



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC 345 OF 2009

WANGULU ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

- 1. ABDALLA SAID KUGOTWA**
- 2. THADDEUS KIMINZA MUTISO**
- 3. JANE NJERI MUTISO**
- 4. MWICIGI KANIU**
- 5. JANE GATHONI MWICIGI**
- 6. THE DISTRICT LAND REGISTRAR KWALE**
- 7. THE ATTORNEY GENERAL.....DEFENDANTS**

JUDGMENT

PLAINTIFF'S CASE

1. The plaintiff instituted this suit by a plaint dated 5th October, 2009 which was later amended on 15th September, 2016. In the amended plaint filed on 19th September, 2016, the plaintiff prays for the judgment against the defendants jointly and severally for:

- a.** A declaration that the 1st, 2nd, 3rd, 4th and 5th defendants acquired no lawful or valid title or interest in all that parcel of land known as Title No. Galu/Kinondo/1 and any titles issued to them by the 6th Defendant are illegal, fraudulently obtained and/or null and void.
- b.** A declaration that the plaintiff is the true and lawful registered proprietor of all that parcel of land known as title No. Galu/Kinondo/1 and is entitled to all proprietorship rights conferred on it by law, including the right to quiet and uninterrupted possession thereof;
- c.** A declaration that the dispossession of the plaintiff by the defendants of all that parcel of land known as Title No. Galu/Kinondo/1 was unlawful;
- d.** A mandatory injunction compelling the defendants by themselves, their employees,

servants and/or agents and all and any persons claiming any title or interest through any of the Defendants in all that parcel of land known as title No. Galu/Kinondo/1 to forthwith (or within such time as the court shall deem fit to order) deliver up vacant possession of the said parcel of land to the plaintiff and at their cost, to remove and/or otherwise demolish any developments, buildings and/or fittings put up thereon and to carry away any debris resulting from such removal and/or demolition;

e. Failing the removal and/or demolition of such developments, buildings and/or fitting within fourteen (14) days after delivery of vacant possession of all that parcel of land known as title no. Galu/Kinondo/1 (or within such time as the court shall deem fit to order), the plaintiff be at liberty to remove and/or demolish any such developments, buildings and/or fittings at the defendants' cost;

f. A permanent injunction restraining the defendants jointly and severally by themselves, their agents, directors, predecessors, successors in interest or otherwise howsoever from further entering upon the parcel of land known as Title No. Galu/Kinondo/1 or any part thereof, from subdividing, surveying, fencing, building upon, selling, alienating, charging and/or from dealing or interfering with the parcel of land known as Title No. Galu/Kinondo/1 in any manner howsoever pending the hearing and final determination of this suit;

g. An order that all entries on the land register in relation to the registration of the 1st defendant as proprietor of the parcel of Land known as Title No. Galu/Kinondo/1 should be revoked and/or otherwise cancelled by the 6th Defendant forthwith.

h. An order that all entries on the land register in relation to the registration of the 2nd, 3rd, 4th and 5th defendants as proprietors of the parcel of Land known as Title No. Galu/Kinondo/1 should be revoked and/or otherwise cancelled by the 6th defendant forthwith.

i. An order that the 6th defendant do forthwith rectify the register for land for the parcel of Land known as Title No. Galu/Kinondo/1 at the Kwale District Land Registry so as to reflect the plaintiff, Wangulu Enterprises Limited as the absolute and only registered proprietor thereof;

j. An order directing the 1st to 5th defendants to surrender any title deeds in their possession related to all that parcel of land known as Title No. Galu/Kinondo/1 to the 6th defendant for purposes of cancellation and an order directing the 6th defendant to forthwith cancel the 1st to 5th defendant's titles upon receipt thereof;

k. General damages for trespass and unlawful dispossession of the plaintiff;

l. Costs of this suit together with interest thereon and on any damages awarded at such rate and for such period of time as this honourable court may deem fit to grant.

2. The plaintiff's case as pleaded is that it is the registered proprietor and absolute owner of all that freehold interest over all that parcel of land known as title No. Galu/Kinondo/1 (hereinafter "the suit property") measuring approximately 2.6 hectares situate in Galu Kinondo area, Kwale County pursuant to a Land certificate issued to the plaintiff on 5th February, 1977. The plaintiff avers that by virtue of being the lawfully registered owner of the suit property, it was at all material times entitled to its proprietary rights as conferred by law, including but not limited to the right to occupy the same and it has not sanctioned any sub-divisions or re-survey of the said parcel of land and that it has not entered into any transaction for the sale or transfer of the suit property or any part or portion thereof to any person.

3. The plaintiff further avers that its title to the suit property was lawfully obtained for valuable consideration pursuant to a sale agreement and the consent of the Kwale Land Control Board and that it

still has possession of the original Land Certificate to the suit property free of any encumbrances and that it continues to receive demands for and continues to pay the requisite land rates to the Kwale County Council and/or its successor, the Kwale County Government.

4. The plaintiff avers that it discovered that on or about 7th August, 2006, without the plaintiff's knowledge or consent, the 6th defendant in collusion with the 1st defendant fraudulently and irregularly cancelled and/or otherwise deleted the plaintiff's name from the register (green card) of the suit property and in its place unlawfully, fraudulently, unprocedurally and/or irregularly inserted the 1st defendant's name as the registered proprietor thereof and issued the 1st defendant with a title deed over the suit property. The plaintiff states that it has never been served with any court process; court order, judgment or decree directing a transfer of the suit property to the 1st defendant or any other person or entity pursuant to which its title to that suit property could be lawfully relinquished or cancelled. The plaintiff states that the Green Card and the parcel file for the suit land do not show the transactions leading to the cancellation of the plaintiff's name and the registration of the 1st defendant as the registered proprietor of the suit property. It is the plaintiff's contention that the registration of the 1st defendant as the registered proprietor of the said land by the 6th defendant was fraudulent and made in dubious circumstances. The plaintiff states that it never dealt with the 1st defendant with regard to the suit property and that it has never signed any sale agreement of the suit property in favour of the 1st defendant and never attended any land control board relating to the suit property pursuant to which the 1st defendant could become the registered proprietor of the suit land. The plaintiff further avers that it has never advertised or offered the suit property for sale to the 1st defendant or any other person and that it has never received any sum of money from the 1st defendant or from any other person in respect of the suit property and that the 1st defendant acquired a title deed to the property fraudulently, irregularly and illegally and therefore the said title is void ab initio and did not confer any good title or any registrable interest to the 1st defendant, adding that the entire transaction was null and void since Land Control Board Consent was not sought or obtained.

5. The plaintiff avers that on 11th April 2008 the 1st defendant fraudulently transferred the suit property to the 2nd, 3rd, 4th and 5th defendants and the 6th defendant fraudulently issued them with a title deed on 12th August, 2008. The plaintiff contends that since the 1st defendant did not acquire a registrable interest or any good title to the property from the plaintiff, he was not capable of passing any registrable interest or any good title to any person and the sale and transfer of the suit property to the 2nd, 3rd, 4th and 5th defendants was null and void ab initio. The plaintiff states that the 2nd, 3rd, 4th and 5th defendants were aware that the title deed the 1st defendant held was not genuine and by their default or neglect contributed to the fraud initiated by the 1st and 6th defendants but chose to finalize the illegal transaction by having a title deed to the same fraudulently and hurriedly issued in their joint names by the 1st defendant. The plaintiff has given particulars of fraud on the part of the defendants. The plaintiff avers that in the circumstances, the registration of the 1st defendant as owner of the suit property and the subsequent transfer and registration by the 1st defendant to the 2nd to 5th defendant on 12th August 2008 was irregular, fraudulent and is null and void and should be revoked. The plaintiff avers that on or about 24th July 2013, the 2nd to 5th defendants and/or their servants and/or agents dispossessed the plaintiff of the suit property after the court dismissed the plaintiff's suit for non-attendance (but later reinstated) and that action was unlawful because the defendants had not obtained any court order or decree granting them vacant possession. That the 2nd to 5th defendants had not filed any suit against the plaintiff or any counter-claim while the 1st defendant who had filed a counter-claim against the plaintiff had it withdrawn on 6th June, 2013 after the plaintiff's suit was dismissed as aforesaid.

6. Richard Kemoli testified as PW1 on behalf of the plaintiff and was cross-examined by Mr. Abubakar, counsel for the 1st defendant and Mr. Mwakireti counsel for the 2nd to 5th defendants and stated that he is one of the directors of the plaintiff company. The other director is his wife Annette Muthoni Kemoli. He stated that in the year 1976, he was introduced to the original owners of suit property by their cousin, one

Bakari Nasoro. That he negotiated with them and they agreed to sell the property to the plaintiff company for Kshs.100,000. He stated that he visited the property to see the location, size and beacons.

7. PW1 testified that his advocates, Waruhiu and Waruhiu Advocates prepared a sale agreement which was signed by the original owners. That he also attended the Land Control Board sitting together with the original owners and obtained consent. PW1 testified that the purchase price was paid in two installments of Kshs.60,000/= and later Kshs.40,000/=. He stated that the purchase price was paid in cash and no receipt was issued. The plaintiff produced the title deed as P. exhibit 1 and stated that he lost documents through burglaries including the sale agreement. That a copy of the sale agreement, consent and transfer were with his advocates and his efforts to obtain the same were futile because the original founder, Mr. Waruhiu passed on while the partners who took over the firm could not trace the documents.

8. PW1 testified that in 1981, the property was charged to National Bank of Kenya Limited and it was discharged in the year 2002. He stated that he had a person looking after the suit property and a fisherman who had constructed a makeshift structure on the suit property and was residing there permanently. He further stated that there was a plaque indicating that the property belonged to the plaintiff and that the property had been fenced with a barbed wire, although there was a way of people to access the beach.

9. PW1 further stated that there was a case filed by the original owners being HCCC NO. 2224 of 1983 Hamisi Athuman Mwatsengeza & 3 Others –v- Wangulu Enterprises Limited & 2 Others. That the plaintiff responded to that case but the same was not heard and determined. He stated that in the case, the original owners were reneging on the sale agreement that had been entered into in respect of the suit property and the plaintiff filed defence which he produced as p.exhibit 4. PW1 stated that to his knowledge, all the original owners are deceased.

10. PW1 testified that there has never been any dealings between the plaintiff and the 1st defendant. That when he learnt of the registration of the 1st defendant as owner of the suit property, he lodged a caveat dated 29th July, 2009 over the property in the Standard Newspaper. He produced the newspaper cutting as p.exhibit 9. He further stated that he reported the matter to the police and Criminal Case No.1130 of 2010 was preferred against the 1st defendant and the Land Registrar, Kwale, though he learnt that the accused persons were acquitted.

11. PW1 stated that the plaintiff sued the 2nd to 5th defendants because he saw an agreement for sale showing that they purchased the suit property from the 1st defendant for Kshs.19.5 million. That they ought to have done due diligence before purchasing the suit property from the 1st defendant and that they should have looked at the sequence of events in the Green Card. He also stated that the 5th and 6th defendants are sued because the Land Registrar ought not to have issued a title deed to the 1st defendant and further that the Land Registrar did not notify him or get in touch with the plaintiff over the issue. He testified that he bought the suit property with a view to put up a retirement home and a hotel but was unable to do so, and has therefore suffered loss and damage.

1ST DEFENDANT'S CASE

12. In his defence dated 9th November, 2009, the 1st defendant denied the plaintiff's suit and stated that the suit property was first registered in the names of Hamisi Athman Mwatsengeza, Hamad Alfani Tsumo, Alfani Omar Kugotwa and Kasim Salim Mwanjaji (the original owners). The 1st defendant avers that sometime on 5th February 1977, the plaintiff wrongly, illegally and/or fraudulently obtained a title to the suit property and therefore the registration of the plaintiff as owner is null and void. It is the 1st defendant's contention that the plaintiff obtained title to the suit property without a valid transfer and without a valid application for consent from the Land Control Board by the original owner. The 1st defendant further accuses the plaintiff for obtaining title without the permission from the original owners and without payment of any consideration to them and forging documents purporting the same to have been executed by the original owners.

13. The 1st defendant avers that he is a relative to the original owners, stating the he is a grandchild of Hamisi Athman Mwasengeza and nephew to the other three original owners. That by reasons of that the family members of the original owners have entrusted him to pursue this matter on their behalf. The 1st defendant states that following the death of the original owners and considering the fraud committed by the plaintiff in obtaining title to the suit property, the 6th defendant had the power and/or authority under the law to cancel the plaintiff's name and replace it with that of the 1st defendant as a trustee of the heirs and/or dependents of the original owners in accordance with Islamic Law. The 1st defendant avers that the land registry's record is a true reflection of the position and/or status of the legal right of the 1st defendant. The 1st defendant further avers that he had every right to enter into any transaction with any person in respect of the suit property, including the 2nd to 5th defendant herein and states that the plaintiff has no right over the suit property. He admitted that there has been previous proceedings in respect of the suit property between the original owners and the plaintiff in Nairobi HCCC NO. 2224 of 1983.

14. The 1st defendant raised a counter-claim and states that the plaintiff fraudulently caused the Land Registry at Kwale to transfer the suit property from the original owners to itself. The 1st defendant prays that the plaintiff's suit against him be dismissed with costs and judgment be entered for him as follows:

i. A declaration that the transfer of PLOT NUMBER KWALE/GALU KINONDO/1 from its original owners to the plaintiff was wrongly, illegally and fraudulently obtained and therefore the same was null and void.

ii. A declaration that the registration of the 1st defendant as owner of PLOT NO. KWALE/GALU KINONDO/1 in trust for the heirs and/or dependents of the original owners, who are now deceased, is proper and within the expectation of the law.

iii. Any act done by 1st defendant subsequent to his registration in respect of PLOT NO. KWALE/GALU KINONDO/1 is justified in the circumstances.

iv. Costs of the counter-claim.

15. The 1st defendant testified as DW1 and adopted his witness statement dated and filed on 29th May 2019 as his evidence-in-chief. He was cross-examined by Ms. Ngigi, Counsel for the plaintiff and Mr. Mwakireti for the 2nd to 5th defendants and re-examined by Mr. Abubakar counsel for the 1st defendant. He reiterated the averments in his defence and stated that the suit property was first registered in the names of Hamisi Athman Mwasengeza, Hamad Alfani Tsumo, Alfani Omari Kugotwa and Kasim Salim Mwamtaji (the original owners). He averred that on 5th February 1977, the plaintiff wrongly, illegally and/or fraudulently obtained title to the suit property and that the registration of the plaintiff as owner of the suit property was null and void because it obtained title without a valid transfer having duly been signed by the original owners, without valid application for consent from the Land Control Board, without the permission of the original owners and without paying any consideration to the original owners and forging documents purporting the same to have been executed by the original owners. The 1st defendant averred that he is a relative to the original owners by virtue of being a grandchild of Hamisi Athman Mwasengeza, and nephew to Hamad Alfani Tsumo and Kasim Salim Mwamtaji in accordance with their clan. That by reasons aforesaid, the family members of the original owners have entrusted him to pursue this matter on their behalf. The 1st defendant stated that following the death of the original owners and considering the fraud committed by the plaintiff in obtaining title to the suit property, the 6th defendant had the power and/or authority under the law to cancel the plaintiff's name and replace it with the 1st defendant's name as a trustee of the heirs and/or dependents of the original owners in accordance with the Islamic Law. That having been registered as a proprietor of the suit property as trustee of the deceased heirs, he had the capacity to sell the suit property and had every right to enter into any transaction in respect of the same with any person including the 2nd to 5th defendants herein. It was his evidence that the plaintiff has no right whatsoever over the suit property. The 1st defendant urged the court to dismiss the plaintiff's suit and to enter judgment in his favour in terms of the counter-claim.

2ND, 3RD, 4TH AND DEFENDANTS' CASE

16. In their amended defence dated 6th October, 2016, the 2nd to 5th defendants pleaded that they are the legally registered proprietors of the SUIT PROPERTY KWALE/GALU KINONDO/1 having purchased the same from the then registered proprietor, the 1st defendant vide a sale agreement dated 11th April, 2008. They aver that they purchased it in good faith for value and without notice, and with consent of the Land Control Board. That the transfer of the property was duly registered and the title deed issued by the 6th defendant, and that they have been enjoying quiet possession of the same, except in December, 2012 when the plaintiff unsuccessfully attempted to dispossess them.

17. Thaddeaus Kiminza Mutiso (DW2) testified on behalf of the 2nd to 5th defendants and was cross-examined by Ms. Ngigi and Mr. Abubakar and Mr. Mwandeje for the 6th defendant and re-examined by Mr. Mwakireti. He adopted his witness statement dated 22.1.2012 and produced the list of documents dated 22.1.2012 as D. exhibits 1-7. These include the certificate of official search dated 8th February 2008, sale agreement dated 11th April, 2008, Application for consent of Land Control Board, letter of consent dated 7th May 2008, application for registration dated 12th August 2008, transfer dated 7th August 2008, and title deed issued on 12th August 2008. He stated that they acquired the suit property from the 1st defendant in good faith without notice and that before they bought the property, they did due diligence and conducted an official search which revealed that the registered owner of the property was the 1st defendant herein. He stated that they then purchased the suit property vide the sale agreement dated 11th April 2008, obtained consent from the Land Control Board at Msambweni and thereafter registered the duly executed transfer of the suit property before they were issued with title deed on 12th August 2008.

18. DW2 stated that he was introduced to the 1st defendant by his father from whom he had bought land from earlier. He maintained that he went through all the process until title was issued, adding that the land was bushy and had to cut trees to get the beacons. He stated that they took possession after buying the land.

19. The 6th and 7th defendants neither filed defence nor gave any evidence in the matter.

SUBMISIONS

20. The plaintiff submitted that he was legitimately registered as the owner of the suit property after purchase from the original owners and that its title has been there since 1997 and has never been surrendered. It is the plaintiff's submission that the registration of the 1st defendant as owner and subsequent transfer to the 2nd to 5th defendants was fraudulent and that fraud has been proved. The plaintiff's counsel cited Section 26 of the Land Registration Act and relied on the case of **Samuel Odhiambo Oludhe & 2 Others –v- Jubilee Jumbo Hardware Limited & Another (2018)eKLR** and submitted that there having been no dealings or transaction between the plaintiff and the 1st defendant, the court ought to find that the 1st defendant in collusion with the 6th defendant obtained registration of the suit property fraudulently. Further, it was submitted that the 1st defendant admitted that he had knowledge of the suit, Nairobi HCCC NO. 2224 of 1983 filed by the Original owners against the plaintiff in respect of the ownership of the suit property, though the same was not concluded. It was the plaintiff's submission that in perpetuating the fraud further, the 1st defendant sold the suit property to the 2nd to 5th defendants while knowing that he did not have a valid title. Relying on the case of **Alice Chemtai Too –v- Nickson Kipkirui Korir & 2 Others (2015)eKLR**, the plaintiff's counsel submitted that the plaintiff has proved to the required standard that the 6th defendant illegally, fraudulently and irregularly manipulated and cancelled the plaintiff's name from the land records and issued title deed to the 1st defendant. It was further submitted that the 6th defendant has no power to cancel or revoke the title and the decisions by the 6th defendant to unilaterally cancel or revoke the plaintiff's title flies in the face of the express provisions of Article 40 (3) and 47 of the Constitution. The plaintiff relied on the case of **Lawrence Muriithi Mbabu –v- District Land Registrar, Nyeri & Another, John Githui Kinyua**

(interested party) (2019) eKLR. The plaintiff submitted that the revocation by the 6th defendant was not one envisaged under Section 142 (1) of the Registered Land Act (repealed). The plaintiff further submitted that the title issued to the 1st defendant was invalid and that he was incapable of passing any interest, right or title to the 2nd to 5th defendants.

21. The plaintiff further submitted that the 2nd to 7th defendants were aware that the transaction with the 1st defendant was not above board and cannot be described as innocent purchasers for value without notice. The plaintiff's counsel relied on the case of **Arthi Highway Developers Limited –versus- West End Butchery Limited (2015) eKLR; Elijah Makeri Nyangw'ira –versus- Stephen Mungai Njuguna & Another (2013) eKLR**, and **Petronilla Nafuna Khaemba –versus- Attorney General & 7 Others (2019) eKLR**. The plaintiff urged the court to find that the plaintiff is the lawful owner of the suit property and to revoke and/or cancel the 1st to 5th defendants' title and the same to be restored in the name of the plaintiff and to order the 2nd to 5th defendants to give vacant possession to the plaintiff. The plaintiff further urged the court to find that the 2nd to 5th defendants' continued occupation of the suit property amounts to trespass and submitted that the plaintiff is entitled to damages. Relying on the case of **Park Towers Ltd –versus- John Mithamo Njika & 7 Others (2014) eKLR** where the court awarded Kshs10 million in general damages for trespass the plaintiff submitted that it be awarded the sum of Kshs20 million as general damages for trespass against the defendants jointly and severally.

22. Regarding the 1st defendant's defence and counter-claim, the plaintiff submitted that the 1st defendant has no *locus standi* to represent the original owners as his pleadings and evidence are based on the fact that he is related to the original owners who are all deceased. That such claims or averments made by the 1st defendant against the plaintiff in the defence and counterclaim could only be made by the deceased persons or their legal representatives. That it is not sufficient for the 1st defendant to state that he is a relative of the deceased or trustee of the heirs of the original owners. The plaintiff submitted that the 1st defendant cannot challenge the plaintiff's title without grant of letters of administration. The plaintiff cited section 82 of the Law of Succession Act, Cap 160 Laws of Kenya and relied on the case of **Daniel Mbaka Obanti –versus- Erick Kasuku Ogwere & Another (2018) eKLR**. The plaintiff also questioned how the 1st defendant, who claims his interest through the original owners, processed and obtained title long after those original owners had died.

23. The plaintiff further submitted that the 1st defendant's counterclaim is time barred, the 1st defendant having admitted that he was fully aware of the dispute between the plaintiff and the original owners since 1977, and which issues were also raised in Nairobi HCCC No. 2224 of 1983. The plaintiff cited section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya and urged the court to dismiss the 1st defendant's defence and counterclaim with costs. The plaintiff submitted that it has proved its case to the required standard and urged the court to grant it the orders sought in the amended plaint against the defendants jointly and severally.

24. The 1st defendant submitted that the plaintiff's suit is incompetent and bad in law. It was the 1st defendant's submission that the plaintiff ought to have raised the question of cancellation of its title with the Registrar who in turn would have sought the High Court's opinion under sections 149 and 150 of the Registered Land Act, 2012 (sic). The 1st defendant's counsel relied on the case of **Speaker of National Assembly –versus- Njenga Karume (2008) 1 KLR425**. The 1st defendant submitted that the suit property after adjudication exercise, was allocated to the original owners who were registered as proprietors on 15th November, 1971, but were not issued with a title deed. That surprisingly, on 5th February 1977, the plaintiff was issued with a title deed. The 1st defendant submitted that the plaintiff was unable to produce a sale agreement, transfer or consent showing that he purchased the property from the original owners and that they transferred it to them. That the plaintiff's assertion that the said documents were lost is not supported by any evidence such as a police abstract. Further, that the plaintiff could have applied for certified copies of the same from the Kwale Land Registry. It is the 1st defendant's submission that the plaintiff obtained the title deed illegally and/or unlawfully and cannot be protected under Article 40(6) of the Constitution. The 1st defendant further submitted that the 6th defendant required no court

order to revoke the plaintiff's title deed and cited section 144 of the Registered Land Act (repealed). The 1st defendant submitted that the registration of the plaintiff as proprietor of the suit property was a mistake that could be rectified pursuant to the provisions under sections 142 and 143 of the repealed Act. The 1st defendant submitted that the applicable law is Cap 300 (repealed) and relied on the case of **PNN versus- ZWN (2017) eKLR**. The 1st defendant submitted that he was appointed as a trustee of the heirs of the original owners and who applied to the Registrar for Transfer on transmission to him for purposes of inheritance. That the Registrar realized the mistake of having registered the plaintiff as the owner and rectified the register accordingly and in exercise of his powers under Section 125 of the Registered Land Act (repealed), registered the 1st defendant as owner by transmission. The 1st defendant submitted that as an heir of the estate of the deceased registered owners, he was entitled under Islamic law to be registered as owner on his own behalf and on behalf of the other heirs as trustee and submitted that the provisions of the Law of Sucession Act, Cap 160 Laws of Kenya do not apply. He relied on the case of **Chelanga-versus- Juma (2002) 1 KLR**. The 1st defendant submitted that the plaintiff has failed to discharge the burden of proof as required under section 107, 108, 109 and 116 of the Evidence Act, Cap 80 Laws of Kenya and added that the plaintiff's case should be dismissed with costs.

25. The 2nd, 3rd, 4th and 5th defendants on their part submitted that there is absolutely no evidence of sale or transfer of the suit property from the original owners to the plaintiff. That the plaintiff's claim of ownership of the suit property is exclusively based on the plaintiff having the title deed and further that he never entered into any transaction with the 1st defendant or any other person to transfer the suit property. It is their submission that the plaintiff has fallen short of proving its acquisition of the suit property. The 2nd to 5th defendants advocate relied on the case of **R –versus- Minister for Transport & Communication & 5 Others Ex parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 (2006) 1 KLR (E&L) 563** and submitted that the plaintiff has completely failed to demonstrate that it acquired the title in accordance with the applicable law at the time and that the said title should be cancelled.

26. The 2nd to 5th defendants submitted that they have demonstrated that they have met all the conditions of innocent purchasers for value and relied on the case of **Weston Gitonga & 10 Others –versus- Peter Rugu Gikanga & Another (2017) eKLR**. That on the other hand, the plaintiff failed to show proof of how it acquired the property. The 2nd to 5th defendants further submitted that they have proved that they did not engage in any fraud and that their title should be accorded protection by the court as the same was acquired in good faith and through lawful means. They urged the court to find that they are in lawful occupation of the suit property and should be protected and urged the court to dismiss the plaintiff's suit with costs.

ANALYSIS AND DETERMINATION

27. From the pleadings filed, the evidence tendered during the trial and the submissions made, the main issues for determination are whether the cancellation and/or revocation of the plaintiff as registered proprietor of the suit property was lawful and whether the registration of the 1st defendant as owner was lawful and whether the subsequent sale and transfer by the 1st defendant to the 2nd, 3rd, 4th and 5th defendants was regular or was it illegal and fraudulent. The other issues to consider are whether the plaintiff is entitled to the reliefs sought in the amended plaint or whether the 1st defendant is entitled to the reliefs sought in the counterclaim.

28. From the evidence on record and the documents produced, it is evident that the suit land belonged to Hamisi Athumani Mwatsengeza, Hemed AlfaTsumo, Alfani Omari Kugotwa and Kasim Salim Mwamtaji who are all deceased. According to the copy of the land register produced in court by the plaintiff as p exhibit No. 5, the date of first registration under the Registered Land Act, Cap 300 Laws of Kenya (repealed), was 15th November, 1974 and the first entry indicated the names of the above named four original proprietors in respect of the suit land measuring approximately 2.6 hectares. Entry number 2 of 5th February 1977 is in the name of Wangulu Enterprises Limited, the plaintiff herein pursuant to a sale of Kshs100,000/= while entry number 3 indicates that the Land Certificate (p exhibit no 1) was issued to

the plaintiff company.

29. While the plaintiff claimed that it bought the suit land from the original registered owners for a consideration of Kshs100,000/= and that the said original owners transferred the land to it, and that is why the property was registered in its name, it is the 1st defendant's case that the suit parcel of land was fraudulently registered in the plaintiff's name. The defendant contends that the land was registered in his name by transmission and that he is the trustee of the heirs of the estate of the deceased original owners and was entitled to be registered under Islamic Law as owner on his own behalf and on behalf of the other heirs. The 1st defendant stated that he applied to the Land Registrar for transfer on transmission to him for purposes of inheritance and was accordingly registered as proprietor and subsequently sold and transferred it to the 2nd to 5th defendants.

30. The plaintiff's witness testified that the plaintiff purchased the suit land from the original owners at a consideration of Kshs100,000/= which was paid in two installments of Kshs60,000/= and Kshs40,000/= which was duly paid in full. PW1 stated that he personally attended the Land Control Board sitting together with the original owners and that transfer was registered and title deed issued in the plaintiff's name. PW1 stated that unfortunately, he lost documents, including the sale agreement, consent and transfer through burglary and efforts to obtain copies were futile due to lapse of time and the death of the plaintiff's advocate the late Mr Waruhiu advocate of Waruhiu & Waruhiu advocates. The plaintiff's evidence is that the suit property was charged to National Bank of Kenya Limited and was discharged in the year 2002. The plaintiff's witness stated that a case was filed by the original owners being **Nairobi HCCC No. 2224 of 1983, Hamisi Athuman Mwatsengeza & 3 Others –versus- 2 Others**. That the plaintiff responded to the case but the same was not heard and determined. To support its case, the plaintiff produced the defence filed in Nairobi HCCC No. 2224 of 1983 (p exhibit no 4)

31. I have perused the defence filed by the plaintiff in Nairobi HCCC No. 2224 of 1983 which was produced as p exhibit no 3. From the averments therein, it is clear that there was a dispute between the plaintiff and the original owners of the suit land. It appears the dispute in that case was whether the whole or part of the suit land was sold to the plaintiff; whether or not the full consideration was paid and whether or not the completion documents were executed by the original owners. In the said defence, the plaintiff maintained that it bought the whole suit land and that the full consideration was paid, consent obtained and transfer duly executed in its favour. What is clear is that there was a transaction which led to a dispute which ended up in court. It is however not in dispute that suit was not concluded. The plaintiffs in Nairobi HCCC No. 2224 of 1983 are all deceased. No doubt that case has abated.

32. There is no dispute that the plaintiff was registered as proprietor and issued with title of the suit property on 5th February, 1977. Whereas it is apparent that there was a dispute between the original owners and the plaintiff herein in Nairobi HCCC No. 2224 of 1983 which, as already stated, was not concluded, the plaintiff remained as the registered owner of the suit property. Therefore the state of affairs remained as it were before the filing of that suit.

33. From the evidence on record, and in particular the copy of the land register (p exhibit No. 5), the plaintiff's name was deleted and entry number four (4) thereof indicates that the 1st defendant was registered as proprietor of the suit property on 7th August, 2006 and title deed issued to him on the same date. The 1st defendant admitted that he was aware of the existence of Nairobi HCCC No. 2224 of 1983 in respect of the suit property between the original owners and the plaintiff. The 1st defendant further admitted that the suit property was first registered in the names of the deceased original owners before the same was registered in the plaintiff's name on 5th February, 1977. Although the 1st defendant claims that the registration of the suit property in the name of the plaintiff was wrongful, illegal and fraudulent, there was no evidence availed before court to explain under what circumstances the name of the plaintiff was deleted/cancelled and in its place, the 1st defendant's name entered in the register and title deed issued to him on 7th August, 2006. In his defence, the 1st defendant states that following the death of the original owners, the 6th defendant had the power or authority under the law to cancel the plaintiff's name and replace it with that of the 1st defendant as a trustee of the heirs and/or defendants of the original owners in

accordance with Islamic Law. The 1st defendant submitted that he was registered as proprietor through transmission. However, the 1st defendant did not avail any evidence to support his contention. Whereas the 1st defendant accuses the plaintiff of fraudulently causing the suit property to be registered in its name, the 1st defendant on his part has not satisfied the court as to how his name came to be registered as owner of the suit property. The 1st defendant cannot claim to have been registered by transmission on 7th August, 2006 when the evidence on record indicate that the suit property was already registered in the plaintiff's name, and not in the names of the original owners. It is therefore doubtful whether Islamic law was applicable as there was no determination of any questions of Muslim Law relating to inheritance, considering that the suit property was already in the plaintiff's name and had been so registered from 5th February, 1977.

34. The counterclaim filed by 1st defendant is clearly based on the 1st defendant's relationship with the original owners of the suit property who are all deceased. It is trite law that the estate of a deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Only a person who had been issued grant of letters of administration has capacity to represent the estate of a deceased person.

35. The powers of the personal representation are set out under Section 82 of the Law of Succession Act, Cap 160 Laws of Kenya which provides as follows:

82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers:

a) To enforce, by suit or otherwise all causes of action which by virtue of any law, survive the deceased or arising out of death for his personal representatives.

b) To sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that;

(i) The purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) No immovable property shall be sold before confirmation of the grant;

c) To assent, at any time after confirmation of the grant, to the vesting of the grant, to the vesting of a specific legacy in the legatee thereof.

d)

36. Section 80(2) of the Law of Succession Act provides as follows;

(2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of the grant.

37. From the foregoing, it is clear therefore that a party cannot commence suit on behalf of the estate of a deceased person without letters of administration and where a suit is commenced without letters of administration in respect of a deceased estate, such a suit is null and void *ab initio*.

38. In the case of **Rajesh Pranjivan Chudasama –versus- Sailesh Pranjivan Chudasama (2014) eKLR**, the Court of Appeal stated:

“... In our view the position in law regards locus standi in succession matters is well settled. A litigant is clothed with locus upon obtaining a limited or a full grant of letters of administration

in cases of intestate succession. In the case of Otieno –versus- Ougo (supra) this court differently constituted rendered itself thus:

“..... an administrator is not entitled to bring any action as administrator before he had taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

39. In light of the foregoing, and in view of the fact that the 1st defendant has admitted that the suit land belonged to his deceased relatives and considering that the 1st defendant has not taken out letters of administration, and further, considering the 1st defendant’s counterclaim is based on the ownership of deceased persons, it is my finding that in as far as the 1st defendant claims through his deceased relatives lacked the requisite *locus standi* to institute the counterclaim and the same is incompetent, null and void.

40. The other issue to consider is whether the 1st defendant legally acquired the suit property. The 1st defendant’s case is that the suit property was registered in his name by virtue of being a relative of the deceased original owners. Sections 118 and 119 of the Registered Land Act (repealed) under which legal regime suit land was registered provided as follows:

“118. If one of two or more suit proprietors of any land, lease or charge dies, the Registrar on proof to his satisfaction of the death, shall delete the name of the deceased from the register.

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

41. The Registered Land Act was repealed by the Land Registration Act 2012. Section 60 and 61 of the latter Act and Section 49 and 50 of the Land Act 2012 have similar provision as those in Section 118 and 119 of the Registered Land Act.

42. Having found that the subject property was already registered in the plaintiff’s name and was no longer in the joint names of the original owners who are since deceased, it logically follows that the subject property did not form part of the deceased’s estate and was thus not available for the 1st defendant as heir to be registered as proprietor in place of the deceased. In my view, the Registrar could not apply the provisions of Sections 118 and 119 of the repealed Act to have the name of the plaintiff deleted from the register and replace it with that of the 1st defendant when it was clear that the subject property was no longer registered in the name of the deceased original owners.

The plaintiff as the real title holder as at 7th August, 2008 having led evidence that they neither sold nor transferred the suit land to the 1st defendant, is prima facie evidence that that the 1st defendant got the suit land registered in his name unprocedurally. From the evidence on record, the 1st defendant was well aware of the registration of the plaintiff as proprietor and further knew that there was a case, Nairobi HCCC No. 2224 of 1983 between the original owners and the plaintiff. The 1st defendant has completely failed to demonstrate how he acquired the title in his name. In this case the 6th defendant neither filed defence nor adduced any evidence to explain the circumstances that led to the cancellation of the plaintiff’s name from the register and the registration thereof of the 1st defendant.

Therefore the process of registration of the 1st defendant as proprietor of the suit land was not done above board and was fraudulent. His registration as proprietor could not have been in accordance with the law. Therefore, from the material on record, it is my finding that the 1st defendant did not acquire a genuine title to the suit property.

43. The next issue to consider is whether the 2nd, 3rd, 4th and 5th defendants were innocent purchasers for value without notice and whether they now hold good title to the suit property. In his evidence, the 2nd defendant stated that he was introduced to the 1st defendant by his father from whom he had bought land from earlier. The 2nd defendant stated that he negotiated the purchase of the land with the 1st defendant and later executed a sale agreement after carrying out due diligence. The 2nd defendant stated that he was aware that the subject land was family land. Indeed, the 1st defendant alleged that he acquired the land by transmission. Having known that the land was family land, it is not clear why the 2nd to 5th defendants only dealt with the 1st defendant. In my view, the 2nd to 5th defendants could not solely rely on a title deed in the name of the 1st defendant and the search confirming so. Considering that they were made aware that the land they wanted to buy was family land in which the previous owners were deceased, it was necessary to find out how the 1st defendant got registered as owner and was issued with title in his name.

44. From the evidence on record, it is doubtful that the 2nd to 5th defendants were innocent purchasers for value without notice. In my view, the 2nd to 5th defendants had actual or constructive notice of the defects in the 1st defendant's title. Had they carried out proper due diligence, they could have easily established that the 1st defendant's registration as owner of the suit land was not supported by any document or law. For the reason that the 1st defendant acquired his title fraudulently, he did not have any or any good title to pass to the 2nd, 3rd, 4th and 5th defendants. What is surprising is that the 1st defendant and subsequently the 2nd to 5th defendants were issued with titles when the plaintiff still held the original title to the suit property in its name.

45. In light of the above, I am satisfied that the plaintiff has proved fraud against the 1st and 6th defendants. I am thus satisfied that the plaintiff has proved its case against the defendants on a balance of probabilities and is entitled to the orders sought herein. As already stated, the 1st defendant's counterclaim is incompetent and bad in law and the same must fail.

46. The plaintiff has proved that the case falls within the exceptions under Section 26(1) of the Land Registration Act, 2012. Further the law relating to cancellation of titles is to be found in Section 80 of the Land Registration Act which provides inter alia, that:

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

(2) the register shall not be rectified to affect the title of a proprietor unless the proprietor had knowledge of omissions, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by act, neglect or default.”

47. The court has examined the evidence on record and is satisfied that fraud on the part of the 1st and 6th defendants was proved. It is clear that the 1st defendant and the 6th defendant were aware of the fraud, mistake or omission. The evidence on record shows that the 6th defendant had no legal basis for cancelling the plaintiff's name from the register and the 1st defendant was irregularly registered as owner of the suit property and therefore did not have a good title to pass to the 2nd, 3rd, 4th and 5th defendants. The court is also of the view that the 2nd, 3rd, 4th and 5th defendants contributed to such factors through neglect or default. In the circumstances, the plaintiff has sufficiently discharged the legal burden of proof placed upon it.

48. Regarding the issue of damages, it is the plaintiff's case that the 2nd to 5th defendants unlawfully took possession of the suit property in the year 2013. It was the evidence of PW1 that the plaintiff's directors intended to put up a retirement home or construct a hotel on the suit property. The plaintiff is still

dispossessed of the suit property to-date. The plaintiff's advocate proposed a sum of Kshs20,000,000/= as general damages for trespass. I have considered the time the plaintiff acquired the suit property. The plaintiff was registered as owner of the property in the year 1977. From the year 1977 up to the year 2013 is a period of about 36 years. The plaintiff has not given an explanation as to why it never carried out the proposed development in all those years. The proposed sum of Kshs20,000,000/= as general damages in my view is quite excessive. I will therefore award the plaintiff the sum of Kshs. 1,000,000 as general damages.

49. The upshot of this is that this court is satisfied that the plaintiff has proved its case against the defendants jointly and severally on a balance of probabilities. The 1st defendant has however, not proved his counterclaim against the plaintiff.

50. Accordingly, and in light of the above findings, I hereby enter judgment as follows:-

(a) That the title of the 1st defendant, Abdalla Said Kugotwa, to the land known as title No. GALU/KINONDO/1 was improperly procured and the same is hereby cancelled.

(b) That having no title, Abdalla Said Kugotwa could not properly have sold and transferred land parcel known as Title No. GALU/KINONDO/1, and the registration of Thaddeus Kiminza Mutiso, Jane Njeri Mutiso, Mwicigi Kaniu and Jane Gathoni Mwicigi, the 2nd, 3rd, 4th and 5th defendants as proprietors thereof is hereby cancelled.

(c) That the register of the land parcel known as Title No. GALU/KINONDO/1 be rectified so as to remove the entries in favour of the 1st, 2nd, 3rd, 4th and 5th defendants, and the title to revert back to the proprietorship of Wangulu Enterprises Limited.

(d) The defendants shall jointly and severally pay the plaintiff damages assessed at Kshs1,000,000/- together with interest from the date of this judgment.

(e) A mandatory injunction is hereby issued compelling the defendants by themselves, their employees, servants and/or agents and all persons claiming any title interest through any of them to deliver vacant possession of land known as Title No. GALU/KINONDO/1 to the plaintiff within 60 days of the date of delivery of this judgment and at their cost to remove and/or otherwise demolish any developments, buildings, and/or fittings put up thereon and to carry away any debris resulting from such demolition and/or removal, in default, the plaintiff shall be at liberty to remove and/or demolish any such developments, buildings and/or fittings at the defendants' cost.

(f) The 1st defendant's counter-claim is dismissed with costs to the plaintiff.

(g) Costs of the suit together with interest thereon are awarded to the plaintiff against the defendants jointly and severally.

(h) Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 21st day of July 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE