



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 779 OF 2009
MULTI TRACK
KENYA PLANTERS COOPERATIVE UNION
LTD.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1st
DEFENDANT

HARVEN GADHOKE 2ND
DEFENDANT

DANIEL MUTISYA NDONYE3RD
DEFENDANT

ROBERT KINUTHIA MUNGAI T/A KAHONOKI ESTATE 4TH
DEFENDANT

FIKAH ACRES LIMITED..... INTERESTED
PARTY

RULING

1. This ruling arises from two applications dated 17th February, 2015 and 18th December 2014 by the 4th Defendant and the Plaintiff respectively. On 26th March, 2015, I directed that the application dated 18th December, 2014 be heard and that the issues raised in the Application dated 17th February, 2015 be dealt with at the hearing of the Application dated 18th December, 2014.

4th Defendant’s Case

2. By an application dated 18th December, 2014, the 4th Defendant sought the following orders:
- a. **THAT** this application be certified as urgent, service of the same be dispensed with and it be heard ex-parte in the first instance.

- b. **THAT** the proposed Interested Party be enjoined as an Interested Party in this suit.
- c. **THAT** pending the hearing and determination of this application, the Plaintiff/Respondent, the Proposed Interested party, their servants and/or agents or otherwise howsoever be restrained from trespassing, entering upon or dealing any further in any way with all that piece of property situate in Makuyu commonly referred to as Kahonoki Estate being L.R Number: 1363/10, 1363/11, 1363/12, 1363/13, 1363/14, 1363/15, 1363/16, 1363/22, 1363/23, 1363/24, 1363/25, 1363/26, 1363/27, 1363/28, 1363/33 (“the suit property”).
- d. **THAT** pending the hearing and determination of this Application and the suit herein, the Land Registrar Nairobi do enter a Caveat against all that parcel of land commonly referred to as Kahonoki Estate being L.R Number:1363/10, 1363/11, 1363/12, 1363/13, 1363/14, 1363/15, 1363/16, 1363/22, 1363/23, 1363/24, 1363/25, 1363/26, 1363/27, 1363/28, 1363/33,
- e. **THAT** pending the hearing and determination of the main suit herein, the Plaintiff/Respondent, the Proposed Interested party, their servants and/or agents or otherwise howsoever be restrained from trespassing, entering upon, transferring or dealing any further in any way with all that piece of property commonly referred to as Kahonoki Estate being L.R Number: 1363/10, 1363/11, 1363/12, 1363/13, 1363/14, 1363/15, 1363/16, 1363/22, 1363/23, 1363/24, 1363/25, 1363/26, 1363/27, 1363/28, 1363/33 (“the suit property”).
- f. **THAT** an order compelling the Plaintiff/Respondent and the Interested Party/Respondent to surrender for cancellation any Title or Registration Certificate over the land Parcel commonly referred to as Kahonoki Estate being L.R Number: 1363/10, 1363/11, 1363/12, 1363/13, 1363/14, 1363/15, 1363/16, 1363/22, 1363/23, 1363/24, 1363/25, 1363/26, 1363/27, 1363/28, 1363/33 (“the suit property”).
- g. **THAT** an order do issue compelling the Registrar of lands to rectify the Registry Index Map to reflect that the 4th Defendant/Applicant is the registered proprietor of all that parcel of land commonly referred to as Kahonoki Estate being L.R Number: 1363/10, 1363/11, 1363/12, 1363/13, 1363/14, 1363/15, 1363/16, 1363/22, 1363/23, 1363/24, 1363/25, 1363/26, 1363/27, 1363/28, 1363/33, (“the suit property”).
- h. **THAT** the costs of this Application be awarded to the Plaintiff/Applicant (sic).

3. The Application was based on the following grounds:

1. The 4th Defendant/Applicant at all material times to this suit has been the registered owner of all that Parcel of land commonly referred to as Kahonoki Estate being L.R Number:1363/10, 1363/11, 1363/12, 1363/13, 1363/14, 1363/15, 1363/16, 1363/22, 1363/23, 1363/24, 1363/25, 1363/26, 1363/27, 1363/28, 1363/33 (“the suit properties”).
2. At all material times to this suit the Plaintiff herein has unsuccessfully been trying to alienate the suit properties herein.
3. This Honourable court through an order of 28th July, 2014, by Honourable Justice Odunga issued an order of status quo to be maintained as regards the 4th Defendant/Applicant’s property.
4. It has since come to the knowledge of the 4th Defendant/Applicant that whilst the Orders of this Honourable Court for status quo was issued with all parties present in Court on 28th July, 2014, the Plaintiff/Respondent went ahead and irregularly transferred and registered the whole of the suit property measuring 859.771 acres contained in 17 titles in its own name on 7th August, 2014 and subsequently transferred the same to a 3rd party Fikah Acres Limited, the proposed Interested Party.
5. Subsequent to 28th July, 2014 the matter was further mentioned on 23rd September, 2014 and further on 28th November, 2014 during which date it was clear to all parties that status quo be maintained.
6. On 29th October, 2014 the Plaintiff/Respondent filed a notice of withdrawal of suit as against the 4th Defendant/Applicant and on 19th November, filed a consent between the Plaintiff, the 1st Defendant and the 2nd Defendant to have the suit marked as fully settled, the 4th Defendant/Applicant was not part of this consent.
7. On 28th November, 2014 the Plaintiff sought to have the whole suit be marked as settled but

- the Honourable Court directed that there was a pending counterclaim by the 4th Defendant/Applicant as against the Plaintiff/Respondent.
8. **These acts of fraud, misrepresentation, material non-disclosure to Court, deceit and illegality are meant to defraud the 4th Defendant/ Applicant off the suit property herein and hoodwink the Honourable Court.**
 9. **The matter is under investigation by the Criminal Investigation department Headquarters in Kiambu.**
 10. **The files at the Land Registry in Nairobi are missing and cannot be traced to place a Caveat against any further dealings in the suit property.**
 11. **No prejudice will be caused to any party by this Honourable Court granting the application.**
4. According to the 4th Defendant, he was at all material times the registered owner of all that parcel of land commonly referred to as **Kahonoki Estate** being **L.R Numbers: 1363/10, 1363/11, 1363/12, 1363/13, 1363/14, 1363/15, 1363/16, 1363/22, 1363/23, 1363/24, 1363/25, 1363/26, 1363/27, 1363/28, 1363/33** measuring **859.771 acres**. According to him, on 28th July, 2014, this matter came up for mention before this Court when the Court issued orders to the effect that the status quo with respect to his property be maintained and for the matter to be further mentioned on 23rd September, 2014. However the 4th Defendant came to learn that in defiance of the said order, the Plaintiff on or about 9th August, 2014 transferred the whole of the 859.771 acres fraudulently and irregularly into its own name without the 4th Defendant's participation, knowledge, and consent or otherwise.
 5. It was disclosed that this matter was last before this Court on 28th November, 2014 when the 4th Defendant was not present since he had travelled to India for a surgery but his son **David Maina** to whom he have given a power of attorney was present and explained to Court the nature of his absence. On 25th November, 2014, his erstwhile advocates were served with a **Notice of Withdrawal of Suit** by the Plaintiff withdrawing the suit as against the 4th Defendant and on 26th November, 2014 a consent dated 19th November, 2014 was filled as between Advocates for the Plaintiff/respondent, Advocate for the 1st Defendant/Respondent and the Advocate for the 2nd and 3rd Defendant/Respondent to the effect that they sought to have this matter marked as settled though the 4th Defendant was never part of the consent and objected to the said consent. On the 28th day of November, 2014 the Advocate for the Plaintiff sought to have the whole suit be marked as settled/withdrawn and in essence concluded whereupon the Court declined the same stating that there was still the 4th Defendant's counterclaim pending to be canvased.
 6. To the 4th Defendant the aforesaid actions were meant to hoodwink this Court and enable the Plaintiff to defraud him the suit property herein and were a desperate attempt to circumvent the rolling wheels of Justice. The 4th Defendant was convinced and convicted that after fraudulently transferring the suit property to its own name and subsequently to the proposed interested party herein (Fikah Acres Limited), the Plaintiffs were in a desperate attempt to have this matter withdrawn from Court and to see unto it that the above facts do not see the light of day. It was disclosed that the fraudulent and illegal transfer by the Plaintiff together with the Interested Party of Kahonoki Estate came to the 4th Defendant's knowledge sometime in the course of the month barely a week before when agents of the Plaintiff visited his land to survey it and were repelled by his workers on the ground against invading the suit property.
 7. According to the 4th Defendant, he reported the said matter to the Police in Makuyu who promised to look into the matter and are currently performing their investigations. He further visited the lands registry Nairobi with a view to perform a land search on the land to ascertain its status only to find that the land files for the above mentioned properties forming part of Kahonoki Estate could not be traced as they were either; misplaced, lost or hidden. Luckily for him, an acquaintance of his had earlier on been approached by the Interested Party with a view of disposing Kahonoki Estate to him and he had conducted a search, which search results revealed that the property had been transferred to the Interested Party by the Plaintiff herein sometime in August 2014, when the orders of this Honourable Court were in place. The 4th Defendant also managed to acquire a copy of the Conveyance document between the Plaintiff and the Interested

Party in relation to L.R. Number 1363/27 and noted a lot of inconsistency and proof of fraud in that:-

- a. **The conveyance falsely indicates that the 4th Defendant entered an agreement with the Plaintiff on 7th August, 2014 to transfer the property to them. This, according to him, was false and a fundamental misrepresentation of facts, as he had never transferred any of the suit property to the Plaintiff/Respondent.**
 - b. **Barely 2 days later on 9th August, 2014, a Saturday, the property was registered in the Plaintiffs name, who in turn proceeded to transfer the same on 19th August, 2014 to the interested party.**
 - c. **In a record 2 days as of 21st August, 2014 the property was then registered in the Proposed Interested Party's name.**
 - d. **Of interest is that the Conveyance on behalf of the Plaintiff was signed by two people of the male gender whose photos appear on the conveyance but on further scrutiny of the 2nd individual executing as secretary the National Identity card Number and PIN Number entered is one of a female gender belonging to one Jacinta Wamaitha Njogu, who was not director or secretary of the Plaintiff/ Respondent.**
 - e. **The signatories of the conveyance on behalf of Fikah Acres Limited, the Interested Party herein were indicated as being Nicholas Murigu Bore and Caroline Muthoni Mureithi who were not directors of Fikah Acres Limited.**
 - f. **A further Search at the Companies Registry to establish the directors of Fikah Estates Limited showed that Nicholas Murigu Bore and Caroline Muthoni Mureithi have never been directors of Fikah Acres Limited and the Directors are Wyll Peter Mungai and Morintat Peter Oiboo.**
8. It was therefore contended by the 4th Defendant that there was a botched amateur attempt to defraud him his property which he toiled for under harsh economic circumstances back in 1972. He disclosed that on further inquiries at the Lands Registry about his property he was informed that it had been reported and there were rumours within the corridors of Ardhi house that he, the 4th Defendant, had since died but before passing on had transferred the suit property herein to the Plaintiff and having heard this and fearing for his life he have reported the same to the Police in Makuyu and the CID headquarters in Kiambu and the same is under investigation. As a precautionary measure he made audio and video recordings of the statements herein as advised by the police.
9. The 4th Defendant asserted that at no one time had he ever contemplated transferring the suit property to the plaintiff since 2009 and in fact the last time this matter came up in Court, the Court was informed that he am ready and willing to deposit Kshs. 51 Million either in Court or with the Plaintiff, being the compromised sum which he was willing and ready to pay in full and final settlement of this matter.
10. According to the 4th Defendant, from the conveyances, one of the parcels of land forming part of the larger Kahonoki Estate and measuring 4.370 Hectares translating to 10.8 Acres was valued at a paltry Kshs. 1,351,765 Million while the truth is that an acre of his property is valued at Kshs. 5 Million which in this case should have translated to Kshs. 54,000,000/= which demonstrates even a clear attempt to defraud the taxman. However despite seeking to be supplied with an official search, he was denied the same.
11. When this application came before me on 18th December, 2014, I directed *inter alia* that for the purposes of the hearing and determination of the application, **Fikah Acres Limited** be joined to these proceedings as an interested party; that the Plaintiff and the Interested Party be restrained from trespassing upon or dealing with the suit properties.

Plaintiff's Case

12. It was these orders that provoked the Application dated 17th February, 2015 by the Plaintiff in which the Plaintiff seeks the following orders:

- a. **That this application be certified as urgent, service of the same be dispensed with and it be heard Ex parte in the first instance.**
- b. **That the honourable court be pleased to review, vacate and or set aside the orders made on 18th December 2014.**
- c. **That pending the hearing and determination of this application the interim orders granted by Honourable Justice Odunga on 18th December 2014 restraining the Applicant and Interested Party from trespassing, entering upon or dealing with the property known as Kahonoki Estate be lifted.**
- d. **That the costs of this application be awarded to the Plaintiff/Applicant.**

13. I must state from the outset that the application and affidavit in support of this application was casually and I dare say carelessly drawn. Not only did it contain unnecessary grammatical errors but the sentences were incomplete and at times incoherent. I have however attempted to make the best of it. Glaring examples include the fact that the application is expressed to be brought on behalf of the ex parte applicant.
14. According to the Plaintiff, the Plaintiff instituted this suit by way of a Plaint dated 22nd October, 2009 and amended on 19th July 2010 and on 19th November, 2013, the 1st Defendant, 2nd Defendant, 3rd Defendant and the Plaintiff drew a consent which was filed on 26th November, 2013 marking the matter as fully settled. Subsequently, on 29th October 2014 the plaintiff withdrew the suit herein wholly as against the 4th Defendant vide a notice which was filed in court on 29th October, 2014.
15. It was averred by the Plaintiff that on 28th November 2014 the matter was listed before this Court when the 4th defendant claimed that he had a pending counter claim that was yet to be dispensed with. However, upon perusal of the court file records there was no evidence that the counterclaim as is purported by the 4th does exist or was ever filed.
16. On 18th December 2014 the 4th Defendant filed a Notice of Motion application seeking for injunctive order against the Plaintiff and the same was granted with a direction that the parties be served for an inter partes hearing on 30th January 2015 but on that date the court wasn't sitting and the matter was listed before the Court on 4th February 2015, (sic) they were ambushed and served with the aforesaid application, notice of change of advocate and court order.
17. In the Plaintiff's view, since the matter was already withdrawn against the 4th Defendant, the same could only be revisited if there was pending counterclaim or there was an issue of costs to be determined but not through subsequent substantive application. It was therefore contended that there was no substratum as the suit had already been withdrawn against the 4th Defendant. To the Plaintiff, the matter was already settled between the 1st, 2nd, & 3rd Defendants and withdrawn against the 4th Defendant thus court is *functus officio*.
18. In response to the Application dated 18th December, 2014, the Plaintiff filed a replying affidavit sworn by its advocate, **Muriithi Wanjau**, on 25th March, 2015.
19. According to the deponent, the Plaintiff herein was one of his clients having acted for it in various matters and specifically in the year 1998 when the plaintiff instructed him to advise and negotiate a suitable moratorium arrangement with its debtors where a settlement arrangement acceptable to both parties would be agreed upon to facilitate payment of such debts without the necessity of court action and to facilitate the running of the affairs of the Plaintiff. According to him, he was aware as the advocate acting that the Plaintiff was owed substantial amounts of moneys by various debtors including the 4th Defendant herein, **Robert Kinuthia Mungai**, and from the records maintained by the plaintiff, he established that the said **Robert Kinuthia Mungai** owed the Plaintiff about Kshs 73 Million as at the time he was instructed to act in the matter being the year 1998 and which was secured by way of a mortgage registered over his parcel of land being L.R 1362/2, securing payment of the principal sum together with the interest and all costs accruing thereon. He further established that efforts by the Plaintiff to enforce its rights under the mortgage had precipitated the filing of two suits by the said 4th defendant being Nairobi HCCC 542 of 1990 and Nairobi HCCC 1484 of 1992.
20. It was deposed that part of their advice as advocates acting in the matter, was for the Plaintiff to

consider an acceptable mode of settlement of the entire debt thereon owed by the said **Robert Kinuthia Mungai** and upon receipt of instructions, he engaged the 4th defendant herein by himself and through his advocate being **Mr Kagiri** (now deceased) of the firm of **Munoru Kagiri & Wamae Advocates** and after various discussions, they settled on an agreement which was mutually executed on the 23rd November 1998 settling the debt on terms inter alia that:

- i. **The total amount owing and due to KPCU would be compromised at Kshs 48 Million together thereon with costs and charges relating to the execution of the terms of the agreement and thereby making a total debt of Kshs 51 Million.**
- ii. **The said sum of Kshs 51 Million would be settled by the 4th Defendant herein by way of a transfer of part of the land subject of the mortgage to KPCU.**
- iii. **The part of the land to be excised and transferred under the agreement would be determined upon a valuation to be done by M/S Tysons Ltd on the basis of the value per acre of the land in question.**
- iv. **The portions to be transferred as aforesaid shall be surveyed, excised and processed up to production of the Deed Plans by M/s Thiga Survey Consortium.**
- v. **The transferor and the transferee under the agreement would appoint the valuers and surveyors to carry out the services subject of the agreement and each would be bound by the results of the respective professional services.**
- vi. **The transferor would meet the survey and valuation fees charged by the surveyors and valuers and the legal fees for the transferee's advocates.**
- vii. **The pending cases at the time would be marked as settled as between the parties.**
- viii. **The transferee shall execute a discharge of charge and which shall be presented for registration together with the transfer in favour of the transferee.**

21. It was averred that the said agreement was then signed by the 4th Defendant and witnessed by his then advocate being **E.K Kagiri, Advocate** and also executed by the plaintiff and pursuant to the terms of the said agreement, the 4th Defendant proceeded to sub divide the land being L.R NO. 1363/2 into about thirty (30) sub divisions through M/s Thiga Survey Consortium. Upon the said sub division, the some of the sub divisions valued and agreed upon between the Plaintiff and the 4th Defendant, were agreed to be transferred to the Plaintiff in settlement of the entire debt outstanding and owing from the 4th Defendant and in consideration of a discharge of the remaining parcels and re-conveyance thereof to the 4th Defendant.

22. It was averred that to effect the transfer of the said portions to the Plaintiff, it executed partial-reassignments of the identified sub divisions in favour of the 4th defendant and who then executed conveyances for the same in favour of the Plaintiff which executed transfers by way of conveyances were executed by the 4th Defendant and deposited with the deponent as the advocate then acting for the Plaintiff. The Plaintiff further executed partial re-assignments of all the other sub divisions in favour of the 4th Defendant and thereby discharging them from the mortgage with the effect that he was now free to deal with them in any manner without any encumbrance or further reference to the Plaintiff. The deponent was then left with the conveyances executed in favour of the Plaintiff and which he advised the plaintiff to provide such funds as would facilitate their registration in favour of the Plaintiff by payment of stamp duty and registration fees but no such funds were available due to the cash flow and liquidity issues obtaining at the Plaintiff and which were well in the public and which eventually precipitated the appointment of Receivers by the secured creditors. It was disclosed that the shareholders and directors of the Plaintiff did on the 31st July 2014 at the company's annual general meeting, decide and direct the directors to liquidate the non-core assets of the company so as to settle the outstanding debts and release the company from the receivers appointed by its secured creditors and the board identified the parcels of land transferred to the Plaintiff from the 4th Defendant as part of the non-core assets which could be disposed off to realize funds for the settlement of debts owed to third party creditors.

23. Accordingly, the board sourced for a buyer for the same being the Interested Party and upon instructions, the deponent released the original suit conveyances executed in favour of the Plaintiff by the 4th Defendant to **M/S Muriu Mungai & Company Advocates** who were acting for the

said Interested Party in the transaction and who proceeded to register the same and further conveyances in favour of the purchaser, the Interested Party.

24. It was averred by the deponent that the 4th Defendant, had severally attended his offices and urged him to release unto him the original conveyances that he had executed in favour of the Plaintiff, on the promise that he would pay to the deponent the sum of Kshs 4 Million and on the claim that he would settle the debt amount outstanding directly to the Plaintiff, but the deponent declined and as he did not have such instructions and that would have defeated his clients' interest in the subject property. According to the deponent, the 4th Defendant has already disposed by way of sale, part of the sub divisions that were discharged by the Plaintiff in his favour pursuant to the agreement of 23rd November 1998.

Interested Party's Case

25. The Interested Party opposed the 4th Defendant's Case.

26. According to the Interested Party, a private limited company undertaking the business of investment and trade in real estate and related interests, it is the registered and beneficial proprietor and beneficial owner of parcels of land more particularly described as L.R Numbers 1363/10, 1363/11, 1363/12, 1363/13, 1363/14, 1363/15, 1363/16, 1363/22, 1363/23, 1363/24, 1363/25, 1363/26, 1363/27, 1363/28 and 1363/33, located in the Gatanga area of the Muranga County within the Republic of Kenya. The Interested Party averred that sometimes in August 2014, it learnt from the plaintiff that it was disposing off some of its properties to facilitate payment of its indebtedness which had even precipitated the appointment of receivers by its secured creditors. The said properties that were available for purchase from the plaintiff were the parcels of land more particularly described as L.R Numbers 1363/10, 1363/11, 1363/12, 1363/13, 1363/14, 1363/15, 1363/16, 1363/22, 1363/23, 1363/24, 1363/25, 1363/26, 1363/27, 1363/28 and 1363/33 (hereafter the suit properties).

27. It was contended that based on the advise by the plaintiff's officers seized of this matter, the 4th Defendant pursuant to the agreement he had mutually entered into with the plaintiff for the repayment of the money he owed it, did sub divided the property being L.R 1363/2 into 30 sub divisions part of which were discharged and released to him and the remainder thereof were assigned to the plaintiff in repayment of the 4th defendant's debt.

28. The Interested Party, being desirous of purchasing the said property retained the firm of **Muriu Mungai & Company Advocates** to act for it in the transaction and the said advocates proceeded to undertake due diligence on the title to the suit property and established the suit properties were therefore available for disposal by way of a sale for valuable consideration, by the plaintiff without any further reference to the 4th defendant. Thereupon, the interested party entered into an agreement of sale for the suit property in which it was agreed that upon payment of the consideration agreed upon, the plaintiff would cause to be transferred to the interested party, its entire title and interest in the suit properties. Pursuant thereto, the interested party paid unto the plaintiff the entire consideration agreed for the purchase of the suit properties and whereupon, the plaintiff executed conveyances in favour of the interested party transferring the title thereto to it. The said conveyances were registered on the 21st August 2014 and thereby constituting the interested party the registered proprietor thereof.

29. It was averred that upon being registered as registered proprietor, the interested party sought to take vacant possession thereof but the same was frustrated by the trespass and unlawful interference thereof by the 4th defendant by himself and persons acting under him and thereby the interested party was constrained to take out an action in recovery thereof being Thika CMCC No. 41 of 2015, **Fikah Acres Ltd –vs- Robert Kinuthia Mungai** in which the Court issued interim orders restraining the 4th defendant herein from interfering with the suit premises in the interim pending the hearing of the said application.

30. It was disclosed that sometimes in February 2015, the plaintiff's advocates in the matter being **Muriithi Kereria & Company Advocates**, advised the interested party that they had been served with an application filed in this matter where the interested party had been joined in the proceedings and an order issued restraining any further dealings on its part pending the hearing and determination of the application.

31. It was averred that the interested party had no notice whatsoever of the present suit and proceedings until it was served with a copy of the said Order on or about the 23rd February 2015 by the plaintiff's advocates and where it was advised that the matter was due for mention on the 24th February 2015 for directions. The interested party did instruct its advocates immediately and who appeared in court on the said 24th February 2015 and sought time leave of the court to be served with the pleadings in the matter for it to take a position on the pending application.
32. It was the Interested Party's case that the said application has no merit and the same is made in manifest bad faith warranting its dismissal, for reasons that:
- i. **The interested party is a purchaser of the suit property for value without any notice of any defect in title and thereby acquired good title to the suit property upon sale and transfer thereto.**
 - ii. **There was no order obtaining to restrain the sale and transfer of the suit property to the interested party as at the time of the sale and transfer thereof to it.**
 - iii. **There was no public notice made or alleged to have been made, of any order, as may be proved but which is denied, by its registration against the title, so as to give notice to any third party such as the interested party, of its existence. Without such notation on the register, then the interested party would not have known of its existence in the ordinary process of undertaking a search over the property before purchase.**
 - iv. **The 4th defendant/applicant executed the assignment of his interest in the suit premises to the plaintiff herein pursuant to the agreement dated 23rd November 1988 where part of the initial property was discharged and re-assigned to him and where he has even proceeded to dispose some of his titles to 3rd parties. These titles include L.R No. 1363/32, 1363/17, 1363/6, 1363/5 and 1363/31 which are all registered in the name of the 4th defendant pursuant to the said agreement of 23rd November 1988 and the partial re assignment executed by the plaintiff and whereas the titles to the suit properties were similarly partially re-assigned to the 4th defendant and who thereafter transferred the same to the interested party, then the 4th defendant/applicant is estopped from alleging fraud and illegality in a process from which he has derived title to his other properties and benefit from the sale of some of them to third party.**
 - v. **If the 4th defendant/applicant acquired good title to the properties that were partially discharged and re-assigned to him and which title he has subsequently passed to third parties, then similarly, the interested parties' title to the suit property which passed from the same process, must as a matter of course be regular and a valid titles. The 4th defendant has subsequent to the partial re assignment of some of his titles disposed the same *inter alia* as follows;**
 - a. **L.R No. 1363/19 and 1363/20 transferred to Kakuzi Ltd on the 26th April 2000.**
 - b. **L.R No. 1363/30, 1363/31, transferred to Sophina Nduku Rukwaro on 18th May 2000.**
 - c. **L.R No. 1363/9, transferred to Kapiti Dairies Limited on the 10th November 2005.**
 - d. **L.R No. 1363/18 and 1363/21 to Kapiti Dairies Limited in the 21st December 2006.**
 - e. **L.R No. 1363/34, leased to Delmonte Limited on the 14th September 2001.**
 - vi. **That if the 4th defendant acquired good title to his properties as above enumerated pursuant to the agreement dated 23rd November 1988, then similarly, the plaintiff acquired good title to the suit properties and which were subsequently transferred to the Interested Party.**
 - vii. **There was no order restraining the transfer of the suit property to the interested party as at the time of the sale and transfer thereof.**
33. According to the Interested Party, the 4th defendant's application is an attempt by him to retract from the agreement dated 23rd November 1988 and which granted him titles to part of the sub divisions of the property and further which granted unto the plaintiff titles to part of the sub divisions in settlement of the debt outstanding and owing from the 4th defendant to it which

agreement has already been performed to the extent that the 4th defendant has derived benefit from the same and cannot impugn the same on grounds of fraud. It further averred that to the extent that no collusion or fraud is alleged or demonstrated on the part of the interested party, the present application is untenable and a clear abuse of the processes of this honourable court and the same should be dismissed since if allowed, the interested party would suffer substantial loss and prejudice.

4th Defendant's Rejoinder

34. In opposition to the application dated 17th February, 2015, and in rejoinder to the contentions by the Plaintiff and the Interested Party, 4th Defendant contended that this application is premised on the argument and false premises that there is no defence and counterclaim on record, while indeed there is one. To the 4th Defendant, this suit was instituted by the plaintiff way back on 22nd October 2009, where after they made an application to file an amended plaint and a further application to file, a further amended Plaint, which they filed. Subsequently the 4th Defendant filed a defence and counterclaim dated 4th April 2012 on 5th April 2012 before this honourable court, a fact which the Plaintiff has at all times during the pendency of this suit been aware of. To the 4th Defendant, the defence and counterclaim has always been on record and in the court file, unless there is some sinister and ulterior motive. It was his view that the application dated 17th February, 2015 was deceitful in that it sought to have the honourable court set aside its own orders dated 18th December, 2014 even without the Respondent filling an affidavit in response to the application. He reiterated that he had never withdrawn his counterclaim and as such is should be heard and determined on merit.
35. With respect to the averments made by **Muriithi Wanjau**, the 4th Defendant, raised what in his view rendered the Assignment invalid. To him, the Assignments dated 7th August, 2014, were intentionally defaced and were prepared by a firm of advocates called **Kagiri and Associates**, a firm that ceased to exist over two years ago after the demise of **Mr. Kagiri Advocate**. It was his view that it was ridiculous that all discharge of charge dated 1st August 2014 were prepared by a firm under the name of **Munoru Kagiri & Wamae Advocates** while the Assignments dated 7th August, 2014 were prepared by the firm of **Kagiri and Associates**, whereby it is alleged that the deceased **Kagiri** who used to be his advocate accepted and signed the documents in 2014 when he had long died in the year 2012.
36. According to the 4th Defendant, his signature was forged and falsely represented to be genuine and in a genuine transaction. However, he never appeared before any deceased advocate on the 7th day of August, 2014 and signed any documents. He however recalled being threatened by the Plaintiff's advocates to sign the documents sometime in 2009, 2010 which he refused and has never signed to date despite threats by the Plaintiff to sue him for refusing to do so. He reiterated that **Kagiri Advocate** could not have executed any such document being long dead and since he had a different advocate representing him in these matters. In support of the foregoing the 4th Defendant relied on the report of forensic document examiner **Mr. Antipas Nyanjwa**, which he exhibited as well as the valuation reports.
37. As concerns the sale agreement of 23rd November, 1998 he averred that the Plaintiff blatantly breached all fundamental clauses of the agreement and after their breach which they were not ready to remedy, he exercised his right to terminate the agreement as provided under the agreement. He however denied offering **Mr Wanjau** money as alleged.
38. It was his view that he had not transferred the suit properties as alleged and with respect to the Interested Party's position he contended that the Interested Party could term himself as an innocent purchaser for value where Fraud is demonstrated and contempt of Court is committed. Based on legal advice he averred that when a matter is clouded with fraud, then one ought not to claim to be an innocent purchaser for value, as claimed by the interested party especially when the Interested Party is part of the fraud.

Cross-Examination of the 4th Respondent

39. Before the hearing of the Application, learned counsel for the Interested Party, **Mr Ochieng Oduol**, sought for and obtained an order for cross-examination of the 4th Defendant on his affidavits.
40. In cross examination, the 4th Defendant who testified that he was 79 years old confirmed the truthfulness of the contents of his affidavit sworn on 18th December, 2014. He confirmed that he stated was the owner of the lands registered as Kahonoki Estate and was aware of the agreement signed between him and dated 23^d November, 1998. He confirmed that he executed the same before **E K Kagiri** who was his lawyer. According to the terms of the agreement, it was agreed that the land be subdivided though the same had already been done into 30 parcels. By that agreement it was agreed that he would keep some parcels while others would be retained for settlement of the debt and on the basis of that agreement, the two cases between him and the Plaintiff would be marked as settled. The debt, he testified was to be settled at a crystallised sum of Kshs 45 million. He admitted that this fact and the fact that the property had been mortgaged were not disclosed in the said affidavit.
41. Although he said that signed the mortgage he was unaware that the same amounted to a transfer. He however denied that he was to retain 15 parcels. According to him, he needed the parcels returned to him to develop the same. He admitted that the sum of Kshs 48 million was to be settled by transferring part of the parcels to be surveyed though the survey was not done since the land had already been subdivided by him into 30 portions. He however admitted that the land could only be subdivided by agreement between him and the Plaintiff and that this had already been done with the Plaintiff's consent though he admitted that he did not disclose this fact.
42. He said that he was unable to remember signing assignments though he never protested. He also admitted that he did not disclose the existence of the letter to him enclosing the conveyances. The 4th Defendant conceded that he did not disclose the various correspondences in respect of the suit properties. He however admitted that pursuant to the Agreement he transferred the parcels of lands which were transferred to him to **Kakuzi Ltd, Sophia Nduku Rukwaro, Kapiti Dairies and Elim Kangendo Mbata** though these facts were not disclosed by him. In his view, it was not necessary to make these disclosures.
43. Asked about the Kshs 48 Million he said he did not pay the same though he had it. He however maintained that the sale was fraudulent and that he did not transfer any of his parcels of land to the Respondents. He however confirmed the existence of the agreement though he could not swear whether he saw the other correspondences.
44. The 4th Defendant admitted that he saw the letter from his lawyer indicating that there was a valuation and that the property was sold on a willing buyer, willing seller basis. Although some properties were to be retransferred to him, he said this was never done.
45. In re-examination by **Mr Njanja**, the 4th Defendant said that he filed a defence and counterclaim on 5th April, 2012 and that the two documents were part of the record. He however said that a number of letters exchanged were neither copied to him nor were their contents explained to him and saw them for the first time in Court.
46. He disclosed that the agreement was that he would retain some parcels and the others were to secure the debt and that the ones which were to be retained by him were subject to valuation in order to determine what was to be given to the Plaintiff but he never saw the valuation and they never agreed on the value per acre hence his decision not to proceed further with the terms. He said that he communicated his objection to the Plaintiff who never responded but only threatened to sue him to compel him to execute the assignments. In his view there was no need for the transfer and he never transferred any land to the Plaintiff. In his view the orders which were granted here meant that the whole property minus what he had disposed of was to be protected. He averred that by the time of the conveyance to the Interested Party, he had not signed any such conveyance as there was an order protecting the property which order had not been discharged. In his view the signatures in the assignment were not his. He reiterated that though **Mr Kagiri** was his lawyer, he passed away on 2nd June, 2012 hence his insistence that there was fraud.

4th Defendant's Submissions

47. On behalf of the 4th Defendant, it was submitted that since on 28th July, 2015, this Court granted

an order for maintenance of the status quo with respect to the 4th Defendant's properties, if this Court finds that there was any interference with the suit property in terms of Registration, transfers, assignments, conveyance, conveyance or otherwise during the subsistence of the orders of this Honourable Court, then the same should be held to be null and void, cancelled and reversed to the status quo ante as it were on 28th July, 2015. In support of this submission the 4th Defendant relied on **Hadkinson vs Hadkinson [1952] All ER 567.**

48. According to the 4th Defendant, the Court proceedings of 28th July, 2015 clearly indicates that all parties to this suit were ably represented by Advocates who are officers of this Honourable Court and were present in Court. The Court order extracted thereafter attests to the above fact. It was submitted that the Respondents herein cannot depart from this fact and reprobate claiming that they were never aware of the Honourable Courts order. The 4th Defendant relied on **Shimmers Plaza Ltd vs. National Bank of Kenya Limited [2015] eKLR** at page 11 and 12, in which the Court of Appeal held:

“Was the respondent one such person? Unfortunately the answer to this question is in the affirmative. The order was made in presence of counsel for the respondent who as stated earlier must be presumed to have informed the respondent of the same. He went ahead and transferred the property before the due date of the judgment seemingly impatient to have this matter concluded once and for all. He acted in clear contempt of this Court. Government institutions, State officers, banks, and all and sundry are enjoined by law to comply with Court orders. We must deprecate in the strongest terms possible the worrying trend in this country where court orders are treated with tremendous contempt by persons and institutions which think wrongly of course, that they are above the law. We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:-

“No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour”.

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy...”

49. With respect to the issue whether the Interested Party was an innocent purchaser for value without notice, it was submitted that a party cannot term itself as an innocent purchaser for value where fraud, misrepresentation, forgery, evasion of payment of stamp duty and failure to adhere to strict provisions of the Law has been demonstrated. It was submitted that the evidence of the forensic document examiner proved that the signatures and handwritings therein are not the 4th Defendant's thus actually being forgeries and fraudulent. Further, the 4th Defendant never signed any Assignments' conveying his land to the Plaintiff and the National Identity Card Number placed on all 15 assignments' as his being ID No. 01911593 is not his. To the 4th Defendant as all the 15 assignments were not certified, this invalidated the transaction since it is a fundamental requirement in any conveyance of land. Another evidence of fraud, according to the 4th Defendant was with respect to the Assignment dated 7th August 2014 purporting that the 4th Defendant appeared before an Advocate **E.K. Kagiri** on 7th August, 2014 and executed the assignments, yet from the communication from the Law Society of Kenya, a body that regulates all Advocates practicing in Kenya, it was demonstrated that the said Advocate **E.K. Kagiri** died on 5th June, 2012. The 4th Defendant therefore urged the Court to find fraud and mischief in all of these documents.

50. It was submitted that though the Interested Party all along alleged and maintained that it bought

the suit property from the Plaintiff, no sale agreement as between the Plaintiff and the interested party as produced before Court. To the 4th Defendant the Interested Party is a shelf, fraudulent company of the Plaintiff used as a vehicle to defraud and that no sale was ever done. The Court was therefore urged to declare the sale null and void for failure to adhere to this strict provision of the law.

51. The 4th Defendant further submitted that no valuation of the suit property was or has been done by the Plaintiff and a fraudulent/false valuation by a Government valuer is indicated on the face of the transfer documents.; that persons who are neither Directors or Secretary of the Interested Party Executing transfer documents on behalf of the Interested Party; and that that the Relationship between the Plaintiff and the 4th Defendant remained to be one of Mortgagor, Mortgagee Relationship and the failure to fulfil the conditions of the agreement rendered the same invalid. Based on **Supreme Court of England in Jones v. Morgan (2001)** it was submitted that any provision whereby a mortgagor is said to forfeit his property on the expiry of the legal right to redeem is void, and any undue postponement or limitation on the mortgagor's right to redeem thereafter will not be enforceable hence the Agreement of 1998 is not enforceable in any way and should crumble under the scrutiny of the lenses of this Honourable Court. It was contended that the Plaintiff breached the provisions of sections 52, 60 and 69 of the ***Indian Transfer of Property Act (ITPA)***.
52. It was further submitted that the *lis pendens* doctrine under section 52 of the ITPA was breached and reliance was placed on ***Blacks Law Dictionary, 9th Edition***, which defines *lis pendens* as the jurisdiction, power or control acquired by a court over property while a legal action is pending and **Fredrick Joses Kinyua & Another vs. E. N. Bated, Nairobi Civil Case No. 4819 of 1989** in which **Justice G. S. Pall** quoted with approval a passage in **Sir H. S. Gaur's *Transfer of Property Act, 7th Ed*; pg. 579** that:

“Every man is presumed to be attentive with what passes in the courts of justice of the state or sovereignty where he resides. Therefore purchase made of property actually in litigation *pendente lite* for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”

53. Further reliance was placed on **Carol Silcock vs. Kassim Sharrif Mohamed [2013] eKLR** at pages 5 to 9 where **Justice A.O. Angote** while addressing the doctrine of *Lis Pendens* observed that:

‘As I stated in Malindi HCCC No. 63 of 2013,; Abdalla Omar Nabhan Vs The Executor of the Estate of Saad Bin Abdalla Bin Abuod & Another, the purposes of the principle of *lis pendens* is to preserve the suit property until the suit is finally determined or until the court issues orders and gives terms on how the suit property should be dealt with. (Emphasis mine) The doctrine of *lis pendens* is founded on public policy and equity.

54. In **Manwji vs U.S. International University and Another (1976-80) KLR 229** Justice Madan, while addressing the purpose of the principle of *lis pendens* adopted the finding in **Bellamy vs. Sabine (1857) 1 De J 566, 584** where Turner L J held as follows:-

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation *pendente lite* were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceedings.”

55. In the same case, **Cranworth L J** observed as follows:

“Where a litigation is pending between a Plaintiff and Defendant as to the right of a particular estate, the necessities of mankind require that the decision of the court in the suit

shall be binding, not only on the litigating parties but also on those who derive title under them by alienation pending the suit whether such alienees had or had no notice of the proceedings. If that were so, there could be no certainty that the proceedings would ever end...”

56. The 4th Defendant relied on *Treaties by Mulla & Gour on the Indian Transfer of Property Act* and *Mulla, 5th Edition, page 245 and Gour, 7th edition, Vol.1, Page 579*. In the former, the two authors stated as follows:

“Every man is presumed to be attentive to what passes to the courts of justice of the state or sovereignty where he resides. Therefore, purchase made of property actually in litigation, *pendete lite*, for a valuable consideration, and without any express or implied notice in point of fact affects the purchase in the same manner as if he had such notice, and he will be accordingly be bound, by the judgment or decree in the suit.

57. At page 241 of *Mulla’s Transfer of Property Act*, 6th Edition, the learned author states as follows:

“The effect of the maxim is not to annul the conveyance but only to render it subservient to the rights of the parties subject to litigation.”

58. To the 4th Defendant, the holding in Fredrick Joses Kinya (Supra) was also relevant where the Court held:

“I am of the view that the Registration of Titles Act is a statute dealing only with the registration of titles to the properties under the same. It lays down the procedure regarding registration of titles. On the other hand the doctrine of *lis pendens* under section 52 of the ITPA is a substantive law of general application. Apart from being on the statute, it is a doctrine equally recognised by common law. It is based on expediency of the court. The doctrine of *lis pendens* is necessary for final adjudication of the matters before the court and in general interest of public policy and good and effective administrative of justice. It therefore overrides section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other”.

59. To the 4th Defendant, it will be a mockery of justice for the court to subject the Plaintiff to another rigour of litigation as against the Intended Interested Party and prove fraud as against the said party. To him, everyman, as quoted in the proceeding paragraphs, is presumed to be aware of the pending suits, especially litigation involving land governed by the ITPA, 1882. Therefore, purchase made of a property actually in litigation *pendente lite* for valuable consideration affects the purchaser in the same manner as if he had notice and will be accordingly be bound by the judgment or decree in the suit.

60. It was submitted that in the **Abdalla Omar Nabhan** case (Supra), it held as follows:

“In the absence of an injunctive order, a party may dispose of a property to a third party but the final judgment or order of the court shall issue as though such a sale or transfer never took place and the judgment shall be binding on the third party. The court shall not be concerned with the developments or investments that such a third party would have put in the property because everybody is presumed to have known about the existence of a suit in respect to such a property.....A party who purchases a property and invests in it while a suit is pending, does so at his own risk notwithstanding the absence of an injunctive order duly registered against the title.”

61. It was submitted that that is the unfortunate situation that the Intended Interested Party has found itself in. It does not matter that the said company (Intended Interested Party) was not aware of the pending suit. The fact remains that the suit property was transferred to the company *pendente lite*. In his view, the doctrine of *lis pendens* is in tandem with the provisions of Sections 1A and 1B of the *Civil Procedure Act*, which provides for the overriding objectives that should guide the courts

in all civil matters and the doctrine of *lis pendens* is necessary for the final determination of the matters before the court and in the general interest of public policy and good and effective administration of justice, which is what the oxygen principle is all about. In support of this position the 4th Defendant relied on **Mradula Suresh Kantaria vs. Surech Nanillal Kaptaria; Civil Appeal Number 277 of 2005** and **Caltex Oil Limited vs. Evanso Wanjihia; Civil Application No. Nairobi 190 of 2009**, to the effect that that the O2 principle had given the courts greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.

62. This Court was therefore urged to pronounce itself towards upholding the tenets of the Constitution of Kenya to promulgate Justice and the administration of Justice. The Interested Party's argument that it is an innocent purchaser for value, it was contended, flies in the face of the fraud, irregularities, illegalities and the very mischief that the principle of *lis pendens* is supposed to address and the Constitutional Principle of the Oxygen Principle. This Court should not close its eyes to illegalities and fraudulent conduct, but pronounce itself on the Rule of Law. The Court was therefore urged to cancel and annul all transactions that have been undertaken on the suit property after its ruling of 28th July, 2014 and grant the Application by the 4th Defendant dated 18th December 2014 in its entirety.

Plaintiff's Submissions

63. On behalf of the Plaintiff, it was submitted that while the 4th Defendant mainly seeks interlocutory injunctive orders over the suit property on allegations *inter alia* that he was at all times the registered proprietor of the suit property, the Plaintiff on the other hand contends that the suit property was at all times mortgaged and assigned to it in satisfaction of a debt owed to it by the 4th Defendant. It was submitted that by the time the 4th Defendant moved the court on the 18th December 2014 and obtained *ex parte* injunctive orders, he did not disclose to court pertinent material facts relating to the status of the suit property and that this deliberate non-disclosure of material fact vitiates any order that the court may have issued and the 4th Defendant should be deprived of any advantage he may have obtained by discharging the said orders. To the Plaintiff, to the extent that it withdrew its suit and there does not exist a valid counterclaim, there is no substratum upon which the 4th Defendant can agitate its Application.

64. In support of its submissions on the issue of non-disclosure, the Plaintiff relied on **R vs. Kensington Income Tax Commissioners, ex p. Princess Edmond de Polignac [1917] 1 KB 486**, **Brink's MAT Ltd vs. Elcombe [1988] 3 All ER CA 188** and **The Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited C.A. No. 50 of 1989**.

65. Based on the said decisions, the Plaintiff submitted the fate of the orders obtained by the 4th Defendant on the 18th December is obvious and ought to be set aside and/or vacate the same. The Plaintiff enumerated facts which in its view render the continued existence of the said orders untenable. In its view, the 4th Defendant owed the Plaintiff a substantial amount of money which as at 1998 was Kshs.73 Million that had been secured through a mortgage dated 28th November 1984 over all that property no. L.R 1363/2. Following suits filed by the 4th Defendant contesting enforcement of the Plaintiff's rights under the said mortgage, a compromise agreement was reached which was executed on 23rd November 1998. The said compromise agreement provided *inter alia* that the total amount owing and due to Plaintiff would be compromised at Kshs 48 Million together thereon with costs and charges relating to the execution of the terms of the agreement and thereby making a total debt of Kshs 51 Million; that the said sum of Kshs 51 Million would be settled by the 4th Defendant herein by way of a transfer of part of the land subject of the mortgage to the Plaintiff; that part of the land to be excised and transferred under the agreement would be determined upon a valuation to be done by M/S Tysons Ltd on the basis of the value per acre of the land in question; that the portions to be transferred as aforesaid would be surveyed, excised and processed up to production of the Deed Plans by M/s Thiga Survey Consortium; that the transferor and the transferee under the agreement would appoint the valuers and surveyors to carry out the services subject of the agreement and each would be bound by the results of the respective professional services; that the transferor would meet the survey and

valuation fees charged by the surveyors and valuers and the legal fees for the transferee's advocates; and that the pending cases at the time would be marked as settled as between the parties; that the transferee would execute a discharge of charge and which would be presented for registration together with the transfer in favour of the transferee. It was added that the 4th Defendant proceeded to sub divide the land being L.R No. 1363/2 into about thirty (30) sub divisions through M/s Thiga Survey Consortium and upon the said sub division, some of the sub divisions valued and agreed upon between Plaintiff and the 4th Defendant were agreed to be transferred to the Plaintiff in settlement of the entire debt outstanding and owing from the 4th defendant and in consideration of a discharge of the remaining parcels and re-conveyance thereof to the 4th Defendant. To effect the transfer of the said portions to the Plaintiff, the Plaintiff executed partial-reassignments of the identified sub divisions in favour of the 4th Defendant and who then executed conveyances for the same in favour of the Plaintiff and the executed transfers by way of conveyances were all executed by the 4th Defendant and transmitted to the Plaintiff all of which are attached in the Plaintiff's List of Documents aforesaid. However the 4th Defendant failed to make this pertinent disclosure to court.

66. It was submitted that as is normal conveyancing practice, those conveyances were left undated until such a time, as funds for stamp duty would become available so that they can be lodged for registration. However, before that could happen, the Plaintiff on the 31st July 2014 resolved to liquidate its non-core assets so as to settle outstanding debts and release the company from receivers appointed by its secured creditors and the suit property herein was identified for disposal whereat a purchaser being the Interested Party was identified to whom it proceeded to conclude a sale. By the time the 4th Defendant obtained the ex parte orders on 18th December 2014, the suit property was duly registered in the name of the Interested Party. As part of the said compromise agreement, the Plaintiff further executed partial re-assignments of all the other sub divisions in favour of the 4th Defendant thereby discharging him from the mortgage with the effect that the 4th Defendant was now free to deal with them in any manner without any encumbrance or further reference to the Plaintiff. Through the Affidavit sworn by the Advocate who appeared for the Plaintiff in the transaction, it was confirmed that the 4th Defendant indeed executed the aforesaid agreement and conveyances. It is instructive to note that the said Advocate was not called for cross – examination on his depositions, which therefore remains, uncontroverted.

67. To the Plaintiff, all the while therefore from 23rd November 1998 till the 28th July 2014 when the *status quo* orders allegedly disobeyed were made, the status of the suit property was that it had been assigned to the Plaintiff through the aforesaid conveyances duly executed by the 4th Defendant, to which a sale in favour of the Interested Party was subsequently concluded. It was submitted that according to ***Blacks Law Dictionary 8th Edition***, status quo is defined as “**the situation as it exists**”. It's obvious that the existing state of affairs as at the 28th July 2014 when the alleged status quo order was granted, was that the said properties had been assigned to the Plaintiff. However, the foregoing material was not placed before court when it made the said impugned ex parte orders; otherwise the court would not have granted the same. The Plaintiff therefore urged that the 4th Defendant should be deprived of any advantage he may have obtained through the said non-disclosure.

68. It was further submitted that it is not disputed that the 4th Defendant was at all times indebted to the Plaintiff to the tune of Kshs. 73 Million as at 1998 and as security thereof, the Plaintiff had a registered mortgage over the suit property and that the redemption date of the said mortgage debt was 5th December 1984, which the 4th Defendant failed to do. In deciding when does the title pass by the coming to an end of the right of redemption vested in the mortgagor the Plaintiff relied on section 60 of the ***Transfer of Property Act*** as amended by Act No. 20 of 1985 (now repealed) which provided as follows:

At anytime after the principal money has become payable, the mortgagor has a right, on payment or tender...or to execute...that any right in derogation of his interest transferred to the mortgagee has been extinguished: Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a court and is exercised before the

mortgagee has under the provisions of this Act, either by public auction or private contract entered into a binding contract for sale of the mortgaged property.

69. This, it was submitted, was an act of the parties manifested through execution of the said compromise agreement in which part of the mortgage property was assigned to the Plaintiff in satisfaction of the mortgage debt, the 4th Defendant right of redemption came to an end.
70. To the Plaintiff, it is not in dispute that the Plaintiff wholly withdrew its suit against the 4th Defendant on the 29th October 2014. The 4th Defendant's contention that it has a subsisting counterclaim against the Plaintiff, it was submitted was misleading as no valid counterclaim exists on record as the one referred to by the 4th Defendant is not supported by a verifying affidavit as required by the mandatory provisions of Order 7 Rule 5 of the ***Civil Procedure Rules***. Therefore upon withdrawal of the Plaintiff suit, the 4th Defendant remedy would only have been to file a fresh suit. It was therefore the Plaintiff's contention that there does not exist any competent proceedings upon which the 4th Defendant's Motion and the subsequent interim orders can be founded. This fact was also not brought to the attention of the court at the ex parte stage and reliance was placed on **HCCC 49 of 2004 – Trans Africa Portway Limited vs. Postal Corporation of Kenya [2006] eKLR** where it was held:

“The defendant herein has not complied with and/or attempted to comply with the mandatory rule requiring verification of a claim brought by way of a counterclaim [See Order VII Rule 1 (2) of the Civil Procedure Rules]. Mandatory rules of procedure goes towards jurisdiction. This omission, in my humble view, goes towards jurisdiction and thus nullifies the counterclaim. I take the lead from MAWJI V. ARUSHA GENERAL STORE [1970] E. A. 137 at page 138 where SIR CHARLES NEWBOLD, P. had this to say on mandatory rules of procedure:

‘I should like to make it quiet clear that this does not mean that the rules of procedure should not be complied with –indeed, they should be. But non-compliance with the rules of procedure of the court, which are directory and not mandatory rules, would not normally result in the proceedings being vitiated if, in fact, no injustice has been done to the parties.’

As the counter-claim herein lacks the supporting verifying affidavit it does not meet the mandatory requirements of Order VII Rules 1 (1) (e) and Order VII Rule (1) (2) of the Civil Procedure Rules...Accordingly, I invoke the provisions of Order VII Rule 1 (3) of the Civil Procedure rules and strike out the counter-claim with costs to the applicant/plaintiff.”

71. To the Plaintiff, no leave of this court has ever been sought by the 4th Defendant to remedy the defect in his counterclaim.
72. The Plaintiff therefore prayed that the 4th Defendant Motion Application be dismissed with costs and the Plaintiff Motion dated 17th February 2015 be allowed as prayed. The Court was further urged to discharge the ex parte orders herein and to make a declaration that there does not exist is a competent counterclaim upon which interlocutory proceedings can be founded.

Interested Party's Submissions

73. According to the Interested Party, it is a purchaser for value of the suit properties being L.R Numbers 1363/10, 1363/11, 1363/12, 1363/13, 1363/14, 1363/15, 1363/16, 1363/22, 1363/23, 1363/24, 1363/25, 1363/26, 1363/27, 1363/28 and 1363/33, located in the Gatanga Area of the Muranga County.
74. According to it, following the decision by the Plaintiff on the 31st July 2014 at the company's annual general meeting, to liquidate the non-core assets of the company so as to settle the outstanding debts and release the company from the receivers appointed by its then secured creditors, the Plaintiff's directors identified the parcels of land transferred to KPCU from the 4th Defendant as part of the non-core assets which would be disposed off to realize funds for the

settlement of debts owed to third party creditors. The Interested Party, being the interested party purchaser acquired the suit premises herein by way of a purchase for valuable consideration and to facilitate the transfer of the title thereto, KPCU's advocates released the original suit conveyances executed in favour of KPCU by the 4th Defendant to M/S Muriu Mungai & Company Advocates for the said **Fikah Acres Limited** in the transaction and who upon payment of the stamp duty and transfer costs applicable, proceeded to register the same in favour of the interested party and who is now the registered proprietor thereof.

75. It was submitted that to the extent that the 4th Defendant had not redeemed the suit premises from the said mortgage, all his title and interest thereon had been transferred to the plaintiff herein since a mortgagor transfers his interest and title to the mortgagee in consideration of a right to redeem upon payment of the sums advanced under the said mortgage. Where this right does not accrue by virtue of repayment by a borrower and/or where the right accrues but it is not excised by a re-conveyance, then the title to a demised property remains vested in the mortgagee and sections 58 and 60 of the ITPA was cited in support of this position.

76. To the interested party, in the absence of any evidence on fraud, the 4th defendant/applicant's allegations are unsustainable and the same ought to be dismissed and disregarded and relied on **R.G Patel vs. Lalji Makani [1957] E.A 314**, in which the court set out the standard of proof as follows:

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

77. It further relied on **Zakayo Michubu Kibuange vs. Lydia Kaguna Japheth & 2 Others (2014) eKLR** where the Court of Appeal held:-

“Forgery is a very serious allegation to make and more so, if it involves one's signature on a disputed document. One would have expected that having made such serious allegation and accusation, the appellant would have done the right thing and immediately took remedial steps such as reporting the alleged forgery to the relevant authorities for appropriate action or intervention. Instead what does he do? He sits tight and cheekily invites the 1st respondent to prove that his signature was not a forgery by invoking the assistance of document examiners. It is a cardinal principle of law that he who alleges must prove. The appellant having failed to undertake the necessary inquiry as to the forgery or not of his signature, the allegation was merely self-serving and without any basis at all.”

78. It was therefore submitted that the 4th defendant has no title or proprietary interest in the suit premises capable of founding basis for the grant of the orders sought. For all purposes and intents, he is now a stranger to the suit premises and his claim for ownership and title, has no basis in law. In the premises, it was submitted that the 4th Defendant's application had no merit and the interested party prayed that the same be rejected at the threshold.

79. In the Interested Party's view, the question of what was the 4th defendant's property at the time the order for maintenance of status quo was made, is a legal question. Proprietorship, in its submission, is a right in law that grants unto a person certain rights with regard to specific property capable in law of being owned. Accordingly, proprietorship in law cannot be presumed, imagined or generalized as purported in the present application. It was submitted that as at the 28th July 2014, the 4th defendant's property consisted of the specific sub divisions of L.R 1362/2 which had been discharged from the mortgage initially registered against the entire parcel of land and re-conveyed to him by the plaintiff, pursuant to the terms of the agreement mutually executed by the parties on the 23rd November 1998 and were the properties that were for purposes of the said order, the 4th defendant's properties. The sub divisions that were never discharged by the plaintiff and which were later sold to the interested party, were not as at the 28th July 2014, being the date of the order herein, part of the 4th defendant's properties as to be subject of the said order. Those sub divisions were purposes of the applicable law, owned by the plaintiff, the 4th defendant having

transferred them to it by the instrumentality of the mortgage and having failed to redeem the same by way of payment of the debt secured thereby. Accordingly, the said order of 28th July 2014, being very specific in its application to the 4th defendant's properties, cannot now be interpreted to appropriate the interested party's properties to its application and purview. It is trite law that a court order is applied in its terms unless varied or reviewed by the court that issued it and it was submitted that the order of the court made on the 28th July 2015 was clear and unequivocal in its direction and target being the 4th defendant's properties and which properties are discoverable and ascertainable. It did not extend to restraining any dealing or disposition of the plaintiff's properties and which were also clearly ascertainable and discoverable and the said order cannot now be used to defeat the interested party's interest in the suit premises.

80. It was submitted that the status quo with respect to the 4th defendant's properties is that the 4th defendant has title and possession thereto and which has not been disturbed, threatened or in any way interfered with by the plaintiffs and the interested parties. Accordingly, there would be no basis of grant of the orders sought on grounds that the interested party's titles to the suit premises was procured in contempt of an order of the court.
81. It was submitted that the interested party's titles to the suit premises, emanated from the same process and documents from which the 4th defendant also obtained titles to the sub divisions that were re-assigned to him. The basis of both the interested party's titles to the suit premises and the 4th defendant's properties, is the agreement dated 23rd November 1988 and from where sub divisions of the original property being L.R No. 1362/2, were done and part of the sub divisions transferred to the plaintiff while the others were discharged and re-assigned to the 4th interested party. The interested party only purchased for valuable consideration the land that was surrendered to the plaintiff pursuant to the agreement mutually executed as between the plaintiff and the 4th defendant and performed in its terms. The court was urged to note that pursuant to the said agreement, the 4th defendant has been able to deal with the parcels of land that were discharged back to him and has in fact disposed some of them by way of sale and lease. It was accordingly submitted that the 4th interested party is thereby estopped from impugning a process to which he was party and from which he has derived substantial advantage and benefit including commercial gain. If the agreement and the subsequent sub divisions were good enough to convey title to him, then they are good for purposes of conveying title to the interested party. The attempt to recant and renege from a process that he has actively participated in is indicative of a party who is not litigating in good faith and who has set out to abuse the process of the court to achieve collateral goals. The 4th defendant is clearly estopped from imputing fraud and illegality as purported in its pleadings as against the plaintiff and the interested party. In support of this position the interested party relied on section 120 of the *Evidence Act*, Chapter 80, Laws of Kenya which provides:

When any person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither that he nor his representative shall be allowed in any suit, proceedings between himself and such person or his representative to deny the truth of that thing.

82. The Interested Party also relied on **Esther Akinyi Odidi & 2 Others vs. Sagar Hardware Stores Limited and Another [2006] eKLR**, where the court held that;

“In essence, a person should always stand by his word or deed given to another and who believes and acts on that word or deed as the truth of the matter. And the person who gave that word or deed to be acted upon cannot be seen to deny the truth of it, is given to the other in any suit or proceeding involving the one to whom the representation was made and the one who represented it or his agenda great base indeed to bind people to their words or deeds said or done, believed as truth by whom the word or deeds are said or done and who act on the same thereby changing their positions/circumstances. If the truth of the deed or word is changed, those-who believed and acted in it stand prejudiced...”

83. It was submitted that based on the averments made on the circumstances under which the

Interested Party purchased the suit premises point to a purchaser for value without notice. It was submitted that the applicant did confirm in cross examination that indeed from the performance of the above agreement, the mortgaged land being L.R 1362/2, was sub divided into thirty (30) sub-divisions and where the applicant received by way of partial reconveyance, title to his share of the sub-divisions. The balance thereof and in terms of the above stated agreement was to be applied by KPCU to the settlement of the applicant's outstanding debt and in exercise of the company's statutory power of sale. The applicant further admitted in cross examination that upon being given his share of sub divisions, he proceeded and disposed several of them by way of sale for valuable consideration, to third parties and retained to the present date, part of the same sub divisions. From the foregoing, it is therefore clear that as at 28th July 2014, the 4th defendant's properties were the sub divisions he got from the settlement agreement mutually executed with the plaintiff and which by his own actions, he had already appropriated and dealt with. If indeed the court order aforesaid was to be applied with respect to the other sub-divisions, the parties who consented thereto would have rightfully provided that the status quo with respect to the plaintiff's properties be maintained. They didn't and the order cannot now be manipulated or stretched in its import to include the suit premises herein after the interested party acquired interest.

84. It was therefore submitted that in consideration of the foregoing and the evidence of the applicant in cross examination, the said order of 28th July 2014, could not have been in reference to all the sub divisions that arose from the agreement between the parties on 23rd November 1998 for reason that the applicant admitted explicitly that some of the sub divisions had already been sold off to and transferred to third parties and who are not party to this suit. Accordingly when parties were consenting to the order of 28th July 2015, they were well aware that out of the initial title, there were three distinct owners of the sub-divisions therefrom being;

- i. The sub-divisions that remained the property of KPCU (the plaintiff) under the terms of the mortgage.
- ii. The sub divisions that were discharged and transferred to the 4th defendant.
- iii. The sub divisions that the 4th defendant had already sold and transferred to third parties.

85. It was submitted that the order referred to all the above properties and that this is just a convenient position taken in a bid to get vary the terms of the initial agreement of the parties and the consent made on the 28th July 2014. The said order was clearly targeted to the 4th defendant's properties and no stretch of equivocation could bring the suit premises herein now registered in favour of the interested party under the ambit of the consent order of 28th July 2014. Accordingly, the applicant's submissions and authorities on the contempt of court orders, are misplaced and inapplicable in the present circumstances.

86. On equity of redemption, the interested party submitted that the same ceased to exist and relied on **Mbuthia vs. Jimba Credit Finance Corporation and Another [1986-89] 1 E.A 340 (CAK)**, where the Court of Appeal held that;

“...the equity of redemption subsisted in the mortgagor until the leasehold premises were sold. It was then extinguished and the act provides that ‘a charge shall be deemed to have been sold when a bid has been accepted at the auction sale. This means that the mortgagor’s right of redemption is lost as soon as the mortgagee either sells the mortgaged property by public auction or enters into a binding contract in respect of it...”

87. It was submitted that when the 4th Defendant/Applicant approached this court *ex parte* and sought the interim orders that he now enjoys, he was enjoined to disclose to this court all the material facts relevant to the court's determination of whether or not there was basis sufficient to the grant of the said orders. Without such disclosure, the discretion of this court was not available to him and the orders so obtained could only have been fraudulently procured and amenable to setting aside and relied on **Bahaduralli Ebrahim Shamji vs. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997 (unreported)**.

88. It was the interested party's position that the doctrine of *lis pendens* is inapplicable to the present application and circumstances for reasons that the agreement that ceded the suit properties to the

plaintiff and who subsequently sold and transferred the same to the interested party, was executed on 23rd November 1998. It is by way of this agreement that the 4th defendant's interest in the properties ceded to the plaintiff in settlement of the debt outstanding and in exercise of its statutory power of sale, was effectively transferred to the plaintiff and his equity of redemption extinguished. At this date, the present suit was not pending before any court and the then pending suits were marked as settled and there cannot therefore be any application of this doctrine. Further, the said doctrine is no longer of any application in the Kenyan jurisdiction being a rule that was provided under the *Indian Transfer of Property Act, 1882*, and which was repealed upon enactment of the *Land Registration Act, 2012* and which commenced on the 2nd May 2012.

89. It was submitted that the issue whether the registration of the conveyances in favour of the interested party was proper in law is a substantive question that can only be determined in trial and the court will note that this was not even a ground initially presented in support of the application herein. That notwithstanding, it was submitted that the power to register an instrument of conveyance with respect to any parcel of land is vested in law to the Registrar of Titles and that before he undertakes a registration, the registrar is enjoined to ensure that all requirements in law are satisfied and upon being so satisfied, he proceeds to register the instrument of conveyance. In the present case, it is not in doubt that the registrar of titles has available to registered conveyances in favour of the interested party. It was submitted that if any of the requirements were not provided to the satisfaction of the registrar, then he/she would not have proceeded to so register but in the present instance, he was satisfied that the conveyances provided were proper in law and thereby proceeded to register the same. The registrar is not even party to the present proceedings and has not been afforded opportunity to respond to the issues raised by the applicant and it was submitted that there is no basis in law for setting aside the registrations herein. It was submitted that in light of section 14(c) of the *Land Registration Act, 2012*, the issues raised by the applicant are largely speculative and presumptuous.

90. In the premises the Court was urged to dismiss the 4th defendant's application and discharge the interim restraining orders made herein so as to allow the interested party to enjoy its proprietary rights over the suit premises.

Determinations

91. I have considered the issues raised hereinabove. It is important to recap the issues which were presented for determination by this Court in the application the subject of this ruling. The 4th Defendant substantially sought orders restraining the Plaintiff and the Interested Party from trespassing, entering upon, transferring or dealing with the suit properties; an order compelling the Plaintiff and the Interested Party/Respondent to surrender for cancellation any Title or Registration Certificate over the suit properties; and an order compelling the Registrar of lands to rectify the Registry Index Map to reflect that the 4th Defendant/Applicant as the registered proprietor the suit parcels.

92. The application was based on two grounds. The first was that the Plaintiff transferred the suit parcels to the Interested Party in violation of a Court order maintaining the *status quo* and that the attempt to settle the suit was fraudulent in light of the fact that the 4th Defendant's counterclaim remained undetermined.

93. The Plaintiff's application on the other hand sought one substantive order that this Court should grant an order to review, vacate and or set aside the orders made on 18th December 2014. The application was based on the grounds that there was non-disclosure of material facts.

94. It is therefore clear that in arguing the two applications counsel dwelt on issues which were not properly the subject of the application before me.

95. On 18th December, 2014, this Court granted the following orders:

- i. **THAT the matter be mentioned on the 23rd September 2014 for directions and/or further orders.**
- ii. **THAT the status quo with respect to the 4th defendant property be maintained.**

96. It is this order that the 4th Defendant contends was violated by the Plaintiff when the Plaintiff transferred some of the suit parcels to the Interested Party. In order to determine whether the order was disobeyed, it is necessary to determine what was the 4th Defendant's property at the time the order was given.
97. It has come from these proceedings that there was an agreement by which of all pending suits were compromised. The existence of the said compromise agreement is not disputed. The terms thereof were similarly not disputed. The said compromise agreement provided *inter alia* that the total amount owing and due to Plaintiff would be compromised at Kshs 48 Million together with costs and charges relating to the execution of the terms of the agreement and thereby making a total debt of Kshs 51 Million; that the said sum of Kshs 51 Million would be settled by the 4th Defendant herein by way of a transfer of part of the land the subject of the mortgage to the Plaintiff; that part of the land to be excised and transferred under the agreement would be determined upon a valuation to be done by M/S Tysons Ltd on the basis of the value per acre of the land in question; that the portions to be transferred as aforesaid would be surveyed, excised and processed up to production of the Deed Plans by M/s Thiga Survey Consortium; that the transferor and the transferee under the agreement would appoint the valuers and surveyors to carry out the services subject of the agreement and each would be bound by the results of their respective professional services; that the transferor would meet the survey and valuation fees charged by the surveyors and valuers and the legal fees for the transferee's advocates; and that the pending cases at the time would be marked as settled as between the parties; that the transferee would execute a discharge of charge and which would be presented for registration together with the transfer in favour of the transferee.
98. It is also not disputed that the original parcel being L.R No. 1363/2 had actually been sub divided by the 4th Defendant into about thirty (30) sub divisions through M/s Thiga Survey Consortium and that some of the parcels emanating from the said subdivision were conveyed to the 4th Defendant who proceeded to dispose of the same to third parties. Accordingly, it cannot be said that L.R No. 1363/2 was still registered in the name of the 4th Defendant. However, was this information disclosed to the Court when the Court granted the conservatory orders the subject of this ruling? There is no doubt at all that when the application which was *ex parte* was made before this Court, this crucial information, if only for the purposes of clearly ascertaining the plots which the order was to apply, was concealed from the Court. The result was that the Court proceeded to grant a blanket but vague order in respect of unidentified parcels under the erroneous belief that L.R No. 1363/2 was still intact.
99. It has come out that at the time of the said order at least three parties had legal and/or beneficial interests to L.R No. 1363/2. Had this position been disclosed to the Court, the Court would no doubt have been specific in the kind of order to give in order to avoid unnecessary litigation. It is therefore my view that the fact of the agreement between the Plaintiff and the 4th Defendant was a material fact that ought to have been disclosed at the time of the hearing of the *ex parte* application. Similarly, the 4th Defendant ought to have disclosed that some of the plots forming part of L.R No. 1363/2 had been disposed of by him pursuant to the said agreement to third parties.
100. What then is the effect of non-disclosure of material facts? In **R vs. Kensington Income Tax Commissioners, ex p. Princess Edmond de Polignac [1917] 1 KB 486** it was held, a holding which was adopted by the Court of Appeal in **The Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited C.A. No. 50 of 1989** and in **Hussein Ali & 4 Others vs. Commissioner of Lands, Lands Registrar & 7 others (2013) eKLR** as follows:

"It is perfectly well settled that a person who makes an *ex parte* application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do - is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it."

101. On what amounts to material facts it was held in Brink's MAT Ltd vs. Elcombe [1988] 3 All ER CA 188 that:

“...The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers...”

102. This position as appreciated by Ibrahim, J (as he then was) in Republic vs. Kenya National Federation of Co-Operatives Limited ex Parte Communications Commission of Kenya [2005] 1 KLR 242 where he held:

“The requirement of full and frank disclosures by applicants in judicial review is the same as in injunction applications. There is no criteria for lowering of standards in the said statements. It does not matter the type of case or matter, once a matter is before the Court in the absence of another or other parties (*ex parte*) the duty of full and frank disclosures are imposed on applicants and the standard must always be fairly high considering the authorities. The rule of the court requiring *uberima fides* on the part of an applicant for an *ex parte* injunction applies equally to the case of an application for the rule *nisi* for a writ of prohibition and if there is suppression of material facts by the applicant, the Court would refuse a writ of prohibition without going into the merits of the case. It is the duty of a party asking for an injunction to bring under the notice of the court all the facts material to the determination of his right to that injunction; and it is no excuse for him to say that he was not aware of the importance of any facts, which he has omitted to bring forward. Every fact must be stated, or even if there is evidence enough to sustain the injunction, it will be dissolved. If the applicant does not act with *uberima fides* and put every material fact before the court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted, but that he must come again on a fresh application. Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant and once that confidence is undermined, he is lost. The court must insist on strict compliance with the rules pertaining to non-disclosure to afford protection to the absent parties at the *ex parte* stage...An applicant and its counsel are required to carry out a diligent inquiry on all the facts including the applicable law before making an *ex parte* application and it is the duty of an applicant to inquire as to whether there exists an alternative remedy.”

103. What then should the Court do when at *inter partes* hearing it turns out that the applicant did not disclose material facts? In Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2 Others Civil Application No. Nai. 140 of 1995, it was held that if the Court finds at the time of *inter-partes* hearing that there was lack of disclosure at the time of *ex-parte* application it should strike out the application. In Margaret Nduati & Another vs. Housing Finance Company of Kenya Nairobi (Milimani) HCCC No. 307 of 2001 it was held that a person who makes an *ex parte* application to the Court is under an obligation to the Court to make the fullest possible disclosure of material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceeding and he will be deprived of any advantage he may have already obtained by means of the order, which has thus wrongly been obtained by him.

104. In Johnson Kimeli vs. Barclays Bank of Kenya Ltd. Kisumu HCCC No. 171 of 2003, it was held that:

“Where the plaintiff is seeking an equitable remedy he must show a good account of himself for the Court would be reluctant to extend its hand to a person with dirty and unclean hands for he would soil the hands of justice. Secondly a Court would not allow a person to benefit from his own wrong for that would amount to judicial treason...The failure to make a candid disclosure of all material and essential facts would militate against the person concealing that evidence or facts from the Court...There is an obligation upon a person seeking an

equitable remedy of injunction to make full disclosure and to show expression of good faith... The courts would be strict on non-disclosure of material facts by a party seeking an *ex parte* order more so when he has obtained the orders by concealing important material from the Court at the first instance.”

105. For a party to fail to disclose material facts or to disclose them in such a way as to mislead the court as to the true facts, amounts to abuse of the Court process and the court ought, for its own protection and to prevent an abuse of the process, to refuse to proceed any further with the examination of the merits. See **Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009.**

106. On the ground of non-disclosure alone this Court is entitled to set aside and vacate the orders granted herein on 18th December 2014 and to strike out the application dated 18th December 2014.

107. There is however an additional ground for doing so. The 4th Defendant has pursuant to the agreement dated 23rd November 1988 recovered some of the parcels which were mortgaged to the Plaintiff and which parcels were only supposed to be re-conveyed to him on consideration that the Plaintiff also got some of the suit parcels. The 4th Defendant having disposed of the said parcels now seeks from this Court an order depriving the Plaintiff the benefit of the same agreement whose benefit he has enjoyed with the result that the plots which accrued to him have changed hands. In my view to grant the orders sought herein would be inequitable. The Court of Appeal in **Pil Kenya Ltd vs. Oppong Civil Appeal No. 102 of 2007 [2009] KLR 442** expressed itself as hereunder:

“Where a litigant has taken the benefit, in whole or in part of the decision in his favour he is precluded from setting up in any subsequent proceedings between the same parties by way of appeal or otherwise that such decision was erroneous or, though correct as to the part which was in his favour, was, wrongly decided as to the residue.”

108. The 4th Defendant if aggrieved is entitled to institute proceedings for fraud in which event he would have to join the Registrar. In **Sun Palm Ltd. & Others vs. Pierre Laporte Ltd. Civil Application No. Nai. 242 of 1997,** the Court of Appeal by a majority held that in dispute revolving around an allegation of wrongful transfer it is difficult to see how the title of the proprietor can be impeached without joining the Commissioner for Lands. See also **The Town Council of Ol'kalou vs. Ng'ang'a General Store Civil Appeal No. 269 of 1997.**

109. Having considered the issues raised in the application dated 18th December, 2014, the inescapable conclusion I come to is that the same is an abuse of the Court process.

Order

110. Consequently, the application by the 4th Defendant dated 18th December, 2014 is hereby struck out and it follows that the application dated 17th February, 2015 is allowed and the orders granted herein in 18th December, 2014 are hereby set aside and vacated.

111. The Plaintiff and the Interested Party shall have the costs of both applications to be borne by the 4th Defendant.

Dated at Nairobi this 1st day of February, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Arwa for Mr Ng'ang'a for the plaintiff

Mr F N Njanja for the 4th Defendant

Miss Kidunduru for Mr Ochieng' Oduol for the Interested Party

Cc Patricia