



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 502 OF 2011

ASHISH MAGON..... 1ST PLAINTIFF

GEETA MAGON.....2ND PLAINTIFF

SARIKA MAGON..... 3RD PLAINTIFF

RASKA INVESTMENTS LIMITED.....4TH PLAINTIFF

- VERSUS -

FRANCIS MAINA KIBUNYI.....1ST DEFENDANT

KAMUNYU KAHENYA.....2ND DEFENDANT

ZEPHANIA OGAMBA.....3RD DEFENDANT

KARIMI WAIGANJO.....4TH DEFENDANT

REGISTRAR OF COMPANIES.....1ST THIRD PARTY

JUDGMENT

PRELIMINARY

1. This case was filed, as the title shows, in the year 2011. I began to hear this case in November 2018 and finally concluded hearing it in the year 2020. That is nine years after it was filed. The delay will explain what I am about to discuss.
2. This case was filed initially by four plaintiffs, but after one of those plaintiffs was struck out of this action. There remained three plaintiffs. I will hereafter go into the details of the identities of those parties.
3. Another case, being ELC Civil Case No. 603 of 2011 was filed in the Environment and Land Court (ELC) by NICHOLUS OKWACHO JUMA. The dispute in that case related to the same immovable property as is involved in this case.
4. This court on 18th January 2012, in the file of the case ELC Civil Case No. 603 of 2011, ordered that this suit HCCC 502 of 2011 be consolidated with ELC Civil Case No 603 of 2011 and that HCCC 502 of 2011 be the “primary file”.
5. Various directions on the hearing of this matter were given, including joining of Registrar of Companies as third party and from my perusal of those orders the plaintiff in ELC Civil Case 603 of 2011 was not invited to participate. Those directions culminated with the commencement of trial in November 2018 and even then there is no indication that that plaintiff in ELC Civil Case 603 of 2011 in ELC Civil Case 603 of 2011 was served or was informed of that hearing. It follows that the plaintiff in ELC Civil Case No. 603 of 2011 did not participate in the trial and therefore that case, ELC Civil Case 603 of 2011, was not heard. As I begin to consider the judgment of this matter it becomes very obvious that the case ELC 603 of 2011 not having been heard cannot be decided in this judgment.

6. It needs also to be noted that the case ELC Civil Case No. 603 of 2011 is a matter that can only be heard by the ELC Court, as provided under Article 162(1)(b) of the Constitution, and not by the Court, the High Court, where case HCC 502 of 2011 was heard.

7. It is because of the above observation that I am left with no alternative other than to set aside, which I hereby do, the order made on 18th January 2012 consolidating both matters. I therefore order that ELC Civil Case No. 603 of 2011 be remitted back to the ELC court for determination.

HCCC 502 OF 2011

8. This case was initially filed by four plaintiffs. The 1st plaintiff is ASHIS MAGON (hereinafter Ashis). The 2nd plaintiff is GEETA MAGON (hereinafter Geeta). The 3rd plaintiff is SARIKA MAGON (hereinafter Sarika). The 4th plaintiff is RASKA INVESTMENTS LIMITED (hereinafter the Company).

9. The plaintiffs by this action seek an order against the defendants:

a. A declaration that the transfer of shares of the 4th plaintiff herein by the Defendants is null and void ab initio and the said shares to revert to the 1st, 2nd and 3rd plaintiffs.

b. A permanent injunction restraining the Defendants and their agents, employees, servants and or through any other person from interfering with operations of, use and/or transacting using the name of the 4th plaintiff and from dealing with any properties of the 4th plaintiff in particular taking possession of, selling, disposing of, removing any valuable material there from, alienating or interfering with the plaintiffs use of the property herein being L.R.No. 330/506 off Riara Road in Nairobi.

10. What those prayers reveal is that the plaintiffs alleged that the transfer of shares of the company by the defendants was unlawful and that they seek restraining orders to stop the defendants using the company's name or dealing with the company's property namely L.R. No. 330/506 (hereinafter the suit property).

11. By their plaint the plaintiffs plead that the company was incorporated on 14th December 1992 with Geeta and her late husband RAMESH MAGON (deceased) (hereinafter Ramesh), as the initial subscribers to the memorandum and Articles of Association. That the company owns a parcel of land; the suit property. That Ashish was allocated shares in the company in 1997 by Ramesh. The plaintiffs plead that on or about 11th May 2009 ZEPHANIA OGAMBA, the 3rd defendant (hereinafter Ogamba) and KARIMI WAIGANJO, the 4th defendant, (hereinafter Waiganjo) fraudulently transferred shareholding of the company to FRANCIS MAINA KIBUNYI, the 1st defendant, (hereinafter FRANCIS) and to KAMUNYU KAHENYA, the 2nd defendant (hereinafter Kamunyu).

12. The plaintiffs also allege that Francis and Kamunyu were negligent in failing to ascertain whether Ogamba and Waiganjo were the true/original subscribers of the company. The plaintiff further pleaded that the share transfer to them was flawed and the alleged acquisition of the suit property was null and void.

13. Francis and Kamunyu by their defence denied the plaintiffs' allegations and pleaded that they purchased the company's shares for valuable consideration without notice of any defect in the title of Ogamba and Waiganjo. That they conducted due diligence through their advocate at the Registrar of Lands, the County Government of Nairobi and at the Registrar of companies. They denied having participated in any fraud.

14. Francis and Kamunyu filed a notice of claim against Ogamba and Waiganjo under Order 1 Rule 24 of the Civil Procedure Rules and also filed a third party notice against the Registrar of Companies.

15. Ogamba and Waiganjo did not participate in the trial and it follows that the defence they filed remained and is still mere allegations and cannot be considered in this judgment: see the case **Shannebal Limited v County Government of Machakos (2018) eKLR** where the court stated:

"In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence"

28. Similarly in the case of Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

29. If one is still in doubt as to the legal position reference could be made to the case of **Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996** where **Rawal, J** (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff."

16. The plaintiffs' case was proved by the evidence of three witnesses. Those witnesses were PREM KUMARI MAGON (Prem) (the mother of Ashish and Ramesh) MOHAMED FAROUK ADAM (hereinafter Farouk) and Ashish.

17. Farouk is a long standing advocate of the High Court of Kenya. His evidence was that he acted for the late Sat Pal Magon (deceased). Sat Pal Magon was the husband of Prem and therefore was the father of Ashish and Ramesh. He further stated that he acted in 1992 for Ramesh and Geeta when they incorporated the company. According to Farouk the initial subscribers to the Memorandum and Articles of Association of the Company were Ramesh and Geeta. He confirmed that he witnesses both their signatures. Farouk also drew and witnessed a lease for 5 years between Ramesh and Ogamba over the suit property.

18. Prem in her evidence confirmed, as had been stated by Farouk, that the company was incorporated by her late son Ramesh and his wife Geeta for the purpose of 'holding' a parcel of land, the suit property. That the said parcel of land was acquired on behalf of the Magon family. Prem made reference to a case filed by Geeta against Ashish and went on to say:

“In the said suit, my daughter in law (*Geeta*) was calling for ownership of the company and its assets to the exclusion of my son and the rest of the family. I did intervene in the said suit and a consent was reached between my family members where my daughter in law, Geeta Magon, transferred her share to me.”

19. Ashish by his evidence in Chief stated that Geeta is a shareholder and director of the company while Sarika, his wife, is a director. That the company was registered in 1992 for the purpose of holding a piece of land (the suit property) bought by his late father Sat Pal Magon on behalf of the Magon family. On the suit property there is a residential house. That in 1997 Ramesh, through Farouk, transferred the one share he held to him and that accordingly he was validly registered shareholder and director of the company. It however came to his knowledge that Ogamba and Waiganjo tampered with the original file at the Registrar of companies and imposed themselves as the initial subscribers and directors of the company. That Ogamba was only a tenant in the house erected on the suit property where he ran a school called St. Deborah Girls High School. That in the year 2009 it became difficult to collect rent from Ogamba and in August 2010 when Ashish sent the debt collector he found Ogamba had vacated the premises. Ashish said that he later learned that it was Francis and Kamunyu who had posted a guard and had taken over the suit property as purchaser. Ashish said that he sued Francis and Kamunyu in case HCCC No. 249 of 2011 seeking to recover from them mesne profit. That suit is still pending.

20. Ashish stated that the sale of shares by Ogamba and Waiganjo to Francis and Kamunyu was fraudulent and the consequent acquisition of the suit property by them was null and void.

21. It was Kamunyu who sighted a newspaper advertisement of sale of land in Lavington area in Nairobi. The advert was in the newspaper, the Daily Nation of 25th February 2005. That advertisement stated:

“LAVINGTON- Prime 1.7 acres with old house ideal 4 apt or town houses Ksh 65 m tel *** owner.”**

Kamunyu called the telephone number in that advertisement and the call was answered by Waiganjo. Kamunyu and Francis agreed to jointly purchase the property and on meeting Waiganjo they negotiated a price of Ksh 60 million. It was then they were informed that the property was registered in the company's name. Before taking any further step they instructed the law firm B.A. Ouma & Associates advocates. Kamunyu stated that that law firm was to undertake due diligence by carrying out necessary searches and drawing up all the documents in respect to the transaction. That on the law firm carrying out a search at the Ministry of Lands Ardhi house it was confirmed that the suit property was registered in the company's name. A search of the Registrar of companies confirmed that Ogamba and Waiganjo were its directors. It was then that the shares of the company were transferred to Kamunyu and Francis together with the company's asset the suit property.

22. Beryl Ouma Advocate, of B.A. Ouma & Associates advocates confirmed she acted for Kamunyu and Francis, in the transaction. The advocate confirmed carrying out searches at Land's Office, Ardhi house, and the office of the Registrar of companies. On the strength of representations made by those two offices she proceeded to act for Kamunyu and Francis in the transaction. The advocate confirmed that all the government taxes for that transaction were paid.

23. The 3rd party, the Registrar of Companies, adduced evidence through Alice Mwendwa, its assistant Registrar. The assistant Registrar gave evidence of the challenges encountered by the Registrar of Companies where there is contestation on takeover/control/transfer of shareholding of companies. That previously unauthorized people, who had no connection to the company, would lodge with the Registrar of companies documents purporting to effect transfer or change of records held by the said Registrar. That after the repeal of the Companies Act in 2015 the Companies Registry now conducts transfer of shares through block chain model online transfer system. This system assists to stem out illegal seizures of companies by people who have no connection to these companies.

24. The assistant Registrar stated that in respect to the company the record of the Registrar of companies shows that the company had two directors/shareholders. They were Ramesh and Geeta. That the Registrar of companies record also shows that as at 24th January 2014 the company's director and shareholder were:

a. Sarika Magon - Nil share

b. Ashish Magon - 1 share

c. Geeta Magon - 1 share

ANALYSIS AND DETERMINATION

25. There are two issues to consider in this judgment. The consideration of those issues encompasses all the issues raised by the parties in this matter. Those issues are:

a. Did the plaintiffs prove they were directors and or shareholders of the company when the transfer of shares was effected in favour of Kamunyu and Francis.

b. Who will bear the costs of the suit.

ISSUE a

26. As stated before Geeta's name was struck out from this case on her application dated 29th February 2012. In support of that application Geeta swore an affidavit and deponed that her authority to institute this case had not been obtained; and that she had not instructed an advocate to act for her and institute this suit. She stated that she resigned as a director of the company on 3rd June 2009 and subsequently transferred all her shares thereof.

27. I have perused a settlement Agreement annexed by Geeta, to her application. That Agreement indicates how the parties to the agreement agreed to share various properties. The relevant part of that agreement provides:

"2. PROPERTIES ALLOCATED TO ASHISH, PREM KUMARI MAGON, AJAY MAGON AND RASHMI KHARBANDA

a).....

b).....

xi) L.R. No. 330/506 Riara Road Kilimani

28. In view of the fact that an agreement was reached with Geeta as stated above it is not clear nor understandable why Ashish when filing this case in 2011 stated in his written statement, attached to the plaint, thus:

"The 2nd plaintiff (Geeta) is my sister in law and is a shareholder and director of the 4th plaintiff (the company)."

29. The above statement by Ashish is but just one of the many inconsistencies I found in his testimony. Let me point out those inconsistencies.

30. In his written statement, representing his evidence in Chief Ashish said that the company was incorporated by his later brother Ramesh and Geeta. That in 1997 Ramesh through Farouk transferred to him one share in the company and he became a shareholder and director. When he cross examined by the advocate of Kamunyu and Francis as to when he became a director of the company Ashish responded:

"I believe around 2002, somewhere there."

31. Ashish on further being cross examined was very evasive and in particular when he was questioned about searches he carried out at the Ardhi house or the Registrar of companies. He was asked if he was the one running the company and he answered in the affirmative. On being asked if the company had a pin number Ashish retorted, "I believe we have". From then Ashish avoided answering very direct and clear questions put to him. For example Ashish was asked if he reported this matter to criminal investigation Department and if so what the results were. He said:

"They found it very clear, they said look, this is very clear we can see what is happening, so I said, "it's okay no problem,""

32. Ashish was asked whether he paid for the shares of the company and this is what he said:

"I must have. It's just transferring of one shareholding."

33. Further Ashish's evidence is that Sarika is his wife and she is a director of the company. When Ashish was asked by the court to spell his wife's name he stated S,A,I,T and not Sarika as shown in the title of this case.

34. I have gone through the concerns I have with the evidence of Ashish because I had an opportunity to observe him as he testified and I found him not to be a truthful witness. And my impression of Ashish is not only on his appearance but it is due to his testimony before court and the evidence he adduced in support of his case. If my view of him, and his testimony, was only on appearance that would go against a finding made in the case **R v Barwich 2001 BCSC 1623 (CanLii)** thus:

"[11] The Ontario Court of Appeal also cited with approval another British Columbia Court of Appeal decision Faryan v. Chorney, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 at pp.356-7, quoting as follows:

If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity

in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness...

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...

The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case."

35. The plaintiff's case was also not assisted by the evidence of Prem, the mother of Ashish. After confirming the written statement was her evidence and on being cross examined she stated that she did not know when her late husband acquired the suit property and then said:

"I don't know if he (her late husband) sold the property (the suit property)."

Further she confirmed that the suit property was been looked after by her elder son (she did not disclose his name) and that the company in her son's and daughter in law's name she then stated:

"I don't know about the company. No my daughter in law did not transfer her share to me."

36. Farouk on being cross examined stated that he could not recall filing any returns for the company. He also stated that he had no firsthand knowledge of transfer of shares of the company to Ashish. Farouk could also not recall having drawn the lease over the suit property between Ramesh and Ogamba. He however later identified the witnessing signature on that lease and said it was his.

37. The plaintiffs allege fraud on the part of the defendants. They allege that the shares of the company were at all material time held by Ashish and Geeta.

38. The evidence produced before court shows the incorporation of the company and although the writing on the page of the first subscribers is faint, it does look like the first subscribers were Ramesh and Geeta. That was in December 1992. After that, the ownership of shares in the company becomes very murky.

39. Ashish says Ramesh transferred his share to him in 1997 and at another time he said he became a director in 2002.

40. What however caused the record to be murky is the actions of the Registrar of companies. It would seem the registrar of companies gave a CR12 of the company to the advocate B.A. Ouma dated 25th March 2009 which reflected the shareholders of the company were Zephaniah Ogamba and James Kirimi Waiganjo(3rd and 4th defendants). Each of them were reflected as holding one share each. When the assistant registrar testified she stated that the CR12 was not genuine. On being probed further she said that she could tell it was not genuine because of the font. She however failed to produce an example of CR12 of that period to prove her statement that the one given to B.A Ouma Advocates was not genuine. There is therefore no evidence that the CR 12 dated 25th March 2009 sent to B. A. Ouma advocates was not genuine. One would have expected that assistant registrar would have informed the court whether the signature appearing on that CR 12 is or is not a signature of an officer who was in the Registrar of companies at the time, the year 2009. She did not.

41. Further she was asked about a CR12 of the company dated 29th July 2011 which was addressed to the firm of advocates Njeru Gichovi. The CR 12 is necessary to reproduce, in part, here as follows:

29th July,2011

NJERU GICHOVI & COMPANY

ADVOCATES

P.O.BOX 50427-00200

NAIROBI

Dear Sir,

REF:RASKA INVESTMENTS LIMITED

We refer to your letter dated 30th May, 2011 and 13th July, 2011.

We apologize for any undue delay as the relevant file cannot be traced at the registry at this moment.

On 23rd June 2011 we held a meeting at the registry in order to find a way forward in this matter. A follow up meeting was held on 30th June 2011 to hear from the firm of Messrs, B.A. Ouma & Company Advocates.

We also held a meeting with Mr Ashish Magon on 13th July 2011 and requested for better particulars including the Annual Returns since incorporation and copies of the relevant receipts paid to date.

As informed by the section head, the documents are necessary and in the absence of any relevant supporting documentation we are constrained to use the computer system which captured the relevant data at the time of scanning.

We have also noted that this matter is under investigation by the CID. We attach a copy of the response of the relevant letter which is under our custody and provides the sought details.

There is also a most recent CR 12 that we obtained from the computer system. Enclosed is a copy of the relevant letter.

According to the records held by this registry as at January 21st 2010, the names of the directors shareholders and their particulars are as follows:

Directors	Address	Nationality	Shares
Kamunyu Kahenya	P.O.Box 42256 000100 Nairobi	Kenyan	1
Francis Maina Kibunyi	P.O.Box 42256 00100 Nairobi	Kenyan	1
		Total	2

The nominal share capital of the company is Ksh 100,000/= divided into 100 shares of 1,000/= each.

We have also been informed by Mr. Ashish Magon that this matter is in court. We await the decision of the court as this matter is sub judice.

Yours faithfully,

WILSON RADING

STATE COUNSEL

FOR: REGISTRAR OF COMPANIES

CC. B.A. OUMA & COMPANY

ADVOCATES

P.O. BOX 8151,00100

NAIROBI

42. The assistant registrar in evidence was able to confirm that the writer of the above letter Wilson Rading was a state counsel in the registrar of companies, when he wrote that letter. She further stated Rading had left the office and was now a magistrate. When the assistant registrar was asked her opinion on the above letter and whether that information was in the database her response was: "I do not know". This is despite her testimony that she had studied the database of the Registrar of companies before attending court.

43. On the whole this was a witness, who although she attended court to represent the office of the Registrar of Companies, seemed to be biased in favour of the plaintiffs. She was very ready to own up as being genuine documents produced on behalf of the plaintiff but documents produced by the defendant she cast doubt on them without giving proper basis for such doubt. This is not a witness this court can rely on in determining this case.

44. So did Ashish, since he was the only plaintiff who testified, satisfy the civil burden of proof? Section 107 of the Evidence Act provides:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

45. Ashish stated that Ramesh transferred his share to him. He said that the said transfer was effected by Farouk. Farouk on being asked said he could not recall effecting such change. The fact that the CR12 of the company dated 24th January 2014 reflects Ashish and Geeta as shareholders is because, and this was confirmed by Ashish that he and his advocate attended the offices of the Registrar of companies and supplied documents to that Registrar. It would seem that that CR12 was produced on the basis of documents supplied by Ashish. That CR12 of 24th January 2014 is eclipsed by the earlier CR12 of the defendants of 25th March 2009 and of 29th July 2011. The Registrar of companies representative before court, the assistant registrar, failed to disapprove those two CR12 produced by the defendants. Ashish in my view failed to meet the standard of proof to prove that the defendants had committed fraud. In the case **ARTHI HIGHWAY DEVELOPERS LTD V WEST END BUTCHERY LIMITED & 6 OTHERS (2015) eKLR** the court had this to say on fraud:

“53. It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from **Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427**:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas. 685 at 697, 701, 709, Garden Neptune V Occident [1889] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

see **Insurance Company of East Africa vs. The Attorney General & 3 Others Hccc135/1998**”

46. There is no proof that the defendants committed fraud. And Ashish failed to prove he was a shareholder or that he was a director of the company. This is because the company’s return which reflected him as a shareholder is denied by Farouk and more importantly it is not supported by any resolution or minutes of the company. Indeed, apart from that company’s return there is nothing else that Ashish can rely on to prove his connection to the company. The shareholders of the company in 1992 were Ramesh and Geeta and by the company’s CR12 of 25th March 2009 the shareholders were Ogamba and Waiganjo. There is ample evidence that they sold and transferred their shares to Kamunyu and Francis. That transaction is supported by the agreements dated 11th May 2009 and the payments made by Kamunyu and Francis. Nothing turns, in my view, on the issue raised by the plaintiffs’ advocate that there is unexplained shortfall of the purchase price. Nothing also turns on the fact that the agreement reflected that Kamunyu and Francis were beneficial owners. Not at all. Black’s Law Dictionary Tenth Edition defines beneficial owner as:

“One recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else.”

47. That definition does not detract this court’s finding that the plaintiffs did not prove fraud nor negligence on the part of the defendants.

48. It needs to be stated that it is curious that Ashish alleges that Ogamba was a tenant and yet it took him from September 2010 to June 2011 for Ashish to know the suit property was now occupied by Kamunyu and Francis. Ogamba it would seem had a lease with Ramesh in the year 2002. The lease was to run for 5 years and three months. It follows that that lease expired in the year 2007. There was no renewal of that lease. Even if Ogamba continued to be a tenant on the suit property and because he was running a business, that is a school, the lease should have been a lease in compliance with the Landlord and Tenant (shop, Hotel and Catering Establishments) Act Cap 301. The landlord, in this case presumably Ashish, should have produced before this court a Rent Book as per section 3 (4) of the stated Act. Neither a Rent Book or receipt of rental payments by Ogamba were produced by Ashish to prove Ogamba was a tenant.

49. Ashish also failed to explain why from the time Ogamba vacated the suit property he did not go on the suit property until June 2011. When he did go he went there with might and force. This is evident from the letter written by Kamunyu and Francis. Let me reproduce part of it:

“RASKA (8149)

23rd June, 2011

The District Commissioner,

Westlands

P. O. Box 30124

NAIROBI

Dear Madam DC,

L.R. NO. 330/506 RIARA ROAD, NAIROBI

UNLAWFUL INVASION AND OCCUPATION OF PRIVATE PROPERTY BY THE ADMINISTRATION POLICE OFFICERS

We write in reference to the subject matter referred above.

On Wednesday 22nd June 2011 at about 1400hours, two administration police officers, who only identified themselves as Tom and Suleiman forced their way and invaded our property, L.R no 330/506, situated along Riara Road, Nairobi. The property is legally owned and registered under Raska Investments Limited which has two directors, Mr Kamunyu Kahenya and Mr Francis Gichuhi (copy of company search dated 21st January 2010).

On receiving the information, Mr Gichuhi proceeded to the property and indeed met two armed officers in the compound, who on enquiry informed me that they had been posted there at the orders of Westlands District A.P Commander, Mr. Daudi Mohammed. Their mission was to maintain law and order, they said. Since then, there has been a regular change of guard for day and night. Under DCAP's command, security Guards from M/s Hatari Security were also allowed into the property illegally.

Upon enquiry from the DCAP (whom Mr Gichuhi had met earlier in the day), flatly refused to explain his action, or withdraw the officers. He also threatened to shoot any of our employees who will obstruct execution of his orders.

As directors of the company that owns the property we wish to protest against this conduct and unilateral decision of the DCAP, in the absence of any real or potential threat of law breaking. indeed, we never requested for police protection on our property. Further, we were neither summoned nor even consulted as the registered owners of the land before this decision was made.

Besides, we have noted that the police officers are being dropped and picked regularly by a private vehicle, in the company of a Mr Ashish who has been claiming the land belonged to his family, but has never provided any proof or registered any dispute in court.

Madam DC, the issue of this land had already been referred by the same Mr Ashish to the Criminal Investigations Department who recorded our statements and asked for ownership documents from us (see copy of letter attached) for investigations. Mr Ashish had no documents to show.

50. As I pondered on the evidence adduced before court I was unable to accept that one, Ashish, who alleges is the owner of property and he prided himself of always checking on the properties he own, why he would fail for 9 months to go on the suit property and note that Ogamba, he alleges was his tenant, was not there. After all his evidence is that all this time Ogamba was not paying rent. The question that keeps arising in my mind is, did Ashish know of the transaction between Ogamba and Kamunyu and Francis. Was he deliberately keeping away to give Kamunyu and Francis a sense of comfort ownership before appearing and alleging he was shareholder/director of the company.

51. In my estimation/consideration of the evidence adduced before me I found that Kamunyu and Francis did all that a prudent purchaser would be expected to do. They hired an advocate and that advocate, B.A. Ouma, carried the necessary searches one being at the companies Registry which revealed Ogamba and Waiganjo were the shareholders of the company. Kamunyu and Francis met the standards of a bona fide purchaser without notice discussed in the case **Joseph Muriithi Njeru v Mary Wanjiru Njuguna & another (2018) eKLR** thus:

“47. Was the 2nd respondent a bona fide purchaser for value without notice and did she acquire a good title? We have partially disposed of this issue. **BLACK'S LAW DICTIONARY** 9th Edition defines a bona fide purchaser as:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

48. In **KATENDE v HARIDAR & COMPANY LTD [2008] 2 E A 173**, the Court of Appeal in Uganda held that:

“For the purposes of this appeal, it suffices to describe a bona fide purchase as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

For a purchaser to successfully rely on the bona fide doctrine as was held in the case of Hannington Njuki v William Nyanzi High Court civil suit number 434 of 1996, must prove that:

(1) he holds a certificate of title;

(2) he purchased the property in good faith;

- (3) he had no knowledge of the fraud;**
- (4) he purchased for valuable consideration;**
- (5) the vendors had apparent valid title;**
- (6) he purchased without notice of any fraud; and**
- (7) he was not party to the fraud.”**

52. Kamunyu and Francis have proved through CR12 of 29th July 2011 that they are the shareholders of the company. They have proved before this court they purchased the shares of the company in good faith, they had no knowledge of any fraud, they purchased the shares for valuable consideration and they satisfied the court that Ogamba and Waiganjo, as seen in the CR12 of 25th March 2009 had a valid title to the shares. There is no evidence before me Kamunyu and Francis participated in fraud at all.

53. It is because of the above findings that I find in respect to the issue (a) above that the plaintiffs did not prove they were directors and shareholders of the company when the transfer of shares was effected to Kamunyu and Francis.

54. It will follow that having made the above finding the plaintiffs' case fail and the costs must follow the event.

OTHER ISSUES

55. The Registrar of companies submitted in this case that it was improperly joined in this action and that there were delays in being joined. That argument is defeated by the fact that the Registrar of companies participated in this trial and cannot allege there was delay in being joined. I also find that the Registrar of companies was a necessary party because the issues that arose herein arose because of the actions taken in that office of issuing various CR 12 that conflict with each other. They were not in my view wrongly joined as parties.

56. It needs to also be stated that the plaintiffs' case was only proved by Ashish, Sarika did attend the hearing. If she did not intend to attend hearing she need to give Ashish power of attorney for him to represent her. It was not enough for her to give authority for Ashish to plead and sign court documents. It follows that her case remained unproved.

CONCLUSION

57. In the end the judgment of the court is:

- a. The plaintiffs' case is dismissed with costs to 1st and 2nd defendants.
- b. The interlocutory injunction issued by this court on 18th January 2012, or any other time, in respect to the property L.R. No 330/506 Riara Road Nairobi is vacated.
- c. In view of my finding in (a) above I do find that a valid title in L.R. No 330/506 Riara Road Nairobi was passed on to the 1st and 2nd defendants.

DATED, SIGNED and DELIVERED at NAIROBI this 8th day of JULY 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Plaintiffs:

For the 1st & 2nd Defendants:

For 3rd & 4th defendants:

For 3rd Party:

ORDER

This decision is hereby virtually delivered this 8th day of July, 2020.

MARY KASANGO

JUDGE