



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 604 OF 2006

HASSANALI ASARIA.....PLAINTIFF

VERSUS

SARBJIT SINGH RAI.....I ST DEFENDANT

REGISTRAR OF TITLES.....2 ND DEFENDANT

MICHAEL OMBALO UNGONDA.....3 RD DEFENDANT

-CONSOLIDATED WITH-

NAIROBI ELC CASE NO. 1717 OF 2007

(Formerly NAIROBI HCCC NO. 1417 OF 2005)

JUDGMENT

1. The dispute in the above two consolidated suits relates to three entries recorded on the parcel register's photostat copy of the certificate of title relating to Land Reference Number 214/636 comprised in Title Number IR 33574. The parcel of land is situated in Muthaiga, Nairobi. As a result of the three entries, the 1st defendant and the plaintiff are holding and waving two rival instruments of title, namely: (i) an original certificate of title registered on 16/2/1988 in favour of Sarbjit Singh Rai (hereinafter referred to as "the **1st defendant**"); and (ii) a provisional certificate of title relating to the same piece of land, bearing a registration date of 21/3/1991, said to have been issued under Section 71 of the repealed Registration of Titles Act (Cap 281), and currently bearing the name of Hassanli Asaria (hereinafter referred to as "**the plaintiff**") as the registered proprietor. The 1st defendant contends that issuance of the provisional certificate of title and the subsequent transfer of the provisional certificate of title to the plaintiff were fraudulent and are therefore null and void. On his part, the plaintiff contends that he is a *bona fide* purchaser for value and his provisional certificate of title is protected under the law. The court is invited to determine, among other issues, the validity of the three entries, and the validity of the two rival instruments of title.

Brief Facts of the Dispute

2. In 1988, the 1st defendant acquired the suit property from M/s Soprani Cassadio Holdings Limited at a consideration of Kshs 500,000, and the suit property was transferred to him on 16/2/1988 vide entry number 2. The 1st defendant was given the original certificate of title while the Registrar of Titles retained a photostat of the title as was required under Section 25 of the Registration of Titles Act. The 1st defendant contends that he has never parted with the said original certificate of title.

3. Subsequent to registration of the 1st defendant as proprietor of the suit property, three entries were recorded on the photostat copy held by the Registrar of Titles, namely: (i) entry number 3 dated 21/3/1991 denoting issuance of a provisional certificate of title under Section 71 of the Registration of Titles Act; (ii) entry number 4 recorded on 5/11/1993 denoting transfer of the suit property to Michael Ombalo Ungonda (3rd defendant) for a consideration of Kshs 3,000,000; and (iii) entry number 5 dated 27/6/2004 denoting transfer of the suit property to Hassanali Asaria (plaintiff) for a consideration of Kshs 16,000,000.

4. Apparently, entry number 5 was made after Michael Ombalo Ungonda (the 3rd defendant) sold the suit property to Hassanali Asaria. However, when the latter attempted to take possession of the suit property, he was repulsed by Mr Rai (the 1st defendant). Mr Rai contended that entry numbers 3, 4 and 5 were fraudulent and that he was not privy to the procurement of the provisional certificate of title and the subsequent entry which purported to transfer the suit property to the 3rd defendant. These developments culminated in the above two consolidated suits.

Nairobi ELC Case Number 1717 of 2007 (Formerly Nairobi HCCC 1417 of 2005)

5. The 1st defendant was the first litigant to initiate action through a plaint dated 24/11/2005 and amended on 21/12/2005 in Nairobi HCCC No 1417 of 2005 (later designated as Nairobi ELC Case Number 1717 of 2007) against: (i) Hassanali Asaria; (ii) the Commissioner of Lands; (iii) Principal Registrar of Titles; and (iv) Michael Ombalo Ungonda. The 1st defendant sought the following orders against the said parties.

- a) A declaration that the plaintiff is the rightful registered proprietor of Land Reference Number 214/636 Nairobi.*
- b) An order that the 1st defendant do deliver up the purported provisional certificate of title to the 2nd and 3rd defendant for cancellation.*
- c) An injunction prohibiting the 1st defendant from entering or attempting to obtain possession of Land Reference Number 214/636 – Nairobi.*
- d) An injunction to restrain the 2nd and 3rd defendants jointly and severally from any dealing in any manner whatsoever with the land comprised in certificate of title number IR.33574 dated 28th May 1979 in possession of the plaintiff.*
- e) Costs of this suit*
- f) Interest*
- g) Such other or further relief that this honourable court may deem fit to grant.*

6. The plaintiff, through a statement of defence dated 24/7/2006, denied the 1st defendant's claim and contended that he had purchased the suit property at Kshs 16,000,000 from Michael Ombalo Ungonda who held a provisional certificate of title issued by the Registrar of Titles; that he had been duly registered as proprietor; and that his title was valid, absolute and indefeasible by virtue of Sections 23 of the Registration of Titles Act.

Nairobi ELC Case Number 604 of 2006

7. The plaintiff subsequently brought Nairobi HCCC Number 604 of 2006 (later designated as Nairobi ELC Case Number 604 of 2006) on 9/6/2006 through a plaint dated 9/6/2006 against the 1st, 2nd and 3rd defendants. He sought the following prayers against the said parties:

- a) A declaration that the plaintiff is and continues to be the registered proprietor of all that parcel of land known as Land Reference Number 214/636 (originally known as Land Reference Number 214/629/8) Muthaiga, Nairobi*
- b) A declaration that the Chief Land Registrar's letter dated 15th December 2005 is null and void.*
- c) A declaration that the plaintiff is the bona fide title holder of Land Reference Number 214/636 (originally known as Land Reference Number 214/629/8) Muthaiga, Nairobi and neither the Registrar of Titles nor the Chief Land Registrar has any right to cancel the certificate of title held by the plaintiff.*
- d) A mandatory injunction to issue to compel the 1st defendant to vacate and hand over to the plaintiff all that parcel of land known as Land Reference Number 214/636 (originally known as Land Reference Number 214/629/8) Muthaiga, Nairobi.*
- e) An injunction to restrain the 1st defendant whether by himself, his servants or otherwise from building structures on or carrying out any form of construction work on, charging, selling, offering for sale or in any way giving possession to anyone other than the plaintiff or otherwise dealing with the plaintiff's parcel of land known as Land Reference Number 214/636 (originally known as Land Reference Number 214/629/8) Muthaiga, Nairobi or obstructing the plaintiff and/or his employees and servants from accessing his said parcel of land.*
- f) In the alternative, an order that the 2nd defendant do pay to the plaintiff damages to be assessed with interest thereon in the event that the plaintiff's title is found to be bad.*
- g) In the further alternative, an order that the 3rd defendant do pay to the plaintiff damages with interest thereon under the provisions of Section 24 proviso(1) and all other powers in the event that the plaintiff's title is found to be bad.*
- h) Costs of the suit.*

8. The 1st defendant filed a statement of defence and counterclaim dated 17/7/2006 in which he asserted that he was the absolute and indefeasible owner of the suit property and averred that the provisional certificate of title issued to the 3rd defendant and the subsequent transfer to the plaintiff were fraudulent, illegal, contra-statute, null and void. The 1st defendant itemized various particulars of fraud. Further, the 1st defendant sought the following orders by way of counterclaim:

- a) A declaration that the provisional certificate of the title issued in respect of Land Reference Number 214/636 (originally known as Land Reference Number 214/629/8) is null and void and of no effect.*

b) A declaration that the 1st defendant is the registered owner of Land Reference Number 214/636 (originally known as Land Reference Number 214/629/8).

c) An order that the 2nd defendant do cancel the provisional certificate of title issued and registered as presentation number 1069 and registered on 21-3-91 in respect of the suit land.

d) An order that the 2nd defendant do cancel any and all entries in the provisional certificate subsequent to 21st March, 1991.

e) General damages against the plaintiff and the 3rd defendant jointly and severally.

f) An injunction to restrain the plaintiff whether by himself, his servants or agents or otherwise from trespassing or in any way whatsoever interfering with the 1st defendant's employment and peaceful possession and occupation of the suit land.

g) Costs of this suit.

h) Any other or further relief as this honourable court may deem fit.

9. Through a reply to defence and defence to counterclaim dated 8/10/2009, the plaintiff reiterated his position and denied the 1st defendant's counterclaim.

Hearing of the Suits

10. Hearing of the consolidated suits commenced on 1/3/2010 before Hon Justice Mbogholi Msagha. The Learned Judge took the evidence of PW 1 – Luis Manuel De Souza and part of the evidence of PW 2 - Hassanali Asaria. Thereafter, the two suits were handled by Hon Lady Justice Nyamweya who concluded taking the evidence of PW 2. Hon Lady Justice Nyamweya further took the evidence of PW 3 – Joash Okecha Kweya; PW4- Iqbal Janmohammed; and PW5 - Pauline Kiarie.

11. I was assigned the matter in February 2017. The parties agreed by consent to proceed from where the hearing had reached. I thereafter took the testimony of PW6 – Joseph Njoroge; PW 7 – Pauline Murithia; and PW 8 – William Murakaru Njogu. I also took the defence evidence of DW1- Sarbjit Singh Rai; DW2 - Edwin Munoko; and DW3 - Gordon Ochieng.

Case of the Plaintiff

12. The case of the plaintiff as contained in his pleadings, evidence and submissions is that he purchased the suit property from the 3rd defendant (Michael Ombalo Ungonda) at a consideration of Kshs 16,000,000. Prior to entering into the purchase agreement, he obtained an official search from the 2nd defendant (Registrar of Titles) which confirmed that the 3rd defendant was the registered proprietor of the suit property. He paid the purchase price and he was registered as proprietor of the suit property. He is still the registered proprietor to-date. He was an innocent purchaser for value. His title is absolute and indefeasible under Section 23 of the repealed Registration of Titles Act and Section 24 of the Land Registration Act 2012. He has suffered damages as result of the stalemate arising from the current contest against the provisional title he holds. It is the plaintiff's case that he is entitled to be declared the legitimate proprietor of the suit property and to be awarded damages. He contends that he was not party to any fraud.

Case of the 1st Defendant

13. The case of the 1st defendant is that he was at all material times the registered proprietor of the suit property, held and still holds the original title. He was therefore the absolute and indefeasible owner of the suit property. The provisional certificate of title issued to the 3rd defendant was fraudulently procured without his knowledge. He further contends that the 3rd defendant was not capable of effecting a transfer to the plaintiff because the provisional certificate of title upon which the purported transfer was effected was fraudulently procured in contravention of Section 71 of the Registration of Titles Act in that it was not procured by the registered proprietor; the mandatory notice was not published in the Gazette, and that the said provisional certificate of title is invalid for all purposes. Further, it is the 1st defendant's case that the purported transfer by the 3rd defendant to the plaintiff was fraught with irregularities, illegalities and fraud because: (i) it is purported to have been registered on 27/6/2004 which is two (2) months prior to the purported date of execution (18/8/2004) and date of presentation (24/8/2004); (ii) it is purported to have been registered on 27/6/2004 which was a Sunday, a day when the Lands Registry is not open for booking of registrable instruments; (iii) Stamp duty on the alleged transfer is alleged to have been assessed on 12/10/2004 yet paid on 27/8/2004; (i) the Presentation Register Day Book Number 1473 which the purported transfer bears related to a transaction relating to a different title, to wit, Title Number IR 47998 presented to the Lands Registry on 30/6/2004 and not on 27/6/2004.

Case of the 2nd Defendant

14. The case of the 2nd defendant is contained in the 2nd defendant's statement of defence dated 29/12/2006, evidence of DW2 and DW3 and submissions by the Attorney General. The 2nd defendant denied the plaintiff's claim and stated that the entries relating to registration of the provisional certificate of title; transfer to the 3rd defendant; and subsequent transfer to the plaintiff, were done fraudulently and therefore are null and void. The 2nd defendant contended through oral evidence and submissions that the provisional certificate of title issued to the 3rd defendant was not gazetted; the transfer to the 3rd defendant and the subsequent transfer to the plaintiff did not have consent from the Commissioner of Lands as was required by the Government Lands Act; the transfer to the plaintiff was purportedly booked on a Sunday, a day when the office of the Registrar of Titles are never open for work; the transfer to the 3rd defendant was procured through fraud and is liable to cancellation; and that the subsequent transfer to the plaintiff was marred by irregularities and is similarly liable to cancellation.

15. The 3rd defendant neither entered appearance nor filed defence. Consequently, the claims against the 3rd defendant are undefended.

Determination

16. I have considered the parties' pleadings, evidence and submissions. I have also considered the constitutional and statutory frameworks and jurisprudence relevant to the key issues in the two consolidated suits. Parties were not able to agree on a common set of issues. I have considered the two sets of issues framed and filed. I have also taken into account the fact that the claims against the 3rd defendant (Michael Umbalo Ungonda) are undefended.

17. The following seven key issues fall for determination in the two consolidated suits: (i) whether entry number 3 denoting registration and issuance of a provisional title in respect of the suit property was procured illegally and is invalid; (ii) whether entry number 4 denoting transfer of the suit property from the 1st defendant to the 3rd defendant was procured fraudulently; (iii) whether entry number 5 denoting transfer of the suit property from the 3rd defendant to the plaintiff, Hassanali Asaria, was procured procedurally and conferred a valid indefeasible title to Hassanali Asaria; (iv) whether the plaintiff is entitled to the reliefs sought, including damages, against any of the parties; (v) whether the 1st defendant is entitled to any of the reliefs sought, including damages, against any of the parties; (vi) if damages are payable, what should be the quantum?; and (vii) what orders should be made in relation to costs of the two consolidated suits?. I will make my pronouncements on the seven issues sequentially in the above order. Before I do that, I will outline, in summary, the constitutional and statutory framework relevant to the dispute in this suit, taking into account the period when the causes of action accrued.

18. The impugned entries were allegedly made between March 1991 and June 2004. The Constitution in force at that time was the previous Constitution which was repealed in August 2010. Save for the framework under Section 75 which dealt with compulsory acquisition of private property, the repealed Constitution did not have an explicit framework on the right to property. Article 40 of the current Constitution does have an explicit framework securing and protecting the right to property.

19. The subject title was issued under the Registration of Titles Act (now repealed) and the memorandum endorsed on the title expressly indicated that the title was subject to the framework in the Government Lands Act (now repealed). The issues in this dispute are therefore to be considered within the context of the framework in the above repealed statutes and the current legal framework on land in so far as they relate to title to land.

20. The first issue is whether entry number 3 denoting registration and issuance of a provisional certificate of title in respect of the suit property was procured illegally and is invalid. Section 71 of the Registration of Titles Act (hereinafter referred to as "**the Act**") contemplated a scenario where a grant or certificate of title would get lost or destroyed. It provided the following framework on how a replacement designated as "provisional certificate of title" was to be procured:

"71: In the event of a grant or certificate of title being lost or destroyed, the proprietor of the land, together with the other persons, if any, having knowledge of the circumstances, may make a declaration, stating the facts of the case, the names and descriptions of the registered owners and the particulars of all changes and other matters affecting the land and the title thereto to the best of the declarant's knowledge and belief, and the registrar, if satisfied as to the truth of that declaration and the bona fides of the transactions, may issue to the proprietor of the land a provisional certificate of title which shall contain an exact copy of the original grant or certificate of title bound up in the register, and of every memorandum and endorsement thereon, and shall also contain a statement why the provisional certificate is issued; and the registrar shall, at the same time, enter in the register notice of the issuing of the provisional certificate, and the date thereof, and why it was issued, and the provisional certificate shall be available for all purposes and uses for which the grant or certificate of title so lost or destroyed would have been available and as valid to all intents as the lost grant or certificate.

Provided that the registrar, before issuing a provisional certificate, shall give at least ninety days' notice in the Gazette of his intention so to do."

21. The above framework provided for certain mandatory requirements that were to be satisfied before a provisional certificate of title would be registered and issued to the registered proprietor. Firstly, before issuing a provisional certificate of title, the Registrar was required to give at least 90 days notice in the Gazette of his intention to issue a provisional certificate of title. The rationale for the gazette notice was to put the registered proprietor and the general public on notice that the Registrar was seized of an application for a provisional title and he would proceed to issue one in the absence of any objection. The second mandatory requirement was that the registered proprietor had to make a solemn declaration stating the facts of the loss. The third requirement was that at the time of registering and issuing the provisional certificate of title, the Registrar was required to endorse on the provisional certificate of title a concise statement setting out the reason why the provisional certificate of title was being issued. The rationale for this requirement was that the concise statement served to put the general public, including prospective purchasers, on notice as to why the provisional certificate of title was issued and existed.

22. In the dispute before court, the 1st defendant was the registered proprietor prior to the registration and issuance of the provisional certificate of title. He testified that he at all material times had the original certificate of title and that he never applied for a provisional certificate of title. He further stated that he never swore the affidavit which was used to procure the provisional certificate of title. He stated that he was not aware of the procurement of the provisional certificate of title until when the plaintiff emerged and laid claim to the suit property claiming to have purchased it from the 3rd defendant.

23. Looking at the evidential materials placed before the court, it is noted that it was conceded by the Acting Chief Land Registrar that there was no notice published in the Gazette. Secondly, the provisional certificate of title does not contain a statement setting out the reason why it was issued. Thirdly, there is evidence that Mr Sandhu who was alleged to have commissioned the affidavit allegedly sworn by the 1st defendant and used to procure the provisional certificate of title had relocated to Canada at the material time and denied ever commissioning the affidavit. Fourthly, there is evidence that the postal address captured in the affidavit was not the 1st defendant's postal address at the date of the purported affidavit.

24. What therefore emerges is a fraudulent entry and consequential issuance of a provisional certificate of title without regard to the mandatory requirements of Section 71 of the Act. Based on the above evidence and illegalities, my finding on the first issue therefore is that

entry number 3 denoting registration and issuance of a provisional certificate of title in respect of the suit property was procured illegally and in violation of the mandatory requirements of Section 71 of the Registration of Titles Act and is therefore invalid.

25. The second issue is whether entry number 4 denoting the transfer of the suit property from the 1st defendant (Sarbjit Singh Rai) to the 3rd defendant (Michael Ombalo Ungonda) was procured fraudulently. I have already made a finding that the registration and issuance of the provisional certificate of title was fraudulent and invalid. The 1st defendant testified that he never procured the provisional certificate of title and he never sold the suit property to the 3rd defendant. He denied ever executing any instrument of transfer in favour of the 3rd defendant. His testimony was not controverted by Michael Ombalo Ungonda or any other witness. DW 3 - Gordon Ochieng, testified that the material title was subject to the provisions of the Government Lands Act and that it was a requirement that the consent of the Commissioner of Lands be obtained before a transfer could be affected. The evidence before court is that the consent of the Commissioner of Lands was never effected when the two transfers were recorded on the photostat copies of the Title. In light of the above uncontroverted evidence, it is my finding that entry number 4 denoting transfer of the suit property from Sarbjit Singh Rai (1st defendant) to Michael Ombalo Ungonda (3rd defendant) was procured fraudulently and is invalid.

26. The third issue is whether entry number 5 denoting transfer of the suit property from Michael Ombalo Ungonda to Hassanali Asaria was procedurally procured and conferred a valid indefeasible title to the latter.

Firstly, I have made a finding that the provisional title and the subsequent transfer to the 3rd defendant were fraudulent and invalid. It therefore follows that the 3rd defendant had no legitimate title to convey to the plaintiff. Besides that, the irregularities and illegalities disclosed in entry number 5 project a scenario where fraudsters procured the entry without regard to the laid down procedure and the law.

27. Firstly, the entry indicates that the transfer was booked/presented and registered under Presentation Register Day Book Number 1473 on 27/6/2004. On the other hand, the purported registered instrument of transfer indicates that it was executed on 18/8/2004, implying that the transfer was registered before it was executed by the parties thereto. Secondly, the stamp duty endorsement on the said instrument of transfer bears the date of 27/8/2004, implying that it was registered before stamp duty was assessed and paid. Thirdly, the transfer is purported to have been registered on 27/6/2004, which was a Sunday, which in Kenya, is a non-working day for land registries. Fifth, entry number 5 indicates that the transfer was booked and registered under Presentation Register Day Book Number 1473 of 27/6/2004. DW2 produced the relevant Presentation Register kept by the Registrar under Section 26 of the Act. It revealed that the registrable instrument presented on 27/6/2004 under Day Book Number 1473 related to Title Number IR 47998 and did not relate to the suit property herein. These are just but a few of the irregularities that came out conspicuously.

28. The totality of the foregoing irregularities is that it has been evidentially demonstrated on a balance of probabilities that there was no procedural registration of the transfer in favour of the plaintiff as contemplated by Part V of the Registration of Titles Act. I say so because Part V of the said Act contained an elaborate mandatory procedural framework on how registration of a registrable instrument was to be procured. In my view, a transfer that was endorsed on the photostat copy of a title kept in the register in blatant violation of the mandatory requirements of Part V was illegal and did not confer title to the person designated as transferee.

29. Counsel for the plaintiff submitted that the provisional title held by the plaintiff was and is absolute and indefeasible by dint of the provisions of Section 23 of the Registration of Titles Act and Section 24 of the Land Registration Act. I do not agree with him. I do not think the purpose of the above legal frameworks was to grant a thumb of approval to fraud or blatant illegalities in the acquisition of title. Indeed, the Court of Appeal in **Redcliff Holdings Limited v Registrar of Titles & 2 others (2017) eKLR** made the following holding on the tenor and import of Section 23 of the Registration of Titles Act:

“a title under Section 23(1) of the Registration of Titles Act is no longer held to be sacrosanct by hook, line and sinker as it was under the Australian law of Torrens System especially when there are allegations of illegalities or irregularities in acquisition of title... the courts, even before the promulgation of the Constitution, appreciated that the mere fact that a person had title did not mean that such title could not be questioned”.

30. Similarly, the Court of Appeal underlined the following legal position in **Moses Lutomia Washiali v Zephania Ngira Angweyi & Another (2018)eKLR** with regard to the status a fraudulently or illegally obtained title:

“where, however title to property was obtained fraudulently or irregularly in violation of the provisions of the Act, (except a first registration), the same was not sacrosanct, did not enjoy any protection, and the court had power to order rectification of the register”.

31. The view by Court of Appeal that a fraudulently acquired title is invalid and does not confer any legal right was similarly upheld in **Arthi Highway Development Limited v West End Butchery Limited & 6 others (2015)eKLR**, a case where falsification commenced at the Companies Registry through forgery of papers and a fraudulent title was subsequently procured and used to subdivide and sell the suit property. The Court of Appeal upheld the validity of the original title which was still held by the original proprietor.

32. My finding on the third issue therefore is that the entry denoting transfer of the suit property to the plaintiff was premised on a fraudulently obtained provisional certificate of title, was fraught with irregularities and is invalid.

33. The fourth and fifth issues deal with the questions of liability and appropriate relief. I will deal with the two issues simultaneously. Having found that the provisional certificate of title held by the plaintiff was fraudulently registered and issued and having made the other preceding findings, including the finding that the said provisional certificate of title is invalid, it follows that the plaintiff's plea for orders affirming the validity of the provisional certificate of title are rejected. In converse, the 1st defendant's plea seeking orders affirming the validity of the original certificate of title which he (the 1st defendant) held and still holds is allowed. Similarly, the 1st defendant's plea for orders invalidating the provisional certificate of title held by the plaintiff is allowed. I now turn to the issue of damages.

34. The facts of this case are disturbing. The case has for the umpteen time brought to the fore the rot in the Lands Registry at Ardhi House. None other than the then Acting Chief Land Registrar, Pauline Murithia, confirmed that the entry denoting the registration and issuance of the impugned provisional certificate of title was done in violation of the mandatory requirements of Section 71 of the Act. Subsequent impugned entries were similarly made fraudulently by fraudsters in the Lands Registry.

35. The Department of Lands through the various Registrars was, and still is, the custodian of land registers. The impugned entries were made by fraudsters owing to apparent lapses on part of the Land Registry. Although witnesses from the Department of Lands were candid and appeared forthright, the Department cannot run away from liability. The plaintiff relied on the fraudulent entries which the parcel register still contains today. For this reason, my finding is that the 2nd defendant (Registrar of Titles) and the 3rd defendant are jointly and severally liable to pay the plaintiff damages.

36. The 1st defendant sought damages against the plaintiff and the 3rd defendant. I have not been furnished with sufficient evidential basis to demonstrate that the plaintiff participated in the fraud. I will therefore not condemn the plaintiff to pay damages to the 1st defendant. It is therefore my finding that the 3rd defendant is liable to pay the 1st defendant damages.

37. I now turn to the issue of quantum of damages. The plaintiff, through counsel urged the court to award him Kshs 667,421,409. I have in the preceding paragraphs come to the finding that the plaintiff never acquired a valid title to the suit property. Indeed, had his conveyancing agents done adequate due diligence in relation to the impugned provisional certificate of title to satisfy themselves that the provisional certificate of title met the requirements of Section 71 of the Act, the plaintiff would have mitigated his losses. In my view, the plaintiff will be properly indemnified by the national exchequer, and by extension, the Kenyan tax payer, through an award equivalent to the purchase price which he lost (Kshs 16,000,000) together with interest thereon at court rate effective from the date of filing Nairobi ELC 604 of 2006. I therefore hereby assess and award the plaintiff damages of Kshs 16,000,000 plus interest at court rate from the date of filing Nairobi ELC 604/2016 against the 2nd and 3rd defendants.

38. For the disturbance and the attendant inability to utilize the suit property (loss of user) owing to the stalemate occasioned by the fraudulent provisional certificate of title, I will award the 1st defendant Kshs 10,000,000 (Ten Million only) payable by the 3rd defendant.

39. On costs, the plaintiff's suit has succeeded partially. The 1st defendant's suit has succeeded fully. The two successful parties are entitled to costs payable by the 2nd and 3rd defendants jointly and severally.

Summary of Findings and Award

40. In summary, my findings on the key issues in the two consolidated suits are as follows:

a) Entry number 3 denoting registration and issuance of a provisional certificate of title in respect of Land Reference Number 214/636 (**the suit property**) was procured fraudulently and in violation of Section 71 of the Act and is invalid, null and void.

b) Entry number 4 denoting transfer of the suit property from the 1st defendant to the 3rd defendant was procured fraudulently and is invalid, null and void.

c) Entry number 5 denoting transfer of the suit property from the 3rd defendant to the plaintiff was procured unprocedurally and in violation of the mandatory requirements of Part V of the Registration of Titles Act and the same is invalid, null and void.

d) The plaintiff (Hassanali Asaria) is only entitled to damages and costs of the suit against the 2nd defendant (Registrar of Titles) and the 3rd defendant (Michael Umbalo Ungonda) jointly and severally.

e) The claim by the 1st defendant is allowed in terms of prayers (a), (b), (c), (d) and (f) of the counterclaim dated 17/7/2006. Further, the 1st defendant's claim for general damages against the 3rd defendant is allowed.

f) The damages payable to the plaintiff (Hassanali Asaria) by the 2nd and 3rd defendants are hereby assessed at Kshs 16,000,000 together with interest at court rate effective from the date of filing Nairobi ELC No 604/2006.

g) The damages payable to the 1st defendant by the 3rd defendant are hereby assessed at Kshs 10,000,000 together with interest at court rate from the date of judgment.

h) The 2nd and 3rd defendants are liable to jointly and severally pay the plaintiff's and the 1st defendant's costs of the consolidated suits.

41. Disposal Orders

In light of the above findings and assessment, I make the following disposal orders in relation to the two consolidated suits:

i. Prayers (a), (b), (c), (d) and (e) of the plaint in Nairobi ELC 604/2006 are declined.

ii. The plaintiff in Nairobi ELC 604/2006, Hassanali Asaria, is hereby awarded damages against the 2nd and 3rd defendants, severally and jointly, in the sum of Kshs 16,000,000 (Sixteen Million) together with interest at court rate from the date of filing the suit

iii. The 1st defendant's counterclaim in Nairobi ELC 604/2006 is allowed in terms of prayers (a), (b), (c), (d) and (f).

iv. The 1st defendant is further awarded damages in the sum of Kshs 10,000,000 with interest at court rate from the date of judgment, against the 3rd defendant

v. The 2nd and 3rd defendants shall bear the plaintiff's and the 1st defendant's costs of the two consolidated suits.

vi. Nairobi ELC 1717 of 2007 (formerly Nairobi HCCC 1417/2005) is marked as disposed by the orders herein.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF MAY 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Mwangi holding brief for Mr Maingi for the plaintiff

Mr Goswami and Mr Rabut for the 1st defendant

Mr Allan Kamau for the 2nd defendant

June Nafula - Court Clerk