought in the amended plaint?*

*(iv) Are the plaintiffs entitled to general damages? If so, against who? And what should be the quantum?*

*(v) What order should be made with regard to costs of this suit?*

33. I will analyse and make findings on the issues sequentially in the above order. The first issue is which of the three titles that the plaintiffs and the two defendants are waving is valid. There is no contestation about the fact that the suit property was surveyed as **Land Reference Number 9104/205** and was a subdivision out of **Land Reference Number 9104/14** comprised in **Grant No 43455** measuring 44.82 hectares, registered in the name of **Wispers Estate Development Limited** on 3/12/1987. The original parcel was therefore private land.

34. There is also no contestation about the fact that the mother title which was produced during trial contains the discharges and the transfers that were registered as a result of the subdivisions. The title relating to the suit property was therefore registered and issued after the relevant discharge and transfer had been registered as entries on the mother title. The mother title exhibited shows that there were a total of **280** entries on the mother title. PW1 testified that the last entry was **No 280** and that the entry related to a transfer in respect of **LR No 9104/178** to **Shabir Ahmed Fakhi** and **Tasneem Ashraf Shabir**. Entry No 39 on the mother title shows that in December 1988, **Wispers Estate Developments Limited** transferred to **John Munge** a parcel of land measuring 0.2832 of a hectare vide Certificate of Title Number **IR 46488**. That particular entry, Entry No 39 however, bears **Land Reference Number 9104/137** which is a duplication of the survey parcel number relating to the parcel measuring 0.1798 of a hectare transferred to **Dilip Keshavji Shah** under the transfer registered as Entry No 38. PW1 explained that there was a duplication error and that the correct survey number for entry No 39 should have been **LR No 9104/205**.

35. Indeed Entry Number 10 contains various partial discharges that were registered reflecting the survey numbers for various subdivision parcels that were surveyed out of the mother title. Among them were the subdivisions parcels that were surveyed as **LR No 9104/137** and **LR No 9104/205** respectively.

36. The certificate of title held by the plaintiffs indicates that it was registered as Number **IR 46488/1** and issued to **John Munge** in December 1988 pursuant to a subdivision transfer registered as Number **IR 43455/39** comprising of Land Reference Number **9104/205** (Original Number **9104/197**) and was delineated on Survey Plan Number **133701** annexed to the discharge of charge registered as **IR No 43455/10**. Save for the erroneous Land Reference Number – 9104/137 - which PW1 explained was a duplication of the survey number of the parcel relating to the transfer registered under Entry No 38, the above details fully tally with what is contained on the mother title, **IR 43455**. It is therefore clear that the roots of the title held by the plaintiffs are traceable. Put differently, the title held by the plaintiffs was a subdivision out of title No 43455 issued as a result of the discharge executed in relation to land surveyed as **LR No 9104/205** and registered as discharge No **IR 43455/10** and the subsequent transfer of the subdivision parcel to **John Munge** in December 1988, registered as **IR 43455/39**. PW1 confirmed that according to the documents held by the Lands Registry, John Munge transferred the suit property to the plaintiffs.

37. The two defendants lay claim to the suit property and wave two different documents bearing the same title number – **IR 87402** – but different details relating to the discharge pursuant to which the survey numbers of the subdivision were registered. The transfers pursuant to which the titles were issued; the dates of the survey plans; and the dates when the two titles were issued vary.

38. The first title bearing Number **IR 87402** is the title which the two defendants contend was the subject of the sale agreement between them. It is expressed as having been issued on 5/4/2001 pursuant to a transfer registered on the mother title as Number **IR 43455/282**. A copy of the mother title was tendered as evidence and there was no transfer registered as Number **IR 43455/282**. The last transfer registered on the mother title was registered as Number **IR 43455/280** in favour of **Shabir Fakhi and Tasneem Ashraf Shabir** and related to Land

Reference Number **9104/178**. Secondly, the first purported title waved by the defendants indicates that it was issued pursuant to a partial discharge registered against the mother title as IR 43455/281. This cannot be correct because the last entry made on the title was Number 280. Thirdly, attached to the first version of title number IR 87402 which was purportedly registered on 5/4/2001 and sold to the 1st defendant by the 2nd defendant, was deed plan number 133701 purported to have been authenticated by the Director of Surveys on 2/9/2011. Authentication of a deed plan would ordinarily be done before the resultant title is issued. A title is a product of an authenticated survey plan. A title purported to have been registered on 5/4/2001 cannot therefore be said to be a genuine product of a survey plan authenticated on 2/9/2011. Lastly on the first version of Title No. IR 87402, an examination of all the entries on the mother title does not reflect a transfer of any parcel of land to the 2nd defendant. The logical conclusion therefore is that the first version of title No IR 87402 is not a genuine title relating to the suit property which is a subdivision out of Title Number 43455.

39. The second title bearing number IR 87402 was uttered to this court, to the plaintiff, and to the 1st defendant through the notice of motion dated 21/10/2014 through which the 2nd defendant sought to be made a party to this suit. This particular version of purported title number 87402 indicates that it was registered and issued to the 2nd defendant on 4/12/2000 pursuant to a transfer by the original owner registered against the mother title as number 43455/232. A perusal of the mother title reveals that the transfer registered as number IR 43455/232 did not relate to the suit property; it related to **Land Reference Number 9104/195**. Secondly, whereas the second version of purported title number 87402 indicates that it was registered as a product of a partial discharge registered as number **IR 43455/224**, the mother title reveals that the partial discharge registered as number 43455/224 related to Land Reference Number **9104/198**. Thirdly, attached to the second version of purported title number 87402 was the purported survey plan purported to have been authenticated by the Director of Surveys on 2/9/2011. Like the first version, this purported title cannot be said to be a valid title resulting from a survey plan authenticated more than ten years after the purported registration of the title. Authentication of a survey plan precedes registration of the title, not vice versa.

40. PW1, a senior Land Registration Officer in the Ministry of Lands was categorical that the two purported titles uttered by the defendants did not exist in the Lands Registry and did not relate to the suit property. She gave factual basis for her conclusions. Further, she was categorical that there was duplication of survey numbers relating to transfers registered as number **IR 43455/38** and **IR 43455/39**. She confirmed that appropriate corrections were made. She further confirmed that the suit property was a subdivision out of Title Number **43455** comprising of **LR 9104/14** and that the said subdivision was surveyed and transferred to **John Munge** by the original owner, **Wispers Estate Development Ltd**. She further confirmed that in 2006, John Munge sold and transferred the suit property to the plaintiffs. Further, she confirmed that in 2010, the plaintiffs charged the suit property to I & M Bank. The evidence of PW1 tallied with the case and evidence of the plaintiffs.

41. The 2nd defendant elected not to lead any evidence in this trial despite being the party who had uttered the two versions of title number 87402. In their defence, they alleged that they got the land as a transfer from “the Government of the Republic of Kenya and that they were issued with the grant on “1st November 1987.” However, none of the two purported titles which the defendants presented to this court bore “1st November 1987” as the date of issue. After conclusion of trial, and despite not leading any evidence, their advocates, through submissions, changed position and contended that they got the land from “Wispers Limited.”

42. It is not sufficient to dangle the instrument of title as proof of ownership moreso when the purported instrument of has been impeached. See the Court of Appeal decision in the case of **Munyū Maina v Hiram Gathiha Maina [2013] eKLR**:

**“We stated that 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 would not be noted in the register.”**

43. The conclusion which the court makes from the above evidence and from the conduct of the 2nd defendant is that the 2nd defendant and its agents are in the business of procuring fake titles. There is a possibility that the duplication of the survey number relating to the two transfers registered as number **IR 43455/38** and **43455/39** may not have been an inadvertent error. It was the beginning of a scheme for the fraudulent generation of the two versions of title number 87402.

44. In light of the foregoing, it is the finding of this court that:

*(i) (a) Certificate of Title Number IR 46488 held in the names of the plaintiffs and expressed as having been issued pursuant to a transfer registered as Number IR 43455/39 and comprising of LR No. 9104/205 [Original Number 9104/14/197] as delineated on Land Survey Plan Number 133701 annexed to the discharge of charge registered as IR No 43455/10 is a valid title issued by the relevant Land Registry at Nairobi in respect of LR No 9104/205 [Original Number 9104/14/197] a subdivision out of Title Number IR 43455, private land which belonged to Wispers Estate Development Limited who transferred the subdivision to John Munge who in turn sold and transferred the subdivision to the plaintiffs.*

*(b) Certificate of Title Number 87402 contended by the 1st*

*defendant to have been the subject of a sale agreement between the two defendants and expressed as having been issued to the 2nd defendant pursuant to a transfer registered as Number 43455/282 and comprising of LR No 9104/205 [Original Number 9104/14/197] as delineated on Land Survey Plan Number 133701 annexed to a partial discharge registered as IR 43455/281 is a fraudulent document that was not validly issued by the Lands Registry and is null and void for all purposes.*

*(c) Certificate of Title Number 87402 presented to the court as evidence of proprietorship of the suit property by the 2nd defendant vide his notice of motion dated 21/10/2014 through which he sought to be made a party to this suit and expressed as having been issued to the 2nd defendant pursuant to a transfer registered as Number 43455/232 comprising of LR No 9104/205 [Original Number 9104/14/197] as delineated on Land Survey Plan Number 133701 annexed to the partial discharge registered as IR 43455/224 is similarly a fraudulent document that was not validly issued by the Lands Registry and is null and void for all purposes.*

45. Having made the above findings in relation to issue number (i), it is my further finding that the plaintiffs are the legitimate proprietors of the suit property, Land Reference Number **9104/205** [Original Number **9104/14/197**] situated in Gigiri, Nairobi.

46. Further, having made the above findings in relation to issue Nos (i) and (ii), it is my further finding that as legitimate proprietors of the suit property, the plaintiffs are entitled to the protection of the safeguards set out in Article 40 of the Constitution and the relevant land registration regimes. Put contextually, the plaintiffs are entitled to prayers (a), (b), (c) and (e).

47. The plaintiffs sought, under prayer (d), an order for delivery and cancellation of Title No IR 87402. As a matter of judicial finding, the defendants presented two fraudulent documents, both bearing title number IR 87402. The Chief Land Registrar, through PW1, confirmed that the two documents bearing title number IR 87402 were not issued by the Lands Registry; did not exist in the Lands Registry; and were not titles relating to the suit property, **Land Reference Number 9104/205**. In the circumstances, there is nothing to be cancelled by the Chief Land Registrar.

48. I now turn to issue number (iv) which relates to general damages. The defendants moved onto the suit property in 2013. The plaintiffs have not been able to develop the suit property because of the illegal claim which the defendants made. The act of moving onto the suit property was masterminded by the 2nd defendant who knew very well that they did not have a valid title to the suit property. They knew the origin of the version of the purported title they were handing to the 1st defendant. As authors of the transgression, they are liable to pay the plaintiffs general damages. The 2nd defendant is therefore liable to bear general damages. I will give the 1st defendant the benefit of doubt and spare him liability because he testified that he entered the suit property on the basis of a land sale agreement dated 6/6/2013 pursuant to which he had paid to the 2nd defendant Kshs 10,000,000 out of the agreed purchase price of Kshs 31,000,000.

49. Because the plaintiffs did not lead evidence to properly assist the court in assessing general damages, I will award them nominal general damages in the sum of Kshs 3,000,000 against the 2nd defendant.

50. Lastly, as the party whose representatives were behind the procurement and uttering of the two fraudulent and fake documents, the 2nd defendant shall bear the costs of this suit.

#### **Disposal Orders**

51. In light of the above findings, the court makes the following disposal orders:

*a) A declaration is hereby made that the plaintiffs are the true and legal owners of Land Reference Number 9104/205 (Original Number 9104/14/197) situated in Gigiri, Nairobi.*

*b) A declaration is hereby made that the two purported certificates of title, both bearing IR No 87402, held by the 2nd defendant, are fraudulent and fake documents.*

*c) A declaration is hereby made that the defendants and their agents are trespassers on the suit property, Land Reference Number 9104/205 (Original Number 9104/14/197) situated in Gigiri, Nairobi.*

*d) A permanent injunction is hereby issued restraining the defendants herein, their agents, servants, employees or any person authorized by the defendants to act on their behalf from further trespassing on, entering, accessing, excavating, levelling, undertaking any construction works or activities, taking possession, alienating or in any other way dealing with all that property known as IR No 9104/205 (Original Number 9104/14/197).*

*e) The 2nd defendant shall pay the plaintiff nominal general damages of Kshs 3,000,000 for trespass.*

*f) The 2nd defendant shall bear costs of this suit.*

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 11TH DAY OF NOVEMBER 2021**

**B M EBOSO**

**JUDGE**

**In the presence of: -**

Ms Ouma for the Plaintiffs

Mr Mutahi for the 1st Defendant

Court Assistant: Lucy Muthoni

#### **NOTE:**

*This suit was heard and a Judgment date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the Judgment virtually at*

*Thika.*

**B M EBOSO**

**JUDGE**

**DIRECTIONS**

**The Deputy Registrar of the Court shall cause a copy of this Judgment to be availed to the Director of Criminal Investigations for him to decide how to deal with the criminal elements of the matter, within his legal mandate.**

**B M EBOSO**

**JUDGE**