REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 2526 of 1991

GITHURAI TING'ANG'A & CO. LTD..... PLAINTIFF

versus

MOKI SAVINGS CO-OPERATIVE SOCIETY LTD..... 1ST DEFENDANT

HANNAH MUKAMI KIRUHI..... 2ND DEFENDANT

JUDGMENT

It was after I had sat down to write the judgment in this suit that I realised thesuit was perhaps part heard and may have been at least part decided, if not fullyheard and decided. That had not been revealed to me by the parties as all they hadrevealed to me was that there was a previous suit No. 1788 of 1984 heard anddecided by Mr. Justice Akiwumi, then a judge of the High Court in 1990. I wastold the Plaintiff in that suit was the present Plaintiff before me and the secondDefendant in that suit, is the First Defendant before me and that the First Defendantin that suit Wanjiku Njau has died but this suit was filed before she died and was not made a party.

Having had the time to carefully peruse the court case file including thepleadings, the evidence and the submissions before me, I find that the facts of thiscase are aptly set out in the judgment of Akiwumi J, as he then was, dated 8th June,1990 in High Court Civil Suit No. 1788 of 1984. From what I have read in thatjudgment and from what I have been told, the First Defendant before me had beenjoined in that suit. It was not made clear at what stage of the proceedings thatDefendant was joined no copy of the relevant proceedings was produced andnone of the Parties appears to remember. Both sides gave me the impression thatafter that Defendant was joined in that suit, the Defendant was not heard in itsdefence. However that Defendant suffered no loss because the Plaintiff's case wasdismissed.

From my reading of the judgment dated 8th June, 1990 and from what I havebeen told, the Plaintiff's claim in Civil Suit No. 1788 of 1984, was for the court'sdeclaration that the Plaintiff was, by virtue of adverse possession, the proprietor of7.5 acres of a parcel of land L.R. No. 5964/1 outside Nairobi City Otherwisereferred to as the suit land. The Plaintiff asserted that it bought the suit land on 2ndMay 1972 and went into possession on 3rd May 1972, the day after it had enteredinto a written agreement with the owner of the suit land, one John Boyes, and had been in open and undisturbed possession of the suit land from that time until thetime of instituting that suit in 1984, a period of 12 years.

Evidence was adduced, as it has been adduced before me, that Wanjiku Njauwas living with John Boye's and was present during the transaction and signed theagreement of sale as a witness and that the whole purchase price of Shs.33,000/=for the suit land was paid.

After John Boyes died in 1976 before transfer of the suit land to the Plaintiff,the land became vested in Wanjiku Njau as the sole beneficiary under the will ofJohn Boyes and She was subsequently registered the owner.

I said the facts are aptly set out in the judgment dated 8th June, 1990 wherethe learned judge found that the land was agricultural land and that no relevantconsent of the land control board had been obtained within the prescribed periodand that therefore the sale transaction had become void for all purposes threemonths from 2nd May, 1972. He found, as a fact, that the period of adversepossession begun to run, whether consent of the land control board was required ornot, from 26th August, 1973 when the last payment of the purchase price was madeand computing the figures, he concluded that 12 years were to expire on 27th August, 1985, He therefore found that although the Plaintiff's possession wasadverse to the Defendant's title, the Plaintiff had brought the suit prematurely in July 1984 and therefore dismissed the suit on the ground of prematurity.

The Defendants do not agree that the learned judge found that the Plaintiff'spossession was adverse, but as I look at his analysis of the evidence before him, I donot subscribe to the thinking held by both defence counsel.

At the middle of page 4 of the judgment what the learned judge said was to be assumed was the fact that the suit land was agricultural land needing consent of the land control board. He was not assuming that the Plaintiff's possession was adverse because, from what he said, that fact was settled in his mind and he accepted the laying of water pipes and said electric and telephone cables had been strung up over the suit land, clearly attributing those to the Plaintiff. Look at his remarks about Wanjiku Njau in relation to those works. He said:

"her lame answer was that she could not stop people fromcarrying out those activities since she was not using thesuit land. It would seem that she herself did not challengethe Plaintiff's use of the suit land as described. It seemshowever, that she complained to the Executor and Trusteeof the will of Boyes about trespass by the Plaintiff'sagents on the suit land. This was presumably before thesuit land was vested in her, because the representative ofthe Executor and Trustee of Boyes' who gaveevidence for the 1st Defendant, stated that upon thecomplaint having been made by the 1st Defendant, a letterdated 15th May, 1978 and objecting to the activities ofthe Plaintiff's agents, was sent by hand to the Plaintiff.He did not deliver this letter himself and could notproduce the relevant delivery book. It does not seem as if this letter was received by the Plaintiff so as to be able tosay that the Plaintiff knew that its possession of the suitland had been challenged in 1978."

When making the final order of dismissal of the suit the learned judge said hewas doing so while confessing "to some sympathy for the Plaintiff."The suit was dismissed simply because the period for adverse possession had notmatured when the suit was filed. Otherwise the learned judge had found that thePlaintiff was possessing or occupying the suit land adversely to the Defendant's titlein that land.

That being the position, it will not be proper for me to make my own findingon the same issue of adverse possession in this same matter as I do not want to riskinconsistency where such risk is not a necessity.

That is the issue of the adversity of the possession of the Plaintiff against thetitle of the Defendants in the suit land. Connected with that issue, there is thequestion as to whether the issue of adverse possession in this matter is now resjudicata. There also exists this court's decision on that issue and I think I shouldcome to that issue latter.

I said the case may be part decided. Other issues remain to be decided.One of them is whether this suit should have been brought by way of an originating summons. It was raised on the side of the Defendants. But looking at their fileddefence, I do not see that issue featuring. As a result it is not among the framed andagreed issues. That issue should not have been raised therefore especially at thisstage after the Defendants had failed to raise it in 1991 or 1992 or thereabouts as apreliminary point of law.

Moreover, since the Plaintiff's case was based on adverse possession as wellas illegality and fraud, the Defendants failed completely to say how the plaintiffcould have brought the case, if not by a Plaint, as they realised an originatingsummons could not do for the allegations of illegality and fraud.

I may add that Originating Summons are meant for simple claims and are nottherefore suitable in claims which are not simple.

I now move to the issues of illegality and fraud together. I would havethought that the Plaintiff's possession having been found to be adverse to the title ofthe first Defendant in HCCC No. 1788 of 1984, there would be no need labouring the issues of illegality and fraud because the existence of the adversity of thePlaintiff's possession means that from 27th August, 1985, Wanjiku Njau's title inthe suit land became extinguished and therefore she had no title to transfer to thefirst Defendant who in turn had no title to transfer to the second Defendant. I willcome back to that after looking at the issues of illegality and fraud since they have also been raised. It becomes necessary to look at the transfers first.

The Plaintiff is not keen in giving transfer dates. John Boyes died in 1976.Upon that death, the suit land became vested in Wanjiku Njau as the solebeneficiary under the will of John Boyes but no evidence has been led to show thedate when the suit land became registered in her name.

Perhaps it was after she had been registered as owner that she was sued bythe Plaintiff in HCCC No. 1788 of 1984. She was sued alone and Moki SavingsCo-operative Society was not joined as the second Defendant in that suit untiltowards the end of the case. Again no evidence has been led to let me know whenMoki Savings Co-operative Society was joined. But undisputed evidence has beenled to say that Moki Savings Co-operative Society was joined after Wanjiku Njauhad transferred the suit land to Moki Savings Co-operative Society.

No extract of title of the suit land has been produced as an exhibit. But acertified copy of certificate of Title has been produced. It was issued under theprovisions of the Registration of Titles Act (Chapter 281 Laws of Kenya) on 26th August 1978 in the name of Wanjiku Njau as owner of the whole estate L.R.No.5964/1 in fee simple.

Entries at the back of that certificate of Title (Plaintiff Exhibit 5) are not easyfor me to read and no body read them before me. But it would appear there was a caveat entered as No.2 whereby the Plaintiff company was claiming purchaser'sinterest. That caveat was removed by entry No.3 made on 13th September, 1989.

The removal of that caveat, it appears opened the way for the transfer of landL.R. No.5964/1 to Moki Savings Co-operative Society Limited on the same date13th September 1989 at entry No.4.

Subsequently at entry No. 5 dated 22nd December 1989, a charge forKshs.3, 000,000/= recorded.

Discharge of that charge was recorded at entry No.6 dated 8th February 1991thereby opening the way for transfer of L.R. No.5964/1 to Hannah Mukami Kiruhiat entry No.7 of same date 8th February 1991 followed by entry No.8 of a charge toBarclays Bank of Kenya for Kshs.3,000,000/= also same date 8th February, 1991.

I have been told that Hannah Mukami Kiruhi having got land L.R. No.5964/1transferred to her and having used that land as security to obtain a loan ofKshs.3,000,000/= from Barclay’s Bank of Kenya Limited, she was proceeding,with the approval of the said bank, to sub-divide land L.R. No.5964/1 into smallplots for the purpose of selling them and had obtained consent of the Land ControlBoard and the approval of the City Council of Nairobi and the Commissioner ofLands for the sub-division when a temporary injunction issued in this suit stoppedthe whole process. It was an ex-parte court's order made on 24th May 1991 and converted to an inter partes consent court order on 11th June 1992.1 hope it isreflected in up to date entries relating to the title to L.R. No.5964/1 which theparties have kept away from me and I hope it constitutes the last entry.

From what I have stated above, I see no entry relating to court orders thePlaintiffs Advocates have kept on mentioning. Apparently there was no courtorder emanating from HCCC No. 1788 of 1984 for entry on the title of the suit land.This is despite the fact that Moki Savings Co-operative Society Limited was joinedas a defendant in that suit after the suit land had been transferred to that Co-operative Society.

From correspondence, Advocates for the Plaintiff kept on writing letters tothe Registrar of Titles, which letters may or may not have been reaching theRegistrar, without the advocates caring to check what was going on the title.They were waiting for the Registrar's replies which, according to the contents ofPlaintiff exhibit No.9, were not forth coming.

It would appear the Registrar had about June/July 1989 served the Plaintiffwith a notice to remove its caveat then on the register. The Plaintiff, as a result, hadgone to court. Obtained a court order relating to the caveat and merely served theorder upon the Registrar. It would appear, if served, the Registrar was not satisfiedwith that service or found some fault with the court order. The order was therefore not effected by the Registrar.

That order is said to have been given by the court on 3rd August 1989.Another one is said to have been given by the court on 25th October, 1989. But thisone is said to have been rejected by the Registrar of Titles on the grounds that thetitle had changed hands. The first court order dated 3rd August 1989 had also beenrejected by the Registrar, according to Plaintiff exhibit 9, and the transfer of L.R.No.5964/1 by Wanjiku Njau to Moki Savings Co-operative Society on 13thSeptember 1989 therefore took place between the date 3rd August 1989 and thedate 25th October 1989 when there was no court order entered on the title L.R.No.5964/1. The Plaintiff is saying that transfer was illegal because it was registeredin contravention of section 57(6) of the Registration of Title Act.

I have said no extract of title has been produced before me in relation to L.R.No.5964/1 to show the entries in question. The Registrar of Titles has been keptout of this suit. He has neither been joined as a party nor called as a witness. Yetthe Plaintiff's case is that the illegalities and fraud alleged took place in the office ofthe Registrar of Titles and were committed by the Registrar either alone or with adefendant or two.

The defendants before me have denied that they committed any illegality orfraud and entries on copy of the certificate of title produced before me do not show illegalities or fraud on the face.

When the Plaintiff talks of illegalities in general and goes on to mentionfraud, I take it that the illegalities the Plaintiff is talking about amount to fraud. Ihave to look at relevant provisions of the Penal Code like sections 312, 318 and 320in relation to the evidence before me. I do not find evidence of Criminal Deception.Evidence of false representation. Evidence of a trick or evidence of any otherfraud.

Adverse possession is a matter of law which many litigants do notunderstand. A litigant will keep on sincerely insisting that he owns a piece of landand sold it or owns it because he bought it or inherited it without knowing that thereis something else called adverse possession. The existence of adverse possession orpossession which is adverse does not always go with illegalities and/or fraud. Butwhere a party claims the existence of any of those crimes, then the duty is upon thatparty to satisfy the court that there is sufficient evidence proving the existence ofthe alleged vice. No evidence has been adduced before me to persuade me thedefendants or anyone of them committed a crime whether fraud or not. I do nottherefore find any of the Defendants guilty of any of the particulars of illegality orfraud set out in the amended plaint.

The Defendants cannot be made responsible for acts committed or omitted by the Registrar of Titles. But the Registrar of Titles has statutory power to acceptor to reject any document, including court orders, sent to him for registration orentry on title. If he acts in breach, he should be brought to court for the offence tobe proved against him. Allegations made against him without bringing him to courtto hear the allegations and defend himself should not be entertained as he should notbe condemned unheard even if the allegations are genuine.

Sometimes people forget that mere service of a court order to a Registrar ofTitles is not sufficient because you are serving a person who has statutory power toaccept or reject that court order and for such court order to be effective, it must beentered on the title or register of the title. As such registration or entry generallyattracts some fees, it is up to the person serving the court order to ensure that thenecessary fees is paid. Mere posting of the court order to the Registrar of Titleswithout more, is therefore not good enough especially if the order is a stay or aninjunction or a prohibition.

Having said the above, I now turn to the application of section 52 of theIndian Transfer of Property Act 1882. Authorities were cited to show that it appliesin Kenya and former to show circumstances in which it applies. From what wassaid, I did not find that fraud or illegality had to be present for section 52 of theIndian Transfer of property Act (I.T.P.A.) to apply. That section reads:

"During the active prosecution in any court havingauthority in British India of a contentious suit orproceeding in which any right to immovable property isdirectly and specifically in question, the property cannotbe transferred or otherwise dealt with by any party to thesuit or proceeding so as to affect the right of the otherparty thereto under any decree or order which may bemade therein except under the authority of the court andon such terms as it may impose."

That section expresses what is known in law as The Doctrine of LisPendens" meant to keep the suit property available to litigating parties so that at theend, the judgment they obtain may be satisfied thereby avoiding interminablelitigation as defendants keep on defeating court orders by transferring or otherwisedealing with the suit property before the court's final order. That will defeat justice

Lord Justice Turner in a leading case BELLAMY V SABINE (1857) I De G & J 566, 584 said:

"It is as I think, a doctrine common to the courts both ofLaw and Equity and rests, as I apprehend, upon thisfoundation - that it would plainly be impossible that anyaction or suit could be brought to a successfultermination, if alienation pendent elite were permitted toprevail. The Plaintiff would be liable in every case to bedefeated by the Defendant's alienating before thejudgment or decree, and would be driven to commencehis proceedings de novo subject again to be defeated bythe same course of proceeding."

Lord Cranworth in the same case explained that the doctrine did not rest on the ground of notice. His Lordship said:

"It is scarcely correct to speak of lis pendens as affectinga purchaser through the doctrine of notice, thoughundoubtedly the language of the courts often so describesits operation. It affects him not because it amount tonotice, but because the law does not allow litigant partiesto give to others, pending the litigation, rights to theproperty in dispute, so as to prejudice the opposite party.*'

Those judgments having been quoted and followed by the Privy Council inthe case of FAIYAZ VS PRAG NARAN 34 -1A -102 and other cases, the doctrineof "lis pendens" has been applied every now and then.

It comes out from the authorities therefore that the doctrine is not based onthe other doctrine of notice but on expediency, that is the necessity for finaladjudication. It has been said that it is immaterial whether the "alienee pendentelite" had or had no notice of the pending proceedings.

Mr. Njiru, counsel for the second Defendant has submitted, relying onMulla's treatise on the Indian Transfer of Property Act (5th Edition), that section 52will not apply to a purchaser without notice. He says that that is the position inIndia and also applies in Kenya.

I must say, with all due respect, that I do not like Mr. Njiru's selectivity ofpages from authorities. He goes to an authority. Picks out the pages he wants onlyand leaves out the rest. That has the effect, I think, of forcing the court to accept Mr. Njiru's point of view. It is good to him and his client. But I do not think it isgood to the court and the administration of justice in general.

To go back to Mulla's treatise where Mr. Njiru left out pages 246 and 247between pages 245 and 248 among other omissions, the position, as already seenfrom the passages quoted above, is that the doctrine of notice does not apply incases where section 52 has been violated. Even in India, the doctrine of notice isapplicable in certain specified states only. Example is Gujerat and Maharashtra byvirtue of Bombay Act 4 of 1939; I wonder whether the states are more than that.England followed suit introducing the doctrine of notice where the doctrine of "lispendens" is applicable. Otherwise in most parts of India and in the whole of Kenyathe doctrine of notice does not operate where section 52 is applicable.

In Kenya there is the case of GEORGE NELL BAIRD-VS-ROBERT MATHAME HCCC No. 1690 of 1982 for specific performance, Porter J, as he then was, said at page 13 of his judgment.

"This mortgage was created after the institution of thissuit and therefore is contrary to s.52 of the Transfer ofProperty Act since there is not in the file any applicationfor consent nor any evidence of such consent."

In a similar case BIR SINGH -VS -PARMAR (1972) EA. 211, Law JA said at page

211 letter I:

"The Judge's view on the matter are clear from hisjudgment. The vendor was under an absolute statutoryduty not to transfer the property during the pendency ofthe litigation. In breach of that duty he purported totransfer to Charan Singh."

In FREDRICK JOSES KINYUA & PETER KIPLANGAT KOECH -vs- GEORGE NEIL BAIRD

Consolidated with GEORGE NEIL BAIRD & WANDA BAIRD -vs - FREDRICK JOSES KINYUA

& PETER KIPLANGAT KOECH HCCC NO. 4819 OF 1989 and HCCC NO. 6587 OF 1991

respectively, Pall J, as he then was said at page 4:

"Mr. Raiji has said that the Plaintiffs were indolent, theyshould have registered a caveat against the title under s.57of the Act. But as Lord Cranworth said in Bellamy -vs- Sabine (Supra) and a long string Indian decisionssupport it, the doctrine of Lis Pendens intends to preventnot only the Defendant from transferring the suit propertywhen the litigation is pending but it is equally binding onthose who derive their title through the defendant whetherthey had or had not notice of the pending proceedings.

Expediency demands that neither party to a suit shouldalienate his interest in the suit property during thependency of the suit so as to defeat the rights of the otherparty."

The learned judge quoted with approval a passage from page 239 of Transfer of roperty Act 9th Edition by Mitra where the learned author says:

"The transfer pendent Title is not in fact void but onlyvoidable at the opinion of the party whose interests areaffected thereby. In a transfer of this kind the transfereestands in the shoes of the transferor and takes the title ofthe latter subject to the pending litigation."

Thus the consent to the transfer by the party whose interests are affected would be ood to remove his interests.

The Judge also quotes Mulla's Transfer of Property Act 6th Edition at page 241 here it is said:

"The effect of the maxim is not to annul the conveyancebut only to tender it subservient to the rights of the partiessubject to litigation."

Another passage quoted by Judge Pall was from the case of MAWJI -VS-INTERNATIONAL UNIVERSITY AND ANOTHER (1976) KLR 185 where Madan J, as he then was, said at page 201:

"I think the situation in Kenya is, or it ought to be, this:the court has power to prevent a breach of the provisionsof section 52 in proceedings before it.. "

Judge Pall did leave out the last part of that passage which said:

"..... in which any right to immoveable property is directly and specifically in question by imposing aprohibitory order against the title or the property toprevent all dealings in it pending the final determinationof the proceedings, except under the authority of the courtand upon such terms as it may impose."

This last part of Judge Madan's passage suggest that in Kenya there may be aprohibitory order to prevent a breach of Section 52 of I.T.P.A.

It be noted that the learned Judge, Madan, did not discuss the doctrine ofnotice which, as already seen, judges in other cases have held it is not applicablewhere breach of Section 52 is to be prevented.

Otherwise when he says the Court has power...." I understand him to meanthat the Court has the discretion to prevent a breach of Section 52 by imposing aprohibitory order. This will be in line with most provisions of present registrationstatutes affecting immovable property in Kenya whereby registration of a caution,caveat, an inhibition, stay, injunction or a prohibitory order is necessary to maintainthe status quo or to prevent further dealings with the property. The differencebetween those statutes and Section 52 of the I.T.P.A is that while under thosestatutes a formal restraint must be made and recorded on the title or the registerrelevant to the immovable property, under Section 52 of the I.T.P.A., according to Madan J, such a formal restraint may or may not be there yet in both situationsSection 52 remains effective and enforceable. That, to my mind, is not bad so that aparty whose interests are affected has the option either to ask the Court for aprohibitory order or to go on with the rest of the litigation without asking for aprohibitory order, either knowing or not knowing that if the property the subjectmatter of the litigation is transferred to someone else or otherwise prejudicially dealtwith during the pendency of the litigation he will fall back to Section 52 of theI.T.P.A. for a remedy.

All that having been said, I would like to go back to the judgment of Pall J inthe Consolidated cases cited earlier. The learned Judge referred to George NeilBaird and Wanda Baird as Plaintiffs and Fredrick Joses Kinyua and Peter KiplangatKoech as Defendants in the Consolidated Suit and he covered a number of points, Iam not aware have been so covered in any other judgment with regard to theapplication of Section 52 of the I.T.P.A. in Kenya.

Briefly there had been an earlier case namely HCCC No. 1690 of 1982 whichwas heard and decided by Porter J as stated before. In that case the PlaintiffsGEORGE NEIL BAIRD and WANDA BAIRD sued ROBERT MATHAME alsoreferred to as R.M. for specific performance of a sale agreement of the suitproperty. While that suit was pending R.M. charged the suit property in favour of Continental Credit Finance Ltd, also referred to as CCF in order to secure a loan ofShs.360,000/- by way of a first charge thereon. On or about 1st August 1989 theHigh Court (Porter J) gave judgment in favour of the plaintiffs ordering R.M. tospecifically perform the said agreement for the sale of the suit property. He alsoordered that any encumbrances created by R.M. after the commencement of the saidsuit be discharged by R.M. on or before 27th September 1985.

R.M. filed an appeal against the said judgment in the Court of Appeal. Butwhile the appeal was pending CCF exercising its statutory power of sale sold thesuit property by public auction to the Defendants FREDRICK JOSES KINYUAand PETER KIPLANGAT KOECH on or about 13th October, 1988 and theDefendants were registered as the proprietor of the suit property under theprovisions of the Registration of Titles Act.

A chain of events; as on or about 20th February 1989 the Defendants alsocharged the suit property with National Bank of Kenya, also referred to as NBK tosecure a loan of Shs.300,000/-. The Defendants further charged the suit propertywith NBK to secure a further loan of Shs.360,000/- advanced to them by the saidBank.

On or about 19th August 1989 the Court of Appeal dismissed the appeal filedby R.M. and completely upheld the judgment of the High Court.

The Plaintiffs having paid the purchase price to the advocates who had beenappointed as stake holders under the said agreement for sale, the plaintiffs had beenput in possession of the suit land and had been subsequently forcibly thrown out ofthe suit land or at least a substantial part thereof by the Defendant thereby makingthe plaintiffs file HCCC No.6587 of 1991 against the Defendants.

The Plaintiff's claim was that the suit property belonged to them and thatregistration of the suit property in favour of the Defendants was subservient to thedecree in their favour. They relied on Section 52 of I.T.P.A. - already quotedearlier.

The Defendants' claim was that they were the registered proprietors of the suit land and under Section 23 of the Registration of Titles Act, they were absolute and indefeasible owners of the suit property and that the certificate of title in their favour must be taken by the Court as conclusive evidence of such ownership.

Section 23 of the Registration of Titles Act also referred to as RTA, states as follows:

"The certificate of title issued by the Registrar to apurchaser of land upon a transfer or transmission by theproprietor thereof shall be taken by all Courts asconclusive evidence that the person name therein as theproprietor of land is the absolute and indefeasible ownerthereof subject to the encumbrances, easement,restrictions and conditions contained therein or endorsed thereon, and the title of the proprietor shall not be subjectto challenge except on the ground of fraud ormisrepresentation to which he is proved to be a party."

The Defendants argued that CCF had no notice or knowledge of the pendinglitigation between the Plaintiffs and R.M. CCF were requested for a loan whichthey granted bonafide to R.M. They became registered proprietors of a charge onthe suit property without notice of the pending litigation. There was no dispute thatso far as section 23 of the RTA was concerned, a chargee under the Act was in thesame position as a transferee. The Defendants therefore submitted that as in thecase of a transferee, the title of CCF as a chargee was indefeasible and not subjectto challenge there being no allegation of fraud or misrepresentation on its part. Assuch the Defendants submitted that the sale of the suit property in favour of theDefendants by CCF exercising its statutory power of sale by public auction wasfinal and conclusive and not subject to challenge. The Defendants said they wereduly registered as the proprietors and a certificate already issued in their favour.The Defendants further submitted that being the registered proprietors of the suitland could not be termed as trespassers in their own land to which they had anindefeasible title.

Those were strong arguments and the Defendants even went further tosuggest payment of damages under section 69 B of I.T.P.A. or section 24 of the R.T.A. instead of them giving up the suit land.

Judge Pall's reply with regard to payment of damages under section 69 B ofthe I.T.P. A. was that section 69 B only applied to a charge which had been lawfullycreated. It cannot apply to a charge which has been created in direct violation ofsection 52 of the I.T.P.A. Similarly the judge said that Section 24 of the R.T.A.was inapplicable in that case as the section only prescribed the remedy to anaggrieved person who had been deprived of land in consequence of fraud or othermatters mentioned in the section and that fraud and those other matters had notbeen the basis of the Plaintiff's claim in that case. The Plaintiff's claim in that casewas based on the common law doctrine of Lis Pendens embodied in section 52 ofthe I.T.P.A.

I recall I have earlier on found that the Plaintiff's claim based on fraud orillegality was not proved even on the balance of probabilities. The question ofpayment of damages cannot therefore arise.

Going back to Judge Pall's judgment, he further refused the Defendant'ssuggestion that the Plaintiffs should have, instead of that case, filed a case seekingto set aside the auction sale of which the Defendant bought the suit property and forthe cancellation of the registration of the Defendants as the proprietors of

the suitproperty. He held the view that if that were allowed, it would negate the very spirit of Section 52 of the I.T.P.A. which makes all transactions carried out during the pendency of the litigation subservient to the rights of the parties to the litigation.

The result would be interminable litigation.

As to the Defendant's argument that they had already obtained title while the Plaintiffs were not and that therefore the Defendant's title was superior, the learned judge did not agree. He said:

"Under S.52 of I.T.P.A the title of the transferee orchargee acquired during the litigation is subservient orsubordinate to the decree which the Plaintiff mayultimately obtain in his favour whether or not the Plaintiffhas executed the decree and obtained a title in hisfavour."

Concerning the Defendant's arguments that the Plaintiffs had been extremelyirresponsible or negligent in not registering a caveat against the title of R.M, orobtaining an interim injunction and that the sale of the suit property was dulyadvertised in the press and yet the Plaintiffs took no steps to stop the sale fromtaking place, the learned Judge said that as the doctrine of notice is not applicable ina case where Section 52 of I.T.P.A. has been violated, all those arguments failed.

About the apparent conflict between Section 52 of the I.T.P.A and Section 23of the R.T.A. the learned judge said that both sections are equally clear andunambiguous. He quoted HOGG, JAMES EDWARD'S REGISTRATION OF TITLE TO LAND THROUGHOUT THE EMPIRE AT PAGE 394 ON "CONCLUSIVENESS OF TITLES" Stating: "The conclusiveness of the register constitutes the statewarranty of title. The warranted title which is conferredby the register being made conclusive is often calledindefeasible whilst the register is sometimes spoken of asindefeasible and the registered title as conclusive. It hasbeen said that an indefeasible title means a completeanswer to all adverse claims on mere production of theregister, and that a person acquiring title from a registeredowner has on himself being registered, an indefeasible title against the whole world. The cases cited illustrate the strength of the registered title but indefeasibility orconclusiveness has its limits and exception ——. Theregister is not literally conclusive as to every possiblematter that is or might be stated in it, nor does the statewarranty of title extend literally to every possible interestin the land. The owner and his property (even when thetitle is a fully warranted one) are still subject to theordinary rules of law. So far these are not altered by theregistration statutes." The learned judge referred to earlier passages in the same book where it was stated at page 100. "The general principle is that registration of title is notintended to change the substantive law of property orinterfere with rights under that law except so far as isnecessary for the carrying out of its professed objects -facility in dealing with land and security of title to land." And at page 101: "Occasionally a right conferred by another statute has been held to be superior to that conferred by registrationand the register accordingly to that extent is notconclusive." The learned judge then looked at case authorities which helped him fortifyhis position. The first case, and a similar one for that matter, was the case of BIRSINGH VS PARMER (1971) E.A. 209. In that case the Appellant who had contracted to sell land registered under theR.T.A. to the Respondent had refused to complete the sale. The Respondent suedfor specific performance. The Appellant sold the suit land while the suit waspending and the purchaser charged the property with Barclays Bank Ltd. The buyerfrom the Appellant was Charan Singh and the Appellant's contention was thatCharan Singh had become the registered owner of the suit properly therebyacquiring an indefeasible title under section 23 of the R.T.A. and that thereforespecific performance had become impossible. The High Court held that the Appellant was bound to transfer the property tothe Respondent who was entitled to specific performance. On appeal, Law J. A, dismissing the appeal said at page 211: "The Judge's views on the matter are clear from hisjudgment. The vender was under an absolute statutoryduty not to transfer the property during the pendency ofthe litigation. In breach of that duty he purported totransfer to Charan Singh." The trial Judge's views that section 52 of I.T.P.A. was not overridden by theprovisions of the R.T.A. and that the vender had no title to carry as he wasprohibited by statute from transferring his title were not upset or criticised by theCourt of appeal. Only that on procedural note the learned Judges of Appeal notedan irregularity which they directed to be rectified by the Registrar of Titles andevery person who according to the register could be adversely affected, to besummoned to be given opportunity of being heard before the order for specificperformance was put into effect I did hold similar views in another case JAMES MWANGI NJIRI VSNGUGI

NG'ANG'A & ANOTHER HCCC No. 3019 of 1994 at page 8 where Iwas being asked to make orders against people who were not parties in that suit andwho had not therefore had the opportunity of defending themselves or commentingon that suit. I concluded that I did not think section 52 of the I.T.P.A. was intendedto ignore the cardinal principle of natural justice. The second case the learned judge looked at on the issue of the apparentconflict between section 52 of the I.T.P.A. and the provisions of the R.T. A. wasMAWJI VS INTERNATIONAL UNIVERSITY AND ANOTHER (Supra).That case did not involve the problematic section 23 of the R.T.A. and thereforeMadan J, as he then was, had no difficulty in thinking he could issue a prohibitory order under section 52 of the I.T.P.A. as an alternative to extending a caveat lodged under section 57 of the R.T.A. There was no conflict. The third case looked at was HCCC No. 1690 of 1982 where Porter J had said: "This mortgage has been created long after the institutionof this suit and therefore contrary to s.52 of the Transferof Property Act since there is not in the file anyapplication for consent nor is there evidence of suchapplication." It was after saying that that Porter J ordered specific performance. Having looked at those authorities Judge Pall resolved the apparent conflict saying thus: "I am of the view that the Registration of Titles Act isstatute dealing only with the registration of titles to theproperties under the same. It lays down the procedureregarding registration of titles. On the other hand thedoctrine of lis pendens under S.52 of T.P.A. is asubstantive law of general application. Apart from beingon the statute it is a doctrine equally recognised bycommon law. It is based on expediency of the court. Thedoctrine of Lis pendens is necessary for final adjudicationof the matters before the court and in the general interestof public policy and good and effective administration ofjustice. It therefore overrides section 23 of the R.T.A.and prohibits a party from giving to others pending thelitigation rights to the property in dispute so as toprejudice the other." The conclusion was that section 52 of the I.T.P.A. overrides the provisions of section 23, of the R.T.A. Consequently the Defendants' title to the suit propertyand subsequently created chargees interest in favour of the National Bank of Kenyawere subservient to the decree for specific performance obtained by the Plaintiff inHCCC No. 1690 of 1982. It was now up to the second Plaintiff, as the first Plaintiffhad died, to enforce the decree for specific performance in the suit in which it wasgranted. I have read, understood, admired and accept what in my view, is a wellreasoned judgment delivered by my learned brother, Pall J, as he then was, in thetwo consolidated suits. I have gone deeper in that judgment because it resolves anumber of the issues raised in the suit before me and the judgment resolves mem inthe way I approve and it is my sincere hope the parties before me in the instant suithave grasped how those issues were resolved and how the same solutions solvesimilar issues herein. Their dispute is over titles which were registered or wereregistrable under the R.T.A. I adopt the same solutions to similar issues in this suit. I will now add a few remarks with regard to the application of section 52 ofthe I.T.P.A. in Kenya before I move to another aspect of this suit to conclude myjudgment. From what I have discussed above it is settled that section 52 of I.T.P.A.applies in Kenya. That is the doctrine of Lis Pendens. It is here both as a doctrine recognised by Common Law as well as a doctrine specifically applied by statutethrough section 52 of the I.T.P.A. The authorities discussed during theseproceeding bring out what I have just said. What the authorities have not told us is the extent to which the doctrine of Lispendens and therefore section 52 of the I.T.P.A. applies in Kenya. Although noauthority has been cited where unregistered land was discussed, I think theapplication of section 52 to unregistered land meets with no problem and thereforethe section applies to unregistered land. This is land where there are no titles issuedalthough mere may be provisions for the registration of documents relating to suchland. Then we have land where titles are issued such as land under the R.T.A.which I have been discussing with its troublesome section 23. Some such statutesare not having provisions like section 23 of the R.T.A. and a part from theRegistered Land Act, also referred to as R.L.A., Chapter 300 Laws of Kenya, theR.T.A. is the most important of them all with regard to registration of ownership ortitle. It means section 52 of the I.T.P.A. applies wherever those other statutes applyin Kenya. However that is not so with regard to the Registered Land Act (R.L. A.). It isunfortunate that we sometimes become inconsistent in the way we implement our National Programmes, as we loose sight of National Programmes laid down very clearly and properly by our forefathers or predecessors. So is the fate of the Registered Land Act. "An Act of Parliament to make further and betterprovision for the Registration of title to land, and for theregulation of dealings in land so registered, and forpurposes connected therewith." Thus runs the preamble to the Act. Our predecessors in their wisdom intended the Act to cover the whole country. To-day 36 years since the Act was promulgated, events can hardly be seen still moving towards that goal and you may hardly find any of the authorised officers telling you that our predecessors were sensible in having the R.L.A. promulgated. Perhaps that is how progress is. Progress where the Kenyan Society has to live with section 52 of I.T.P.A., yet that section together with

its parent statute were intended, in the provisions of the R.L.A., to go away years before the next millennium. If countries like England where the Common Law doctrine of Lis Pendens originated have enacted legislation providing for a notice to be given before the doctrine of Lis Pendens applies, why should Kenyans continue to live with that doctrine without the requirement for a notice? Notice is necessary at least for the good, me reliability, and the security of our commercial transactions in immovable property. My late learned brother Pall J. Said in the consolidated cases I have discussedabove that the R.T.A. is a procedural law and its section 23 is therefore overriddenby the provisions of section 52 of the I.T.P.A. which is substantive law. TheRegistered Land Act combines both substantive law and procedural law. It makesprovisions for the registration of cautions, prohibitory order restrictions or any otherrestraining court order affecting a piece of land in litigation before a court of law sothat even in the case of lis pendens, there should be a notice entered on the registeras suggested by Madan J, as he then was, in the case of Mawji (Supra). The Registered Land Act contains section 28 concerning indefeasibility of the title in terms, if not stronger, then as strong as section 23 of the R.T. A. Section 28 of the R.L.A. states: "The rights of a proprietor, whether acquired on firstregistration or whether acquired subsequently for valuableconsideration or by an order of court shall not be liable tobe defeated except as provided in this Act, and shall beheld by the proprietor, together with all privileges andappurtenances belonging thereto, free from all otherinterests and claims whatsoever, but subject:- (a) to the leases, charges and otherencumbrances and to the conditions andrestriction, if any, shown in the register; and (b) unless the contrary is expressed in the register, to such liabilities, rights andinterests as affect the same and are declaredby section 30 not to require noting on theregister: Provided that nothing in this section shall be taken torelieve a proprietor from any duty or obligation to whichhe is subject as a trustee." The arguments used by Judge Pall to go round section 23 of the R.T.A. may not do to go round section 28 of RLA. and I doubt whether there are any better arguments. But even if those arguments could also be used successfully to oust section 28 of the R.L.A., unlike the R.T.A. the R.L.A. goes further to make specific provisions in section 164 ousting the jurisdiction or the application of the Indian Transfer of Property Act 1882. Section 164 of thie R.L.A. says: "Upon the first registration of any land under this Act theTransfer of Property Act, 1882, of India shall cease toapply to that land, except in relation to any dealingentered into before the date of first registration." Clearly this is a law (the R.L.A.) Superior to the R.T.A. and where it isapplied in Kenya not only will section 52 but the whole of the I.T.P.A. ceases toapply. That is one area or situation where section 52 of the I.T.P.A. will not applyin Kenya. Another situation where section 52 of the I.T.P.A. will not apply in Kenya isone where the Plaintiffs claim against the Defendant in a previously instituted suit during which time the transfer in violation of section 52 of the I.T.P.A. is claimedto have been made, was dismissed and the same plaintiff files similar suit againstthe same Defendant in a subsequent suit. That is where the subsequent suit is res-judicata. There may be other limitations to the application of section 52 of the I.T.P.A.in Kenya. But for the purpose of the instant suit, let me be contented with thosetwo limitations which, in any event, remove any impression which may have beenthere to the effect that section 52 of the I.T.P.A. applies to the whole of Kenya orapplies in Kenya without limitations. That leads me to the issue of res judicata which I have just mentioned aboveand which I earlier on promised to return to. I will tackle the issue of res judicata first in relation to the allegation of fraudand perhaps illegality, and secondly, in relation to the allegation of adversepossession. Looking at the plaint and the resultant judgment of Akiwumi J in HCCC No.1788 of 1984, the issue of fraud or illegality was not raised in relation to anytransfer. But there is no dispute that Moki Savings Co-operative Society Ltd, thefirst Defendant before me, was joined in that suit as the second Defendant.Transfer of the suit property by Wanjiku Njau to Moki Savings Co-operative Society Ltd. is alleged by the Plaintiff before me to have been fraudulent or illegaland it is from that alleged fraudulence and/or illegality that the transfer of the suitproperty by Moki Savings Co-operative Society Ltd to the second Defendant beforeme, Hannah Mukami Kiruhi is alleged also to be fraudulent and/or illegal. I did find earlier that the alleged fraud and/or illegality had not been proved.But even if there were evidence to sustain that allegation, I hold the view that theissue of fraud and/or illegality should have been raised in HCCC No. 1788 of 1984and ought to have been raised in that suit. Although it was not raised, it must nowbe deemed to have been an issue in that suit and therefore deemed to have beendecided in that suit which was dismissed and no appeal filed. The issue of fraud and/or illegality is therefore res judicata in this suit beforeme. With regard to the issue of adverse possession in relation to res judicata, thejudgment of Akiwumi J was delivered on 8th June, 1990. The Plaintiff did notappeal although it had filed a notice to appeal. The notice was subsequentlydismissed by the Court of Appeal. While the Defendants were saying the Plaintiffhad lost, the Plaintiff, after filing its notice to appeal, appear to have

developed afeeling that it had not lost because it only needed to wait to have the 12 years periodmature on 27th August, 1985. When the Plaintiff felt that period had matured, the Plaintiff filed this suit on 23rd May, 1991. The second Defendant applied for an order to strike out the suit for being resjudicata on the ground that matters in issue were conclusively dealt with in HCCCNo. 1788 of 1984. The application was heard by Bosire J, as he then was. Hedeclined to grant the prayer for res judicata on the ground that res judicata had notbeen raised in the defendant's respective defences. That was on 20th May 1996,six years after this suit had been filed an indication that even the Defendants werehesitant on the issue of res judicata. In February 1996while that application, filed in November 1995, was stillpending, another application was filed by the Plaintiff seeking to amend the Plaintto include the issue of adverse possession. That application was opposed by theDefendants on the basis that the Plaintiff's claim based on adverse possession wasbarred by reason of being res judicata the issues being raised in the instant casehaving been dismissed in HCCC No. 1788 of 1984. That application came for hearing before Mbito J and that was the time he said: "The claim for such adversity was..... found to have commenced in May 1973 and by 1984 therefore, thestatutory period of 12 years had not lapsed and it wastherefore found to be premature and dismissed. ThePlaintiff has however continued to be on the premises before a suit for its eviction had been filed by thedefendants and by the time the current suit was filed in1991 no action to oust it from the premises had beenfiled. Consequently in this court's view, it is now entitledto agitate the adversity for the period prior to the currentsuit which is now well over the statutory period." That was on 17th January 1997 and he concluded: "This new claim was not adjudicated in the earlier suitand in this court's ruling, res judicata does not arise." It means therefore that in this suit before me, the issue of the adversity of thePlaintiff's possession was decided, as I have already said elsewhere, by Akiwumi J,as he then was, in a previously decided case No. 1788 of 1984 and Judge Mbitoagrees with me on mis, apart from Judge Akiwumi himself. On the issue of res judicata, Judge Mbito purported to decide it, and this is agood example of the short comings of one case or one subject matter of a case beinghandled by more than one judge or magistrate at different times. As I doubt thatjudge Akiwumi faced with the same issue of res judicata would have arrived at thesame verdict as did Judge Mbito, I will uncomfortably delve a bit into theinterpretation of Judge Akiwumi's judgment wishing that it were possible for himto correct me on appeal if I am wrong. I am doing it uncomfortably because it isnot my practice to make a decision contrary to or inconsistent with a previousdecision made by a learned sister or brother judge in the High Court on the same issue in the same suit between the same parties. To-day I am faced with a previousjudgment which I think has been interpreted by one of my learned brothers in a wayI do not think the other learned brother who wrote and delivered it would haveinterpreted it. I have heard the main suit and must write my final judgment. I amnot hearing an interlocutory application. I should add that it would appearfollowing Judge Bosire's refusal to adjudicate on the issue of res judicata on theground that it was not raised in the defences filed, the Defendants amended theirdefences and brought in the issue of res judicata. From what Judge Mbito said in his ruling, the Plaintiff's claim based onadversity had been found by Judge Akiwumi to be premature and was thereforedismissed. But since the Defendants had not evicted the Plaintiff, the prematureperiod of the adversity of the Plaintiff's possession continued to mature and hadtherefore subsequently matured on 27th August 1985 and the Plaintiff was entitledas at 23rd May 1991 when this suit was filed and thereafter to agitate the adversity. The question is, if that were the position, why did Judge Akiwumi have todismiss HCCC No. 1788 of 1984 on 8th June 1990, almost five years after the dateof maturity on 27th August 1985? Why did he not say that although the Plaintiffhad filed the suit prematurely, maturity had been subsequently achieved on 27thAugust 1985 before the judgment and before the Defendants evicted the Plaintiff and that therefore the Plaintiffs claim could be granted on 8th June 1990? Whydismiss the claim and wait until 11 months after that judgment in order to file thissuit on 23rd May 1991 saying adverse possession had matured, meaning theposition as at 8th June 1990 when that adverse possession was still being said to bepremature had changed so that as at 23rd May 1991 that same adverse possessionhad became mature, notwithstanding the fact that the date of maturity was to be27th August 1985? In my opinion since on 8th June 1990 Judge Akiwumi was still saying thePlaintiff's case was premature because the period of 12 years had not been achievedat the time HCCC No. 1788 of 1984 was filed in July 1984, it means that even on23rd May 1991 when this suit was filed, the Plaintiff's case was premature andliable to dismissal on that ground. Otherwise I do not see any logical differencebetween the date 8th June 1990 and the date 23rd May 1991 as concerns maturity ifthe date of maturity of the 12 years adverse possession should have been and cameto be 271h August 1985. The Plaintiff's case HCCC No. 1788 of 1984 was dismissed on 8th June1990 on the ground that it was premature. The Plaintiff did not appeal. ThePlaintiff is not entitled to come back latter to this court

whether by way of a freshsuit or not, claiming the same adverse possession on the basis that the period of adverse possession has now matured. It is my considered view that that claim is resjudicata. It follows that if the Plaintiff's case was premature on 8th June 1990, thesame was premature on 13th September 1989 when Wanjiku Njau transferred thesuit property to Moki Savings Co-operative Society Ltd and the same situationobtained on 8th February 1991 when Moki Savings Co-operative Society Ltdtransferred the suit property to Hannah Mukami Kiruhi. That being the position and this suit having become res judicata both on theissue of fraud/illegality and on the issue of adverse possession, section 52 of theTransfer of Property Act 1882 of India does not apply as that section only applies ina subsequent suit which is not res judicata. On the whole therefore, it means Wanjiku Njau had a good title to transfer toMoki Savings Co-operative Society Ltd which in turn had a good title to transfer toHannah Mukami Kiruhi. I should not grant any of the declarations and ordersprayed for in the Plaint and the Plaintiff's suit fails in its entirety.

Accordingly the Plaintiff's suit herein be and is hereby dismissed with coststo the Defendants.

Dated this 21st day of September 1999

J.M. KHAMONI

JUDGE