



**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 the suit was perhaps part heard and may have been at least part decided, if not fully heard and decided. That had not been revealed to me by the parties as all they had revealed to me was that there was a previous suit No. 1788 of 1984 heard and decided by Mr. Justice Akiwumi, then a judge of the High Court in 1990. I was told the Plaintiff in that suit was the present Plaintiff before me and the second Defendant in that suit, is the First Defendant before me and that the First Defendant in 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 the pleadings, the evidence and the submissions before me, I find that the facts of this case are aptly set out in the judgment of Akiwumi J, as he then was, dated 8<sup>th</sup> June, 1990 in High Court Civil Suit No. 1788 of 1984. From what I have read in that judgment and from what I have been told, the First Defendant before me had been joined in that suit. It was not made clear at what stage of the proceedings that Defendant was joined no copy of the relevant proceedings was produced and none of the Parties appears to remember. Both sides gave me the impression that after that Defendant was joined in that suit, the Defendant was not heard in its defence. However that Defendant suffered no loss because the Plaintiff's case was dismissed.

From my reading of the judgment dated 8th June, 1990 and from what I have been told, the Plaintiff's claim in Civil Suit No. 1788 of 1984, was for the court's declaration that the Plaintiff was, by virtue of adverse possession, the proprietor of 7.5 acres of a parcel of land L.R. No. 5964/1 outside Nairobi City otherwise referred to as the suit land. The Plaintiff asserted that it bought the suit land on 2nd May 1972 and went into possession on 3<sup>rd</sup> May 1972, the day after it had entered into 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 the time of instituting that suit in 1984, a period of 12 years.

Evidence was adduced, as it has been adduced before me, that Wanjiku Njau was living with John Boye's and was present during the transaction and signed the agreement 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 of John Boyes and She was subsequently registered the owner.

I said the facts are aptly set out in the judgment dated 8<sup>th</sup> June, 1990 where the learned judge found that the land was agricultural land and that no relevant consent of the land control board had been obtained within the prescribed period and that therefore the sale transaction had become void for all purposes three months from 2<sup>nd</sup> May, 1972. He found, as a fact, that the period of adverse possession begun to run, whether consent of the land control board was required or not, from 26<sup>th</sup> August, 1973 when the last payment of the purchase price was made and computing the figures, he concluded that 12 years were to expire on 27<sup>th</sup> August, 1985, He therefore found that although the Plaintiff's possession was adverse 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's possession was adverse, but as I look at his analysis of the evidence before him, I do not 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 from carrying out those activities since she was not using the suit land. It would seem that she herself did not challenge the Plaintiff's use of the suit land as described. It seems however, that she complained to the Executor and Trustee of the will of Boyes about trespass by the Plaintiff's agents on the suit land. This was presumably before the suit land was vested in her, because the representative of the Executor and Trustee of Boyes' who gave evidence for the 1<sup>st</sup> Defendant, stated that upon the complaint having been made by the 1<sup>st</sup> Defendant, a letter dated 15<sup>th</sup> May, 1978 and objecting to the activities of the Plaintiff's agents, was sent by hand to the Plaintiff. He did not deliver this letter himself and could not produce the relevant delivery book. It does not seem as if this letter was received by the Plaintiff so as to be able to say that the Plaintiff knew that its possession of the suit land had been challenged in 1978."

When making the final order of dismissal of the suit the learned judge said he was doing so while confessing "to some sympathy for the Plaintiff." The suit was dismissed simply because the period for adverse possession had not matured when the suit was filed. Otherwise the learned judge had found that the Plaintiff was possessing or occupying the suit land adversely to the Defendant's title in that land.

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

That is the issue of the adversity of the possession of the Plaintiff against the title of the Defendants in the suit land. Connected with that issue, there is the question as to whether the issue of adverse possession in this matter is now res judicata. There also exists this court's decision on that issue and I think I should come to that issue later.

I said the case may be partly 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 filed defence, I do not see that issue featuring. As a result it is not among the framed and agreed issues. That issue should not have been raised therefore especially at this stage after the Defendants had failed to raise it in 1991 or 1992 or thereabouts as a preliminary point of law.

Moreover, since the Plaintiff's case was based on adverse possession as well as illegality and fraud, the

Defendants failed completely to say how the plaintiff could have brought the case, if not by a Plaintiff, as they realised an originating summons could not do for the allegations of illegality and fraud.

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

I now move to the issues of illegality and fraud together. I would have thought that the Plaintiff's possession having been found to be adverse to the title of the 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 the Plaintiff's possession means that from 27<sup>th</sup> August, 1985, Wanjiku Njau's title in the suit land became extinguished and therefore she had no title to transfer to the first Defendant who in turn had no title to transfer to the second Defendant. I will come 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 sole beneficiary under the will of John Boyes but no evidence has been led to show the date when the suit land became registered in her name.

Perhaps it was after she had been registered as owner that she was sued by the Plaintiff in HCCC No. 1788 of 1984. She was sued alone and Moki Savings Co-operative Society was not joined as the second Defendant in that suit until towards the end of the case. Again no evidence has been led to let me know when Moki Savings Co-operative Society was joined. But undisputed evidence has been led to say that Moki Savings Co-operative Society was joined after Wanjiku Njau had 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 a certified copy of certificate of Title has been produced. It was issued under the provisions of the Registration of Titles Act (Chapter 281 Laws of Kenya

6<sup>th</sup> 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 easy for 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's interest. That caveat was removed by entry No.3 made on 13<sup>th</sup> September, 1989.

The removal of that caveat, it appears opened the way for the transfer of land L.R. No.5964/1 to Moki Savings Co-operative Society Limited on the same date 13<sup>th</sup> September 1989 at entry No.4.

Subsequently at entry No. 5 dated 22<sup>nd</sup> December 1989, a charge for Kshs.3,000,000/= recorded.

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

I have been told that Hannah Mukami Kiruhi having got land L.R. No.5964/1 transferred to her and having used that land as security to obtain a loan of Kshs.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 small plots for the purpose of selling them and had obtained consent of the Land Control Board and the approval of the City Council of Nairobi and the Commissioner of Lands for the sub-division when a temporary injunction issued in this suit stopped the whole process. It was an ex-parte court's order made on 24<sup>th</sup> May 1991 and converted to an inter partes consent court order on 11<sup>th</sup> June 1992. I hope it is reflected in up to date entries relating to the title to L.R. No.5964/1 which the parties 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 the Plaintiffs Advocates have kept on mentioning. Apparently there was no court order 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 joined as 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 to the Registrar of Titles, which letters may or may not have been reaching the Registrar, 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 of Plaintiff exhibit No.9, were not forthcoming.

It would appear the Registrar had about June/July 1989 served the Plaintiff with a notice to remove its caveat then on the register. The Plaintiff, as a result, had gone to court. Obtained a court order relating to the caveat and merely served the order upon the Registrar. It would appear, if served, the Registrar was not satisfied with 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 3<sup>rd</sup> August 1989. Another one is said to have been given by the court on 25<sup>th</sup> October, 1989. But this one is said to have been rejected by the Registrar of Titles on the grounds that the title had changed hands. The first court order dated 3<sup>rd</sup> August 1989 had also been rejected 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 13<sup>th</sup> September 1989 therefore took place between the date 3<sup>rd</sup> August 1989 and the date 25<sup>th</sup> 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 registered in 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 kept out of this suit. He has neither been joined as a party nor called as a witness. Yet the Plaintiff's case is that the illegalities and fraud alleged took place in the office of the Registrar of Titles and were committed by the Registrar either alone or with a defendant or two.

The defendants before me have denied that they committed any illegality or fraud 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 mention fraud, I take it that the illegalities the Plaintiff is talking about amount to fraud. I have to look at relevant provisions of the Penal Code like sections 312, 318 and 320 in 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 other fraud.

Adverse possession is a matter of law which many litigants do not understand. A litigant will keep on sincerely insisting that he owns a piece of land and sold it or owns it because he bought it or inherited it without knowing that there is something else called adverse possession. The existence of adverse possession or possession which is adverse does not always go with illegalities and/or fraud. But where a party claims the existence of any of those crimes, then the duty is upon that party to satisfy the court that there is sufficient evidence proving the existence of the alleged vice. No evidence has been adduced before me to persuade me the defendants or anyone of them committed a crime whether fraud or not. I do not therefore find any of the Defendants guilty of any of the particulars of illegality or fraud 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 accept or to reject any document, including court orders, sent to him for registration or entry on title. If he acts in breach, he should be brought to court for the offence to be proved against him. Allegations made against him without bringing him to court to hear the allegations and defend himself should not be entertained as he should not be condemned unheard even if the allegations are genuine.

Sometimes people forget that mere service of a court order to a Registrar of Titles is not sufficient because you are serving a person who has statutory power to accept or reject that court order and for such court order to be effective, it must be entered on the title or register of the title. As such registration or entry generally attracts some fees, it is up to the person serving the court order to ensure that the necessary fees is paid. Mere posting of the court order to the Registrar of Titles without more, is therefore not good enough especially if the order is a stay or an injunction or a prohibition.

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

"During the active prosecution in any court having authority in British India of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the right of the other party thereto under any decree or order which may be made therein except under the authority of the court and on such terms as it may impose."

That section expresses what is known in law as "The Doctrine of Lis Pendens" meant to keep the suit property available to litigating parties so that at the end, the judgment they obtain may be satisfied thereby avoiding interminable litigation as defendants keep on defeating court orders by transferring or otherwise dealing 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) 1 De G & J 566, 584 said:

"It is as I think, a doctrine common to the courts both of Law and Equity and rests, as I apprehend, upon this foundation - that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo subject again to be defeated by the same course of 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 affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party.\*"

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

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

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

I must say, with all due respect, that I do not like Mr. Njiru's selectivity of pages from authorities. He goes to an authority. Picks out the pages he wants only and 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 is good 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 247 between pages 245 and 248

among other omissions, the position, as already seen from the passages quoted above, is that the doctrine of notice does not apply in cases where section 52 has been violated. Even in India, the doctrine of notice is applicable in certain specified states only. Example is Gujarat and Maharashtra by virtue 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 "lis pendens" is applicable. Otherwise in most parts of India and in the whole of Kenya the doctrine of notice does not operate where section 52 is applicable.

In Kenya there is the case of GEORGE NEIL 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 this suit and therefore is contrary to s.52 of the Transfer of Property Act since there is not in the file any application for 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 his judgment. The vendor was under an absolute statutory duty not to transfer the property during the pendency of the litigation. In breach of that duty he purported to transfer 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, they should have registered a caveat against the title under s.57 of the Act. But as Lord Cranworth said in Bellamy -vs- Sabine (Supra) and a long string of Indian decisions support it, the doctrine of Lis Pendens intends to prevent not only the Defendant from transferring the suit property when the litigation is pending but it is equally binding on those who derive their title through the defendant whether they had or had not notice of the pending proceedings.

Expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of the suit so as to defeat the rights of the other party."

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

"The transfer pendent Title is not in fact void but only voidable at the opinion of the party whose interests are affected thereby. In a transfer of this kind the transferee stands in the shoes of the transferor and takes the title of the latter subject to the pending litigation."

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

The Judge also quotes Mulla's Transfer of Property Act 6<sup>th</sup> Edition at page 241 where it is said:

"The effect of the maxim is not to annul the conveyance but only to tender it subservient to the rights of the party subject to litigation."

Another passage quoted by Judge Pall was from the case of MAWJI - 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 provisions of section 52 in proceedings before it.. "

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

"..... in which any right to immovable property is directly and specifically in question by imposing a prohibitory order against the title or the property to prevent all dealings in it pending the final determination of the proceedings, except under the authority of the court and upon such terms as it may impose."

This last part of Judge Madan's passage suggests that in Kenya there may be a prohibitory 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 of notice which, as already seen, judges in other cases have held it is not applicable where a breach of Section 52 is to be prevented.

Otherwise when he says the Court has power...." I understand him to mean that the Court has the discretion to prevent a breach of Section 52 by imposing a prohibitory order. This will be in line with most provisions of present registration statutes affecting immovable property in Kenya whereby registration of a caution, caveat, an inhibition, stay, injunction or a prohibitory order is necessary to maintain the status quo or to prevent further dealings with the property. The difference between those statutes and Section 52 of the I.T.P.A. is that while under those statutes a formal restraint must be made and recorded on the title or the register relevant 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 situations Section 52 remains effective and enforceable. That, to my mind, is not bad so that a party whose interests are affected has the option either to ask the Court for a prohibitory order or to go on with the rest of the litigation without asking for a prohibitory order, either knowing or not knowing that if the property the subject matter of the litigation is transferred to someone else or otherwise prejudicially dealt with during the pendency of the litigation he will fall back to Section 52 of the I.T.P.A. for a remedy.

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

Briefly there had been an earlier case namely HCCC No. 1690 of 1982 which was heard and decided by Porter J as stated before. In that case the Plaintiffs GEORGE NEIL BAIRD and WANDA BAIRD sued ROBERT MATHAME also referred to as R.M. for specific performance of a sale agreement of the suit property. 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 of Shs.360,000/- by way of a first charge thereon. On or about 1st August 1989 the High Court (Porter J) gave judgment in favour of the plaintiffs ordering R.M. to specifically perform the said agreement for the sale of the suit property. He also ordered that any encumbrances created by R.M. after the commencement of the said suit be discharged by R.M. on or before 27<sup>th</sup> September 1985.

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

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

On or about 19<sup>th</sup> August 1989 the Court of Appeal dismissed the appeal filed by R.M. and completely upheld the judgment of the High Court.

The Plaintiffs having paid the purchase price to the advocates who had been appointed as stake holders

under the said agreement for sale, the plaintiffs had been put in possession of the suit land and had been subsequently forcibly thrown out of the suit land or at least a substantial part thereof by the Defendant thereby making the plaintiffs file HCCC No.6587 of 1991 against the Defendants.

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

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 a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all Courts as conclusive evidence that the person named therein as the proprietor of land is the absolute and indefeasible owner thereof subject to the encumbrances, easement, restrictions and conditions contained therein or endorsed thereon, and the title of the proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party."

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

Those were strong arguments and the Defendants even went further to suggest 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 of the I.T.P. A. was that section 69 B only applied to a charge which had been lawfully created. It cannot apply to a charge which has been created in direct violation of section 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 an aggrieved person who had been deprived of land in consequence of fraud or other matters mentioned in the section and that fraud and those other matters had not been the basis of the Plaintiff's claim in that case. The Plaintiff's claim in that case was based on the common law doctrine of Lis Pendens embodied in section 52 of the I.T.P.A.

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

Going back to Judge Pall's judgment, he further refused the Defendant's suggestion that the Plaintiffs should have, instead of that case, filed a case seeking to set aside the auction sale of which the Defendant bought the suit property and for the cancellation of the registration of the Defendants as the proprietors of the suit property. 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 or chargee acquired during the litigation is subservient or subordinate to the decree which the Plaintiff may ultimately obtain in his favour whether or not the Plaintiff has executed the decree and obtained a title in his favour."

Concerning the Defendant's arguments that the Plaintiffs had been extremely irresponsible or negligent in not registering a caveat against the title of R.M, or obtaining an interim injunction and that the sale of the suit property was duly advertised in the press and yet the Plaintiffs took no steps to stop the sale from taking place, the learned Judge said that as the doctrine of notice is not applicable in a 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 23 of the R.T.A. the learned judge said that both sections are equally clear and unambiguous. 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 state warranty of title. The warranted title which is conferred by the register being made conclusive is often called indefeasible whilst the register is sometimes spoken of as indefeasible and the registered title as conclusive. It has been said that an indefeasible title means a complete answer to all adverse claims on mere production of the register, and that a person acquiring title from a registered owner has on himself being registered, an indefeasible title against the whole world. The cases cited illustrate the strength of the registered title but indefeasibility or conclusiveness has its limits and exception. The register is not literally conclusive as to every possible matter that is or might be stated in it, nor does the state warranty of title extend literally to every possible interest in the land. The owner and his property (even when the title is a fully warranted one) are still subject to the ordinary rules of law. So far these are not altered by the registration 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 not intended to change the substantive law of property or interfere with rights under that law except so far as is necessary 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 registration and the register accordingly to that extent is not conclusive."

The learned judge then looked at case authorities which helped him fortify his 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 the R.T.A. to the Respondent had refused to complete the sale. The Respondent sued for specific performance. The Appellant sold the suit land while the suit was pending and the purchaser charged the property with Barclays Bank Ltd. The buyer from the Appellant was Charan Singh and the Appellant's contention was that Charan Singh had become the registered owner of the suit property thereby acquiring an indefeasible title under section 23 of the R.T.A. and that therefore specific performance had become impossible.

The High Court held that the Appellant was bound to transfer the property to the 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 his judgment. The vender was under an absolute statutory duty not to transfer the property during the pendency of the litigation. In breach of that duty he purported to transfer to Charan Singh."

The trial Judge's views that section 52 of I.T.P.A. was not overridden by the provisions of the R.T.A. and that the vender had no title to carry as he was prohibited by statute from transferring his title were not upset or criticised by the Court of appeal. Only that on procedural note the learned Judges of Appeal noted an irregularity which they directed to be rectified by the Registrar of Titles and every person who according to the register could be adversely affected, to be summoned to be given opportunity of being heard before the order for specific performance was put into effect

I did hold similar views in another case JAMES MWANGI NJIRI VS NGUGI NG'ANG'A & ANOTHER HCCC No. 3019 of 1994 at page 8 where I was being asked to make orders against people who were not parties in that suit and who had not therefore had the opportunity of defending themselves or commenting on that suit. I concluded that I did not think section 52 of the I.T.P.A. was intended to ignore the cardinal principle of natural justice.

The second case the learned judge looked at on the issue of the apparent conflict between section 52 of the I.T.P.A. and the provisions of the R.T.A. was MAWJI VS INTERNATIONAL UNIVERSITY AND ANOTHER (Supra). That case did not involve the problematic section 23 of the R.T.A. and therefore Madan 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 institution of this suit and therefore contrary to s.52 of the Transfer of Property Act since there is not in the file any application for consent nor is there evidence of such application."

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 is a statute dealing only with the registration of titles to the properties under the same. It lays down the procedure regarding registration of titles. On the other hand the doctrine of lis pendens under S.52 of T.P.A. is a substantive law of general application. Apart from being on the statute it is a doctrine equally recognised by common law. It is based on expediency of the court. The doctrine of Lis pendens is necessary for final adjudication of the matters before the court and in the general interest of public policy and good and effective administration of justice. It therefore overrides section 23 of the R.T.A. and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice 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 property and subsequently created chargees interest in favour of the National Bank of Kenya were subservient to the decree for specific performance obtained by the Plaintiff in HCCC No. 1690 of 1982. It was now up to the second Plaintiff, as the first Plaintiff had died, to enforce the decree for specific performance in the suit in which it was granted.

I have read, understood, admired and accept what in my view, is a well reasoned judgment delivered by my learned brother, Pall J, as he then was, in the two consolidated suits. I have gone deeper in that judgment because it resolves a number of the issues raised in the suit before me and the judgment resolves them in the way I approve and it is my sincere hope the parties before me in the instant suit have grasped how those issues were resolved and how the same solutions solve similar issues herein. Their dispute is over titles which were registered or were registrable 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 of the I.T.P.A. in Kenya before I move to another aspect of this suit to conclude my judgment.

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 statute through section 52 of the I.T.P.A. The authorities discussed during these proceedings bring out what I have just said.

What the authorities have not told us is the extent to which the doctrine of Lis pendens and therefore section 52 of the I.T.P.A. applies in Kenya. Although no authority has been cited where unregistered land was discussed, I think the application of section 52 to unregistered land meets with no problem and therefore the section applies to unregistered land. This is land where there are no titles issued although there may be provisions for the registration of documents relating to such land.

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 statutes are not having provisions like section 23 of the R.T.A. and a part from the Registered Land Act, also referred to as R.L.A., Chapter 300 Laws of Kenya, the R.T.A. is the most important of them all with regard to registration of ownership or title. It means section 52 of the I.T.P.A. applies wherever those other statutes apply in Kenya.

However that is not so with regard to the Registered Land Act (R.L. A.). It is unfortunate that we sometimes become inconsistent in the way we implement our National Programmes, as we lose 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 better provision for the Registration of title to land, and for the regulation of dealings in land so registered, and for purposes 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, the reliability, and the security of our commercial transactions in immovable property.

My late learned brother Pall J. Said in the consolidated cases I have discussed above that the R.T.A. is a procedural law and its section 23 is therefore overridden by the provisions of section 52 of the I.T.P.A. which is substantive law. The Registered Land Act combines both substantive law and procedural law. It makes provisions for the registration of cautions, prohibitory order restrictions or any other restraining court order affecting a piece of land in litigation before a court of law so that even in the case of lis pendens, there should be a notice entered on the registers as 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 first registration or whether acquired subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-

(a) to the leases, charges and other encumbrances and to the conditions and restriction, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he 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 R.L.A. 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 the R.L.A. says:

"Upon the first registration of any land under this Act the Transfer of Property Act, 1882, of India shall cease to apply to that land, except in relation to any dealing entered 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 is applied in Kenya not only will section 52 but the whole of the I.T.P.A. cease to apply. That is one area or situation where section 52 of the I.T.P.A. will not apply in Kenya.

Another situation where section 52 of the I.T.P.A. will not apply in Kenya is one 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 claimed to have been made, was dismissed and the same plaintiff files similar suit against the 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 those two limitations which, in any event, remove any impression which may have been there to the effect that section 52 of the I.T.P.A. applies to the whole of Kenya or applies in Kenya without limitations.

That leads me to the issue of res judicata which I have just mentioned above and which I earlier on promised to return to.

I will tackle the issue of res judicata first in relation to the allegation of fraud and perhaps illegality, and secondly, in relation to the allegation of adverse possession.

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 any transfer. But there is no dispute that Moki Savings Co-operative Society Ltd, the first 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 illegal and it is from that alleged fraudulence and/or illegality that the transfer of the suit property by Moki Savings Co-operative Society Ltd to the second Defendant before me, 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 the issue of fraud and/or illegality should have been raised in HCCC No. 1788 of 1984 and ought to have been raised in that suit. Although it was not raised, it must now be deemed to have been an issue in that suit and therefore deemed to have been decided in that suit which was dismissed and no appeal filed.

The issue of fraud and/or illegality is therefore res judicata in this suit before me.

With regard to the issue of adverse possession in relation to res judicata, the judgment of Akiwumi J was delivered on 8th June, 1990. The Plaintiff did not appeal although it had filed a notice to appeal. The notice was subsequently dismissed by the Court of Appeal. While the Defendants were saying the Plaintiff had lost, the Plaintiff, after filing its notice to appeal, appear to have developed a feeling that it had not lost because it only needed to wait to have the 12 years period mature 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 res judicata on the ground that matters in issue were conclusively dealt with in HCCC No. 1788 of 1984. The application was heard by Bosire J, as he then was. He declined to grant the prayer for res judicata on the ground that res judicata had not been raised in the defendant's respective defences. That was on 20<sup>th</sup> May 1996, six years after this suit had been filed an indication that even the Defendants were hesitant on the issue of res judicata.

In February 1996 while that application, filed in November 1995, was still pending, another application was filed by the Plaintiff seeking to amend the Plaintiff to include the issue of adverse possession. That application was opposed by the Defendants on the basis that the Plaintiff's claim based on adverse possession was barred by reason of being res judicata the issues being raised in the instant case having been dismissed in HCCC No. 1788 of 1984.

That application came for hearing before Mbiti 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, the statutory period of 12 years had not lapsed and it was therefore found to be premature and dismissed. The Plaintiff has however continued to be on the premises before a suit for its eviction had been filed by the defendants and by the time the current suit was filed in 1991 no action to oust it from the premises had been filed. Consequently in this court's view, it is now entitled to agitate the adversity for the period prior to the current suit 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 suit and 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 the Plaintiff'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 Mbiti agrees with me on this, apart from Judge Akiwumi himself.

On the issue of res judicata, Judge Mbiti purported to decide it, and this is a good example of the short comings of one case or one subject matter of a case being handled by more than one judge or magistrate at different times. As I doubt that Judge Akiwumi faced with the same issue of res judicata would have arrived at the same verdict as did Judge Mbiti, I will uncomfortably delve a bit into the interpretation of Judge Akiwumi's judgment wishing that it were possible for him to correct me on appeal if I am wrong. I am doing it uncomfortably because it is not my practice to make a decision contrary to or inconsistent with a previous decision 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 previous judgment which I think has been interpreted by one of my learned brothers in a way I do not think the other learned brother who wrote and delivered it would have interpreted it. I have heard the main suit and must write my final judgment. I am not hearing an interlocutory application. I should add that it would appear following Judge Bosire's refusal to adjudicate on the issue of res judicata on the ground that it was not raised in the defences filed, the Defendants amended their defences and brought in the issue of res judicata.

From what Judge Mbiti said in his ruling, the Plaintiff's claim based on adversity had been found by Judge Akiwumi to be premature and was therefore dismissed. But since the Defendants had not evicted the Plaintiff, the premature period of the adversity of the Plaintiff's possession continued to mature and had therefore subsequently matured on 27th August 1985 and the Plaintiff was entitled as 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 to dismiss HCCC No. 1788 of 1984 on 8th June 1990, almost five years after the date of maturity on 27th August 1985? Why did he not say that although the Plaintiff had filed the suit prematurely, maturity had been subsequently achieved on 27th August 1985 before the judgment and before the Defendants evicted the Plaintiff and that therefore the Plaintiff's claim could be granted on 8th June 1990? Why dismiss the claim and wait until 11 months after that judgment in order to file this suit on 23rd May 1991 saying adverse possession had matured, meaning the position as at 8th June 1990 when that adverse possession was still being said to be premature had changed so that as at 23rd May 1991 that same adverse possession had become mature, notwithstanding the fact that the date of maturity was to be 27th August 1985?

In my opinion since on 8th June 1990 Judge Akiwumi was still saying the Plaintiff's case was premature because the period of 12 years had not been achieved at the time HCCC No. 1788 of 1984 was filed in July 1984, it means that even on 23rd May 1991 when this suit was filed, the Plaintiff's case was premature and liable to dismissal on that ground. Otherwise I do not see any logical difference between the date 8th June 1990 and the date 23rd May 1991 as concerns maturity if the date of maturity of the 12 years adverse possession should have been and came to be 27th August 1985.

The Plaintiff's case HCCC No. 1788 of 1984 was dismissed on 8th June 1990 on the ground that it was premature. The Plaintiff did not appeal. The Plaintiff is not entitled to come back later to this court whether by way of a fresh suit 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 *res judicata*.

It follows that if the Plaintiff's case was premature on 8<sup>th</sup> June 1990, the same was premature on 13<sup>th</sup> September 1989 when Wanjiku Njau transferred the suit property to Moki Savings Co-operative Society Ltd and the same situation obtained on 8th February 1991 when Moki Savings Co-operative Society Ltd transferred the suit property to Hannah Mukami Kiruhi.

That being the position and this suit having become *res judicata* both on the issue of fraud/illegality and on the issue of adverse possession, section 52 of the Transfer of Property Act 1882 of India does not apply as that section only applies in a subsequent suit which is not *res judicata*.

On the whole therefore, it means Wanjiku Njau had a good title to transfer to Moki Savings Co-operative Society Ltd which in turn had a good title to transfer to Hannah Mukami Kiruhi. I should not grant any of the declarations and orders prayed for in the Plaintiff's suit and the Plaintiff's suit fails in its entirety.

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

Dated this 21<sup>st</sup> day of September 1999.

**J.M. KHAMONI**

**JUDGE**