REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO. 135 OF 2017

(FORMERLY ELC NO.104 OF 2007, NAIROBI)

NATIONAL SOCIAL SECURITY FUND

BOARD OF TRUSTEES.....PLAINTIFF

VERSUS

GEOFFREY CHEGE KIRUNDI.....1ST DEFENDANT

MIKE MAINA KAMAU.....2ND DEFENDANT

COMMISSIONER OF LANDS.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

By an **Amended Plaint** dated **23rd April 2004,** the Plaintiff herein brought a claim against the Defendants and sought for the following orders as against the 1st and 2nd Defendants jointly and severally :

a) A declaration that the Grant of Title Registered as number I.R 66195/1 in respect to Land reference number 209/12274, is incurable defective and was at all material times incapable of being sold and transferred by M/S Kitusuru Limited to the Plaintiff.

b) In consequence of (a) above the said Grant of Title transferred to the Plaintiff be voided.

c) That this Honourable Court be pleased to issue a declaration that notwithstanding the corporate veil of the then M/S Kitusuru Limited, the 1st and 2nd Defendants as Directors of the then M/S Kitusuru Limited are liable to;

i. Refund to the Plaintiff of the entire sum of Kenya Shillings Two Hundred Ninety Two Million Five Hundred Thousand (Kshs.292,500,0000/=)

ii. Indemnify the Plaintiff for legal costs incurred by the Plaintiff in the transaction amounting to Kshs.3, 376,500/=.

iii. To pay to the Plaintiff interest at Court Rates on (i) and (ii) from the respective date of payment of the said sums of Kshs.292,500,000/= and Kshs.3,376,500/= by the Plaintiff being 6th October 1995 and 23rd January 1996, respectively until full payment by the 1st & 2nd Defendants to the Plaintiff.

d) Any other relief that this Honourable Court may deem fit and just to grant.

e) Costs.

As against the 3rd and 4th Defendants, it sought for the following Orders jointly and severally:-

a) A declaration that the Grant of Title Registered as number I.R 66195/1 in respect to land reference number 209/12274 is incurable defective and was at all material times incapable of being sold and transferred by M/S Kitusuru Limited to the

Plaintiff.

b) In consequence of (a) above, the said Grant of Title transferred to the Plaintiff be voided.

c) Cancellation of the transfer to the Plaintiff registered as No. I.R 661195/2 at the 3rd and 4th Defendants cost.

d) Full indemnity to the extent of the sum of Kshs.292,500,000/= lost by the Plaintiff in the sale transaction and the 3rd and 4th Defendants be liable to the Plaintiff to the extent of the said amount.

e) Full indemnity on legal costs incurred by the Plaintiff in the transaction amounting to Kshs.3,376,500/= and the 3rd and 4th Defendants be liable to the extent of the said amount.

f) Interest on (d) & (e) at court rates from the respective dates of payment of the said sums being 6th October 1995 and 23rd January 1996.

g) Costs.

h) Any other relief that this Honourable Court may deem fit and just to grant.

In its statement of claim, the Plaintiff averred that by a letter dated **3rd May 1995**, the 1st Defendant acting as an Advocate for **M/S Kitusuru Ltd,** offered to sell to it **L.R 209/12274,** and implied that **Kitusuru Limited** had a proper title and all procedures of its acquisition had been undertaken. That **Kitusuru Ltd** and the Plaintiff entered into an agreement for sale dated **28th September 1995,** at a consideration of **Kshs.292,500,000/=** and the 1st and 2nd Defendants executed the sale agreement on behalf of the Company as Director and Director/Secretary and the suit property was transferred to it.

However the Plaintiff could not gain vacant possession or access the suit land as it later discovered via letters addressed to it by Ministry of Environment and Natural Resources on **8th of July 2003,** and **18th July 2003,** that the suit land is still gazetted as part of Karura Forest. That upon addressing demand letter to **M/S Kitusuru Limited,** it was informed that the Company had been deregistered.

The Plaintiff contended that notwithstanding the deregistration, the Company is still liable to the Plaintiff for fraud committed by the 1st and 2nd Defendants in their individual capacity. It was the Plaintiff's contention that **Kitusuru Limited,** never had a good title to the subject land capable of being offered for sale to it.

The Plaintiff particularized fraud by the Defendants in its Plaint and averred that the Defendants did not fulfil their obligations under the Contract, consequently they are not entitled in equity to keep the proceeds of sale. That the Plaintiff is entitled to refund of the moneys paid as it relied on the Grant of Title issued by the 3rd Defendant and registered as **I.R 66195/1,** and the records of the Lands Registry which purported to reflect **Kitusuru Limited** as the owner and therefore being the absolute and indefeasible proprietor of the subject property. Further that the 3rd Defendant and other land officials granted its consent to the transfer of the suit property to the Plaintiff with knowledge that the same was invalid.

The 1st Defendant in his Statement of Defence dated **11th May 2004,** denied the Claim by the Plaintiff. He averred that no action lies against him as the Plaintiff had no moral obligation to act on the letter of offer dated **3rd May 1995**. He denied perpetrating fraud and averred that the suit property had a proper title.

He further averred the Government of Kenya offered the suit land to **Kitusuru Limited** by a letter of allotment dated **4th April 1995,** which on payment of the premiums crystalized into a Grant of the suit land and that the Government had no force in law to cancel the Grant without compensation as it executed the documents pertaining to the suit land. Further that the Government must be deemed to have waived its rights of degazettment by its conduct and actions.

He alleged that upon dissolution of **Kitusuru limited**, by Registrar of Companies, if the said land was still owned by **Kitusuru Ltd**, then it reverted back to the Government and the Government has no land to declare in law invalid and therefore the Plaintiff has no cause of action. Further that the assertion that the Plaintiff cannot use the suit land is misconceived as it had not been stopped from utilizing it and that it has no *locus standi* as it relies on an illegal contract and further that the suit is statute barred.

The 2nd Defendant filed his defence on **24th August 2004,** and averred that **Kitusuru Limited** is in law a separate legal person from its shareholders and or its Directors and Plaintiff's suit does not disclose any cause of action against him and it is therefore an abuse of the Court process. He averred that he held a share in **Kitusuru Limited** in trust for one **Hosea Kiplagat.** That by an Order issued by **President Daniel Arap Moi (retired),** the 3rd Defendant lawfully allotted the suit property to a Company belonging to the said **Hosea Kiplagat,** and subsequently lawfully issued Grant of title in respect of the said land after all legal requirements were complied with. He averred that if the sale involved part of the Forest land and therefore illegal, the Plaintiff's claim is based on an illegal transaction and it does not lie or the parties entered into a contract of sale under a mistake of law.

The 3rd and 4th Defendants filed their statement of defense dated **15th June 2004,** and denied all the allegations pleaded in the Plaint. It admitted that the suit property is part of **gazetted Forest,** and that the Grant was issued by the 3rd Defendant to the Plaintiff but denied that the same was issued fraudulently.

After various Applications, the matter proceeded via *viva voce* evidence wherein the Plaintiff called 3 witnesses while each of the Defendants called one witnesses each to support their respective defence.

PLAINTIFF'S CASE

PW1 - Hope Mwashumbe, adopted her witness statement dated **24th October 2014,** and produced the Plaintiff's bundle of documents as Exhibits A and B. She testified that the Plaintiff bought the suit land in **1995,** from the initial grantee being **Kitusuru Limited**.

It was her evidence that the Plaintiff(NSSF) received an offer from **Kirundi Advocate** on behalf of **Kitusuru Limited** to purchase the suit land. That it instructed a **Firm of Valuers,** being **Lloyd Masika Valuers** to value the land and a Valuation Report was prepared and tabled before the Board of Trustees for approval. Once the approvals were obtained, the **Law Firm of Esmail & Esmail Advocates,** was appointed to act on behalf of the Plaintiff (NSSF), as evidenced by the sale agreement dated **28th September 1995,** that captures the price of **Kshs.292,500,000/=,** and the property was eventually transferred to NSSF and registered on **5th October 1995**.

She told the Court that NSSF did not take possession of the suit land immediately and that the sale agreement indicated the property was bought free from any encumbrances. However when one **Joel Ruto,** the Estate Officer visited the suit property to inspect it in the year **2003**, he presented a report to the Managing Trustee of NSSF, indicating that he had been denied access to the suit property by the Forest Department, as it was alleged that the Land was part of **Karura Forest**, which had not been **degazetted** and ultimately NSSF could not utilize the land. Further that the Plaintiff received a letter dated **8th July 2003,** from the Forest

Department confirming that the suit land was part of **Karura Forest**.

It was then that the Plaintiff instructed its Advocates to file this suit for recovery of money, but later found out that **Kitusuru Limited** had been dissolved following **Gazette No. 42 of 1996.** She testified that by the time the letter dated **17th October 1995** was written, the money had been released to **Esmail & Esmail Advocates** on **3rd October 1995,** and paid to **Kitusuru Limited** and **Kitusuru Ltd** was deregistered 14 days after the money was released to the Advocates on **6th October 1995**.

She further testified that in **1995,** the Fund was not aware that the suit property was Forest land and only knew about it in **2003,** when it intended to develop the said land. It was her testimony that the Letter by **Kirundi Advocates** did not give full disclosure.

She testified that **Kirundi Advocate** acknowledged that his **Law Firm** received the full purchase price and since **Kitusuru Ltd** was already dissolved through instruction of same Directors, there was no need of lifting of the corporate veil. That the Commissioner of Lands failed on his duty and should compensate the Fund as the money was public funds, since it was part of the pension money for workers. She urged the court to enter Judgment for the Plaintiff as prayed in the **Amended Plaint**.

She further testified that the Fund employed competent **Assessors** and **Valuers a**nd that **Llyod Masika Ltd** was approved as the Valuer. It was her testimony that the title was a Government given title and it was registered under **Registration of Titles Act (now repealed)** and the land was sellable. That the Grant had a condition and the same was for residential premises. She further testified that no one knew that the land was in **Karura Forest**, when it was purchased and as per documents in Exhibit B. Further that the Ministry of Environment & Natural Resources had agreed to excision of the Land and authority was given to **Pelican Engineering Ltd** to excise **18.41ha,** from **Karura Forest** for development.

Further that the initial Offer letter was for **Kshs.350 million**, but NSSF gave a counter-offer of **292,500,000/=** which was accepted by the Vendor. She contended that NSSF purchased the land so that it could invest its money. That the Ministry of Finance was also involved in the transaction and though NSSF did its due diligence, the Ministry of Lands misrepresented facts.

Further that she was absent during the transaction and did not know if the property was visited. She acknowledged that a Company is a separate legal entity from the shareholders and that the suit is brought against the shareholders since the Company is already dissolved. It was her contention that the 1st and 2nd Defendants were the Directors of **Kitusuru Ltd,** and the document shows there was no separation between the Company and the Directors.

It was her further testimony that the procedure of purchase involved **due diligence** and **Llyod Masika Ltd** valued the land but no attempt was made to ascertain where the land was. Further that the Valuer did not indicate that the land was in the Karura Forest. It was her testimony that they did not restore **Kitusuru Limited** back to the Register since they chose to sue the Directors. That NSSF also needed approvals from the Board of Trustees, Ministry of Finance and Ministry of Lands but there were no letters confirming the said approvals in court since most of the correspondences over this transaction were marked **'secret'** and **'confidential'**. Further that the suit property was legally acquired.

That though there was an intention to excise the land from the **Karura Forest,** that was not done and **Kitusuru Limited** did not disclose to NSSF that the process of excising had not been done. She confirmed that the money was deposited to the account of **Kirundi & Company Advocates,** and that the reason they have sued the Commissioner of Lands is because **if** he had **not** issued the Grant(title), then NSSF would not have parted with the money.

PW2 Joel Kipkemoi Ruto, adopted his witness statement dated **18th February 2014,** and relied on it entirely. It was his testimony that the Grant in favour of NSSF was issued by the Registrar of titles and there was no evidence that the title was issued fraudulently. He further testified that the **Transfer** and **Sale Agreement** are genuine and he had no documents to show any fraud or fraudulent activities.

Further that NSSF purchased the property for development of housing Estates. It was his further evidence that **Llyod Masika Valuers** went

to the site before the purchase but NSSF did not visit and inspect the land until **2003.** That from the letter issued by Ministry of **Environment and National Resources,** the Forest Department was aware of the allocation and authorized **Pelican Engineering Co. Ltd** to excise **18.4 Ha.** from **Karura Forest** and the said Government Ministry had the duty to **degazette** the said land. Further that the buyer was supposed to confirm that **degazettment** was done.

He further testified that the agreement was in order, but the problem was that there was no access to the land on the ground as the title held by **NSSF** did not correspond with what was on the ground as the land was totally in **Karura Forest**. It was his testimony that the 1st and 2nd Defendants committed fraud as they were Directors of the Company that took an active role in the acquisition of the land and its disposal. He stated that the land is not in their possession since it is within the hands of Chief Conservatoire of Forest, but NSSF has the Grant which is only a paper title.

PW3 Essau Oginga Omollo, adopted his witness statement. He testified that the map dated **17th December 1934,** is for **LR No. 209/12274,** and a Forest proclamation map and it delineated the Forest areas and the maps are used for Management of Forest Reserves and he produced the maps as exhibits. It was his testimony that the suit land is part of **Karura Forest** and it has not been excised as it is under Management of Kenya Forest Services and the boundaries were beaconed.

That the installation of the Electric fence started in **2008,** but there were beacons clearly marked in the cadastral plan. He stated that members of the public can access the said **Karura Forest**. Further that the process of setting the suit land aside was supposed to start through a **gazette Notice** by the Minister in charge of Forest and release a legal notice, but that was not the case herein. He further stated that Non-Forest area around **Karura Forest** is distinguished by the boundaries and a Survey to the area can be done by professional surveyor based at the Kenya Forest and authenticated by Department of Survey of Kenya and authorized surveyors can survey the area, but with authority of the Kenya Forest. That in **1995, Karura Forest** was not very secure and the description in the letter dated **3rd May 1995,** was not correct as the suit property is between Old Muthaiga and Kitusuru Estate and it was not prime land for sale since that was Forest land. However the description of the land is accurate and an intended buyer would know it was Forest land, as it is actively managed.

Further that no land can be alienated from a protected Forest Reserve and that the land must first be degazetted for it to be alienated. He further testified that the Commissioner of Lands had no role in management of Forest land and Forest Department was housed in the Ministry of Environment and Natural Resources. He further testified that the Grant or title was issued to **NSSF** and the Forest Department was not involved and that it did not authorize excision of the said parcel of land from **Karura Forest**.

1st DEFENDANT'S CASE

DW1 Geoffrey Chege Kirundi, the 1st Defendant herein adopted his witness statement dated **29th November 2011,** and testified that he was instructed by **Hosea Kiplagat** and **Mike Maina** to write an **Offer Letter** to the Plaintiff, with regards to sale of the suit land. That though he was concerned on the legality of Grant, it was issued by the Government and he was convinced that the title was genuine and valid. He stated that he followed all the procedures of the Law and he had no reason to doubt that the Government had not followed the laid down procedures and law in issuing the Grant.

Further that the Ministry of Environment and Natural Resources had written a letter to **Pelican Engineering Co. Ltd** dated **13th July 1994,** before incorporation of **Kitusuru Limited** which was incorporated on **19th October 1994**. That vide a letter dated **28th July 1994,** to **Pelican Engineering Limited,** an authority was given to excise an area of 18.41ha in **Karura Forest** and the said **Pelican Engineering Ltd** was authorized to carry out Cadastral survey.

That on **3rd January 1995, Pelican Engineering Company** Limited authorized the Commissioner of Lands to issue the allotment letter in the name of **Kitusuru Limited**. He testified that he was instructed by the shareholders to hold the Directorship of the Company as a nominee of the shareholders. That via a letter dated **26th September 1996**, **Mike Maina,** one of the shareholders wrote to him appointing him as a trustee of **Kitusuru Limited,** representing his interests. That the Letter of Offer was not accepted wholly but **NSSF** made a counter-offer which was accepted by the Vendor. Then he forwarded the sale agreement and the transfer duly executed to **Esmail & Esmail Advocates**, Stamp duty was paid and the consent from the Commissioner of Lands was obtained before the land was transferred to **NSSF**. That after he received the purchase price of **Kshs.292,000,000/=** from the purchaser, he paid out the total amounts as instructed by **Hosea Kiplagat** and **Mike Maina.** That he retained **Kshs.5,000,000/=** as legal fees, but the next day **Hosea Kiplagat** went for the money and he was forced to pay it back to **Hosea** as he feared for his life. He stated that when the suit was filed, there was an Application to serve **Hosea Kiplagat** with 3rd Party Notice by the 2nd Defendant which

Application was allowed bu the 3rd Party Notice was never served.

He further testified that he was not aware that the Government was planning to allocate **18.41ha** to **Hosea Kiplagat** from **Karura Forest** and that Hosea Kiplagat did not want the Grant to be in his name. It was his evidence that **Kitusuru Limited** was mere trustee as per the letter dated **8th August 1993.** Further that the registered owner was to receive part of the purchase price and the beneficial owner was also to receive part of the proceeds through **Maucho & Company Advocates.**

He further testified that the offices of **Kitusuru Limited** were located in his offices at Bruce House 9th Floor, and that is where the meetings used to be held and that **Kitusuru Limited** did not have a bank account and he used his personal Account to receive the purchase price. He produced the Declaration of trust and confirmed that he prepared it and executed it and that he was a nominee of **Mike Maina**.

Further that the Company was formed only for purposes of carrying out the instant transaction. That in the Memorandum and Articles of Association, the Company was not intended to carry out any business of Real Estate and it did file any returns as it was dissolved in 1996.

He further testified that the Plaintiff asked the President of the Republic of Kenya to remove the special conditions No.2, 4 and the last sentence of Clause 9 of the Grant and the changes were reflected on the transfer and on the Grant from Kitusuru to the Plaintiff, which incorporated the deletions and the same was signed by the Commissioner of Lands. He confirmed that the Land is inside **Karura Forest** and that the Plaintiff did not visit the Land. That **David Masika of Lloyd Masika Valuers** and their Advocates had stated that the Plaintiff did not need to be shown where the land was. It was his further evidence that the transfer was not subject to **Forest Act**, but was subject only to Government Land Act. That the Commissioner of Lands endorsed the transfer and allowed alienation of already gazetted Forest land. That he received the cheque for the purchase price on **6th October 1995,** and disbursed the money to **Mike Maina** and **Hosea Kiplagat** and thereafter **Mike Maina** instructed him to dissolve the Company, a day after the money had been disbursed.

He testified that under the Forest Act, the Permanent Secretary of Treasury sits in the Board and he is the custodian of Government land and that he did not know if the Forest was under the Forest Conservatoire, a different regime from the one that governs NSSF. Further that the **'letter of allotment'** was not copied to Conservatoire of Forest and the survey was done by a private surveyor and approved by a Government surveyor via letter dated **13th July 1994**.It was his testimony that the survey was done by a private entity

2ND DEFENDANT'S CASE

DW2 Mike Maina Kamau, adopted his witness statement dated **30th November 2012,** and testified that **Mr. Kirundi Advocate** and **Mr. Hosea Kiplagat,** invited him and asked him to assist **Mr. Kiplagat** get a plot. That **Hosea Kiplagat,** told him they were planning to be allocated land in **Karura Forest**. That he was requested to clear the vegetation from **Karura Forest** since he was a contractor. Further he was to make sure the title was availed to him. That the deal was like any other deal and that the allottees were powerful people in **President Moi's Regime**, and they needed somewhere to hide and that is why they looked for him as they did not want to come out as the beneficiaries of the said parcel of land.

It was his evidence that **Mr. Kirundi** was part of the deal and not an innocent Advocate. Further that they agreed on what each one of them would do and **Mr. Hosea Kiplagat,** was to make sure he talked to the higher authority to ensure that allocation of the land was done and also he was to talk to people at the Lands office and the 1st Defendant was a legal advisor to everyone. He stated that when he was approached for his Company to be used for the allotment, he initially had no problem with that, but he later realized that he did not want his Company **Pelican Engineering Limited** to be used as he realized it was better to form another Company as he did not understand what was happening. He realized that **Mr. Kirundi** was a lawyer and a Director at **Kitusuru Limited** and the two only wanted his Company for purposes of allotment of the plot and that his Company **Pelican Engineering** had, many Government projects and he did not want it to be involved with land allotment and shady deals.

That on the letter dated **3rd May 1995**, **Mr. Kirundi** alluded that **Kitusuru Limited** was the registered owner but the title had not yet been issued. It was his evidence that when **Mr. Kirundi** wrote the said letter, he spoke for himself and when the Company was registered, **Mr. Kirundi** was doing everything for himself and did not open a bank account for the Company. Further that they did not have any agreement on how to operate the Company. That he never took the NSSF officials to the land, but he would see **Mr. Kirundi** and **Hosea Kiplagat** going to the ground and showing the **NSSF** officials the suit land. That his Company **Pelican Engineering Co. Ltd** cleared vegetation from the said land after it was allotted to **Kitusuru Ltd**.

That **Kitusuru Company** was dissolved in **1996**, because it had outlived its usefulness and achieved what it had been formed for. However the Directors never met to discuss the dissolution He further stated that he filed an Application to enjoin **Hosea Kiplagat** and **Retired President Daniel Arap Moi**, which application was allowed, but he did not know if they were served with the 3rd Party Notice.

That he appointed **Mr. Kirundi** as his lawyer and he was only to take instructions from him. He testified that he paid the survey charges and **Mr. Kirundi** was not party to the clearing of the suit land. He confirmed that he instructed **Mr. Kirundi** to dissolve the Company and arranged to pay land rates to the City Council of Nairobi.

In re-examination, he stated that he was a Managing Director of many companies and he was not in charge of finances at **Kitusuru Limited** but **Mr. Kirundi** was the Managing Director and in effect he dealt with the money. He stated that before the money was received, he gave instructions on what was to be done, but he was not involved in the process of disbursement of the money nor was he supplied with any statement of how the money was disbursed.

3RD & 4TH DEFENDANTS CASE

DW3 Gordon Ochieng, relied on his witness statement. It was his testimony that the initial allotee of the suit land was **Pelican Engineering Co. Limited** and that the Ministry of Environment and Natural Resources had confirmed there was permission to issue or allote the land to **Pelican Engineering Ltd**. Later **Pelican Engineering Ltd** authorized the Commissioner of Lands to issue allotment letter in the name of **Kitusuru Ltd.** The same was done and there was acceptance of the Letter of Offer by **Kitusuru Limited** and it made payment amounting to **Kshs.6,443,500/=** which was Stand Premium and a title deed(Grant) was issued in favour of **Kitusuru Ltd**.

It was his evidence that the Plaintiff were supposed to carry out **due diligence** on their own. That once title was issued, the owner could sell the land and therefore the suit land was transferred to NSSF. He further testified that the Commissioner of Lands signed purely out of trust and could only have refused to sign the transfer if the land was not available.

That the land was to be degazzetted from being a Forest land and it was the duty of the Minister of Environment and Natural Resources to ensure the same was done. Further that the title herein is yet to be revoked and **NSSF** can use the land if granted permission by the Forest Department. However, the suit land was not available for allocation as it was never degazetted as it was on a gazetted Forest.

Further that the Ministry of Lands through the Commissioner of Lands granted consent to transfer the land from **Kitusuru Ltd** to **NSSF**. However the acquisition and transfer were shrouded with irregularity and illegality and the said illegality was on the part of the allotees who made an application for alienation of the said land from **Karura Forest** and specified the area to be allotted.

After the close of *viva voce* evidence, parties herein filed their respective lengthy written submissions wherein they cited various provisions of law and various decided cases as authorities to support their respective positions.

This court has now carefully read and considered the rival written submissions, the evidence on record, the exhibits produced thereto and the relevant provisions of law and makes the following findings;

There is no doubt that in the year **1993**, Pelican Engineering Company Ltd owned by 2nd Defendant **Mike Maina,** applied for allocation of some land within **Karura Forest**. It is also evident vide a letter dated **28th July 1994**, the Ministry of Environment and Natural Resources informed **Pelican Engineering Ltd** that authority had been given to **excise** an area of about **18.41Ha.** in Karura Forest for development. From the above referred letter which was signed by **J. M. Mutie,** for Director of Forestry and copied to the Permanent Secretary, Ministry of Environment & Natural Resources, it is evident that the Government through the said Ministry agreed to excise **18.41 Ha**. from **Karura Forest** and allocate it to a Company by the name of **Pelican Engineering Ltd**.

Further the said **Pelican Engineering Ltd,** was authorized to carry out cadastral survey in the said area in consultation with the Government Survey Department. Therefore the above instructions show that the said authorization was given by Government Officials. It is also evident that the said **Pelican Engineering Co. Ltd** was allotted the said land and vide a letter dated **3rd January 1995**, requested the Commissioner of Lands to issue the allotment letter to **M/S Kitusuru Ltd**.

Further the Commissioner of Lands who was another Government Official allowed the said request and issued the Letter of Allotment to **M/S Kitusuru Ltd** on **4th April 1995.** It is evident that **M/s Kitusuru Ltd** had been incorporated on **19th October 1994**, as per the Certificate of Incorporation produced in court as exhibit.

It is not in doubt that **Kitusuru Ltd** was issued with a **Grant** for the excised **18.41 Ha.** on **21st June 1995** and a Deed Plan was attached to the said Grant. The Grant and Deed Plan were issued by Government Officials and **Kitusuru Ltd** did not issue the said documents to itself. It is also evident that immediately after the Letter of Allotment was issued to **Kitusuru Ltd** and before the Grant was issued, **Kirundi & Co. Advocates** sent a Letter of Offer dated **3rd May 1995,** to Managing Trustee of NSSF, the Plaintiff herein and offered to sell the land parcel **No.LR.No.209/12274-Nairobi** which had been excised from **Karura Forest** to the said Fund. The said land was offered at **Kshs.350,000,000/=.** It is obvious that NSSF did accept to purchase the suit property, since on **28th august 1995**, the **Law Firm of Kilonzo & Co. Advocates** wrote a letter to **Kirundi & Co. Advocates,** marked as ***'strictly Private & Confidential',*** informing the Vendor's advocate that the said **Law Firm of Kilonzo & Co. Advocates** had instructions to act for NSSF in the purchase of the suit property **LR.No.209/12274** measuring **49.4911 acres**. Several other correspondences were exchanged between **Kilonzo & Company Advocates** and **Kirundi & Co. Advocates.**

However on **12th September 1995**, **M/S Esmail & Esmail Advocates** informed **M/S Kirundi & Co. Advocates,** that it had been instructed by NSSF to act on its behalf in connection to the said purchase of **LR.No.12274**, the suit property. Further, **Esmail & Esmail Advocates** informed **M/S Kirundi & Co. Advocates** that it would forward the agreement for sale and transfer for execution by M/S Kirundi's Client.

From the above communication, it is evident that NSSF was represented by external lawyers of repute and it did not act without legal representation. Therefore it is obvious that the Plaintiff herein was not a hapless uninformed purchaser. PW1 had told the court that after the letter of offer was sent to the Fund, the Board of Trustees discussed the same in very secretive and confidential manner.

From the available evidence, it is also evident that before purchase of the suit property, NSSF instructed **Lloyd Masika Valuers** to carry out valuation of the suit property. A valuation could not be carried without visiting the property that was to be valued. Therefore **Lloyd Masika Valuers** should have known where the property that was being purchased was located or situated. Since the instructing client was NSSF, then NSSF cannot be heard to say that it did not know that the purchased property was in **Karura Forest**.

It is also evident that a sale agreement was finally executed between **Kitusuru Ltd** as the Vendor, and NSSF as the purchaser of **LR.No.209/12274** measuring **45.4911 acres**. The purchase price was **Kshs.292,500,000/=.** The sale agreement was executed on **28th September 1995,** and it is evident that the completion date was on or before **30th day of September 1995,** which was only **two days** after the sale agreement was executed. It is evident that NSSF was represented by a Law Firm of repute and the sale agreement was executed by the Managing Trustee and the Chairman of the Fund. It buffles this court why the Fund would allow such a shorter period for completion, given that most sale agreements give a period of 90 days as the completion period.

Further the sale agreement was subject to the Law Society Conditions of Sale **(1989).** One such conditions is that the Vendor should be ready to give vacant possession upon receipt of the purchase price. The Plaintiff's witness alleged that the **Fund** did not take immediate possession and the question that begs answers is why the **Fund** (Plaintiff herein) did not take vacant possession immediately given that the sale was subject to Law Society conditions of sale. If the Plaintiff had attempted to take possession in **1995,** after payment of the purchase price, then it would have realized that the purchased land was in **Karura Forest**, unless it did not want to take the said vacant possession or unless the Plaintiff's Management, being the Managing Trustee and the Board of Trustees was involved in the complicity herein.

It is also evident that after execution of the sale agreement, the suit property was transferred to NSSF, after the transfer document was signed on **5th October 1995** by the Director of the **Kitusuru Ltd**, the Chairman and Managing Trustee of NSSF and the Commissioner of Lands. The said transfer was entered and registered against the title on the same date for a consideration of **Kshs.292,500,000/=.** Consequently, NSSF became the registered owner of the suit property. It is evident that the said transfer was signed by the Commissioner of Lands and the transfer on the title was endorsed by the Registrar of Titles. The said entries were not entered by **Kitusuru Ltd** but by the Government Officials, or employees being the Commissioner of Lands and Registrar of Titles. The issuance of the Grant to **Kitusuru Ltd** was also done by the Government Officials.

Further it is not in doubt that a payment voucher was prepared for **Kshs.292,500,000/=** which was payment for purchase of

LR.No.209/12274-Nairobi, the suit property. The said payment was duly authorized by the relevant officers of NSSF. There is no evidence that there was any coercion from **Kitusuru Ltd** for preparation of the said voucher. From the available evidence, it is evident that the purchase price of **Kshs.292,500,000/=** was later forwarded to **M/S Kirundi & Co. Advocates** by **M/s Esmail & Esmail Advocates,** vide a **Cheque No.753576** dated **6th October 1995**. The said cheque was forwarded to **Kirundi & Co. Advocates** by **M/S Esmail & Esmail Advocates** vide a letter dated **6th October 1995**.

PW1 told the court that even after accepting the offer, signing the sale agreement and after the suit property was transferred to **NSSF**, the Plaintiff (NSSF) did not visit the suit property until **2003.** Further, there was no evidence on whether a search was carried out at the Lands Registry before **NSSF** entered into the sale agreement in issue. There is also no evidence whether the Plaintiff herein through its internal or external Lawyers inquired from the Commissioner of Lands on the authenticity of the Vendor's Grant given the colossal sum the Fund was about to part with as purchase price. Further, it is clear that the sale agreement was between **Kitusuru Ltd** and **NSSF**. It is also evident that **Kitusuru Ltd** was dissolved vide a **Gazette Notice No.4287** dated **26th July 1996.**

Further, it is evident from the evidence of PW1 and PW2 that NSSF attempted to take possession of the suit land in **2003,** but could not get access to the said land. It is also not in doubt that on **8th July 2003**, the Ministry of Environment & Natural Resources through the Chief Conservatoire of Forest wrote to the Managing Trustee of NSSF and informed him that **LR.No.209/12274,** was located in Karura Forest Reserve which was gazetted Forest. Therefore NSSF was denied access to the said land. However, the said Ministry of Environment and Natural Resources had earlier on vide its letter dated **28th July 1994,** confirmed that it had authorized excision of **18.41 Ha.** from Karura Forest in favour of **Pelican Engineering Co. Ltd** for development. However PW3, informed the court that even with the said authorization, the excisioned land parcel was never degazzetted and thus the said parcel of land is still a gazetted Forest Land.

After the above communication from the Chief Conservatoire of Forest, the Managing Trustee of NSSF realized that the Fund had lost money and demanded a refund of the purchase price from **Kitusuru Ltd** through a demand letter dated **23rd July 2003**. The said demand was done in **2003**, about **8 years** after the purchase of the suit land and **7 years** after **Kitusuru Ltd** had been dissolved. Thereafter the Plaintiff filed the instant suit which is contested by the Defendants.

The above are the undisputed facts. The court finds the issues for determination are as follows:-

1) Whether the suit is statute barred.

2) Whether Kitusuru Company Ltd had a good title capable of transferring to the Plaintiff.

3) Did the Plaintiff and Kitusuru Ltd enter into a legal Contract or sale agreement?

4) If so, did the Plaintiff acquire a good title to the suit property?

5) Did the Defendants herein perpetuate fraud?

6) Whether the 1st & 2nd Defendant were properly sued?

7) Whether the Plaintiff is entitled to the orders sought?

8) Who should bear costs of the suit?

1. <u>Whether the suit herein is statute barred?</u>

The 1st Defendant in his defence, evidence in court and subsequent submissions pleaded that the suit herein is time barred. His submissions was supported by the other Defendants who urged the court to find and hold that the suit herein is time barred. It was the Defendant's submissions that the sale agreement was entered on **28th September 1995** and the suit property was registered in favour of the Plaintiff on **5th October 1995.** That the suit herein is based on Contract and therefore time started running against the Plaintiff on **5th October 1995**. The 1st Defendant alleged that the Plaintiff's suit is hinged on the fact that the Vendor failed to observe the **Forests Act, Cap 385 (now repealed)**. The Defendants relied on Section **4(1)(a)** of **Limitation of Actions Act,** which provides that actions founded on Contract may not be brought after the end of **six years** on which the cause of action accrued.

Further that Plaintiff also alleged that there was **fraud** and **misrepresentation** perpetuated by the Defendants herein. It was submitted by the Defendants that **Section 4(1)(e)** of the **Limitation of Actions Act** provides that actions claiming equitable relief may not be brought after the end of six years from the date which the cause of action accrued. Further that even if the Plaintiff alleged **fraud**, on the part of the Defendants, **Section 4(3)** of the **Limitation of Actions Act** provides that an action founded on **tort** may not be brought after the end of **3 years**, from the date which the cause of action accrued. It was submitted that since the suit land was registered on **5th October 1995**, then the suit herein is time barred under **Sections 4(1) (a)(e) and 4(3)** of the **Limitation of Actions Act**.

However, the Plaintiff submitted that its claim is based on **fraud** and **misrepresentation**. That though the transaction occurred in the year **1995**, the discovery of the said **fraud** was done in the year **2003,** when the Plaintiff was denied access to the suit property and when it also received a letter from the Chief Conservatoire of Forests to the effect that the suit land was a gazetted Forest land. The said letters were written on **8th July 2003** and **18th July 2003**. It was the Plaintiff's submissions that fraud herein was discovered in the year **2003** and the suit was filed on **17th March 2003.**

The Court has considered the Amended Plaint and it is clear that the Plaintiff's claim is based on Fraud. Further the Plaintiff allegedly discovered that it could not use the land in **2003** when it was denied access to the suit land. **Section 26** of the **Limitation of Actions Act** provides:-

> ***"Where, in the case of an action for which a period of limitation is prescribed, either -***
>
> ***(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent;or***
>
> ***(b) the right of action is concealed by the fraud of any such person as aforesaid;or***
>
> ***(c) the action is for relief from the consequences of a mistake,***
>
> ***the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:***

It is clear from the above provisions of law that time does not begin to run until fraud is discovered. Since the Plaintiff has alleged that it discovered fraud herein in **2003**, and the suit was filed in **2004**, then 3 years had not lapsed and the suit herein is not time barred.

Further, it is evident that at the time of purchase of the suit property, the Vendor had a Grant that had been issued by the Government and the Commissioner of Lands had also signed the transfer. Therefore the Plaintiff could not have discovered fraud at that time since everything flowed seamlessly. Time herein began to run in the year **2003,** and the suit was filed in the year **2004** and so the suit herein is not statute barred.

2. Whether Kitusuru Co. Ltd had a good title capable of transferring the same to the Plaintiff.

As the court pointed out in the undisputed facts, it is clear that **Pelican Engineering Ltd,** had applied for allocation of some land from **Karura Forest**. After the application, the Ministry of Environment and Natural Resources gave authorization for excision of **18.41 Ha**. from **Karura Forest**. The said Ministry also allowed the Applicant to prepare Cadastral Plan with the assistance of Government Surveyor. Further, after the said **Pelican Engineering Co. Ltd** requested the Commissioner of Lands to issue the allotment letter in favour of **Kitusuru Co. Ltd**, the Commissioner of Lands did issue the said letter on **4th May 1995**. The Commissioner of Lands was a Government Official and it was evident that by dint of the Government Land Act(now repealed), the President of the Republic could grant unalienated Government land to applicants of such land. Though Karura Forest was a Gazetted Forest land as per the provisions of **Section 4** of the **Forest Act Cap 385** (now repealed), the allocated land had not been degazzetted and therefore it was not unalienated government land available for allocation.

However, with the assurance from the Ministry of Environment and Natural Resources that excision of the applied land had been authorized, then **Pelican Engineering Ltd,** and later **Kitusuru Ltd** would certainly not doubt the said assurance from the Government officials.

Further after the letter of allotment, the said land was registered in favour of **Kitusuru Ltd** by the Commissioner of Lands. The said Grant was issued under the **Registration of Titles Act Cap 281** (now repealed). As provided by **Section 23** of the said Act, then **Kitusuru Ltd** was the absolute and indefeasible owner of the said parcel of land. See **Section 23** of **Registration of Titles Act**, which states:-

> ***23. (1) 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 proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.***

However, such an acquired title could be challenged if the same was acquired through **fraud** or **misrepresentation**.

Prima-faciely, the Certificate of title held by **Kitusuru Ltd** looked like it was a good title. It was issued after a letter of allotment was issued by the Commissioner of Lands and thereafter the Grant was issued after it was signed by the Commissioner of Lands and endorsed by the Registrar of Titles. However, it is trite that the root of a registered proprietor title is very important. See the case of **Munyu Maina…Vs… Hiram Gathiha Maina, Civil *Appeal No.239 of 2009***, where the Court of Appeal held that:-

> ***"We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."***

It is not in doubt that the suit property was a parcel of land that was part of Karura Forest. Though the Ministry of Environment and Natural Resources had authorized the excision of about **18.41 Ha.** from Karura Forest, it is very clear that the excision was never degazzetted as was provided by the existing Law then being **Section 4** of the **Forests Act Cap 385 (repealed)** which provides;-

> ***(1).The minister may, from time to time, by notice in the Gazzete-***
>
> ***(a) declare any unalienated Government land to be a forest area;***

(b) declare the boundaries of a forest and from time to time alter those boundaries;

(c) declare that a forest area shall cease to be a forest area.

2) Before a declaration is made under paragraph (b) or paragraph (c) of subsection (1), twenty -eight days notice of the intention to make the declaration shall be published by the minister."

There was no evidence on whether the Minister in Charge of Forests at that particular time altered the boundaries of the Forest by degazetement. If the said degazettement was never done, then the suit land was still a gazetted Forest land by the time the Grant was issued to **Kitusuru Ltd**. Though the Grant held by **Kitusuru Ltd** looked proper and was issued by the relevant Government officials, proper process and procedure were never followed to degazette the suit property. See the case of **Henry Muthee Kathurima..Vs..Commissioner of Lands & Another (2015) eKLR**, where the Court of Appeal stated in paragraph 18:-

"We have considered the submissions by the Appellant in this appeal and have no hesitation to state that we concur with the findings of the trial court…… The Commissioner of Lands had no power to alienate public land and any action taken without due authorization is a nullity.

….. an action taken by the Commissioner of Lands without legal authority is a nullity; such action however technically correct is a mere nullity and not only voidable but void with the no effect, either as legitimate expectation, estoppel or otherwise".

However it was not the duty of the allottee to degazzette the suit land. It was the duty of the relevant Ministry being the Ministry of Environment and Natural Resources to degazette the said parcel of land after issuing the requisite 28 days Notice. It was also the duty of the Commissioner of Lands to confirm that the said land had been degazetted or was available for alienation. Therefore even if **Kitusuru Ltd** held a proper Grant issued by the Commissioner of Lands, it was irregularly acquired. See the case of **Joseph Letunya & 21 Others…vs… Attorney General & 5 Others (2014),** where the Court held that:-

"I find that I must agree with the 1st, 2nd, 3rd, 4th and 6th Respondents' arguments. The process of conferring legal and equitable property rights in land under Kenyan law is settled, and is dependant upon formal processes of allocation or transfer and consequent registration of title, or of certain transactions that confer beneficial interests in land in the absence of a legal title of ownership. The process of allocation of forest land is further governed by the Forest Act that requires a process of excision of forest land before such land can be allocated. The Applicants did not bring evidence of such processes of allocation of title to land located in the Mau Forest and solely relied on their long occupation of the same. ……

The Respondents however did not provide any evidence of compliance with the required procedure of excision of the said forest land under the then Forest Act particularly the gazettement of the said excision, or of the details of the said allocations.

In the light of these findings it is apparent that there were significant irregularities committed during the allocations made after the 2001 forest excisions of Mau Forest, which included the allocations made with respect to the land occupied by the Applicants. This court cannot therefore uphold the legality of the said allocations. This Court also in this regard adopts the findings and recommendations made in the* Report of the Government Task Force on the Conservation of the Mau Forest Complex*, and particularly the recommendations that all titles that were issued irregularly and not in line with the stated purposes of the settlement scheme be revoked, and that members of the Ogiek Community who were to be settled in the excised area and have not yet been given land should be settled outside the critical catchment areas and biodiversity hotspots."

Though **Kitusuru Ltd** held a Certificate of title, the root through which the said title can be traced was irregular. However, the court finds that this irregularity was occasioned by the actions of the Government officials. These Government officers who gave authority of excision of the suit land were from Ministry of Environment and Natural Resources and the Commissioner of Lands who gave an allotment letter without ascertaining that the said land had been degazetted. There was no evidence that **Kitusuru Ltd,** coerced the said officials to act as they did. Further the said officials had been entrusted to safeguard public property and they owed the public a duty of care. On whether there was political pressure to excise the said land, those were only allegations by the witnesses which allegations were never substantiated or expounded.

Having found that the root of the title held by **Kitusuru Ltd**. Was not proper and having found that the said title was irregularly acquired, then the court finds that **Kitusuru Ltd** had no good title capable of transferring to the Plaintiff herein.

3. Did Kitusuru Co. Ltd enter into a legal Contract with the Plaintiff herein.

It is evident that the contract herein was for sale and purchase of land. **Section 3(3)** of the **Law of Contract Act** provides that:-

"No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party"

From the available evidence, there is a sale agreement dated **28th September 1995,** that was executed by the Vendor and the purchaser. The said agreement is in writing and it meets the criteria stated in above Section of the Law. Further, the name of parties were given and the property was duly described and the purchase price was quoted. See the case of ***Nelson Kivuvani....Vs....Yuda Komora & Another, Nairobi HCCC No.956 of 1991***, where the Court held that:-

> ***"the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract***".

The sale agreement herein meets the requirements of a Contract for sale of land. Further, it is evident that the Vendor had given a letter of offer and quoted a figure of **Kshs.350,000,000/=.** Though the purchaser did not accept that offer, it must have given a counter-offer of **Kshs.292,500,000/=** which was accepted by the Vendor. There was also a consideration being payment of the purchase price of **Kshs.292,500,000/=** which was indeed paid. Further the sale agreement was signed by the Directors of the Vendor and the Chairman and Managing Trustees of the purchaser and these were authorized persons for the purpose of execution of the said agreement for the two entities. The said authorized persons had proper mental capacities to act as they acted. In all respect, the sale agreement entered between the Vendor (**Kitusuru Ltd** and the purchaser **NSSF**) was legal contract or sale agreement.

The only short coming herein is that though the Vendor had a Certificate of title, the same was irregular as the property in respect of the said title was still a gazetted Forest land and had not been degazzetted though the Ministry of Environment and Natural Resources had authorized the excision of the said land from Karura Forest. However as the court held earlier, the said degazzettement was not the duty of the allottee but the relevant Ministry. Further the Commissioner of Lands had a duty to confirm that the said degazzettement had been done before issuance of the allotment letter. Whether the above omission by the above stated Government officials was by design or not is not very clear.

After analysis of the available evidence, the court finds that the sale agreement entered between the Plaintiff and **Kitsuru Co. Ltd** was legal contract safe that the land in question was irregularly acquired.

4. <u>If so, did the Plaintiff acquire a good title to the suit property?</u>

The court has found and held that the sale agreement entered between the Vendor and the purchaser herein was legally done. However, the property that was sold to the Plaintiff was irregularly acquired. Having acquired the suit property irregularly, then the Vendor had no good title to the suit property. Without a good title, the Vendor could also not pass a good title to the purchaser. **Section 26(1)(b)** of the **Land Registration Act** is very clear that a registered proprietor title can be impeached if the same was acquired **illegally, unprocedurally, irregularly** or through **corrupt** scheme. Further, **Subsection 1(b)** provides that the title holder does not have to be party to the vitiating facts, but so long as the title was obtained **unprocedurally, illegally** or **irregularly**, then it is impeachable. See the case of **<u>Elijah Makeri Nyangware…Vs…Stephen Mungai Njuguna & Another (2013) eKLR</u>** where the court held that

> ***"…Is the title impeachable by virtue of Section 26(1) (b)? First, it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26(1) (b) is to remove protection from an innocent purchaser of innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26(1)(b) in my view is to protect the real title holders from being deprived of the titles by subsequent transactions".***

Since it is evident that due process was not followed herein as the suit property was never degazzetted before allotment, even if the Vendor or the purchaser were not party to the irregularity or omissions by the Government officials from the Ministry of Environment and Natural Resources and the Commissioner of Lands, the court finds and holds that **Kitusuru Ltd** did not have a good title and therefore, it could not pass any good title to the Plaintiff herein. The Plaintiff's title is therefore voidable. It was alleged that the same had been revoked by the National Land Commission. However no such evidence was tendered.

5. <u>Did the Defendants herein perpetuate fraud?</u>

The Plaintiff's suit is hinged on fraud allegedly perpetuated by the Defendants upon it. The Defendants have denied committing any fraud against the Plaintiff herein. **<u>Blacks Law Dictionary</u>** defines **fraud** as follows:

> ***"Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury."***

Further on **<u>page 731</u>**, of the said **<u>Blacks Law Dictionary</u>**, fraud is further defined as;-

> ***"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment"***

From the above description of fraud, it is clear that he who alleges **fraud** must show that there was **deceitful** practice or **wilful device** that was directed to him or her with intent to **deprive** him of his right.

Further, there must be evidence that there was **concealment** of **material fact** which induced him to act to his own detriment. The Plaintiff

has alleged that the Defendants herein transferred the suit property to it fraudulently. However, it is important to point out that the sale agreement in issue was between the Plaintiff and **Kitusuru Ltd**. The 1st and 2nd Defendants were Directors of the **Kitusuru Ltd.** Evidence was adduced by the Plaintiff on how the suit property was sold to it by **Kitusuru Ltd** without disclosing that the said parcel of land was in **Karura Forest**. However, it is important also to note that **M/s Kirundi Advocate** only floated an offer to the Plaintiff. The Plaintiff had an option of either accepting the same or rejecting it. It is evident that the Plaintiff gave a counter-offer which was accepted by the Vendor. Further, it is evident that before the transaction took place, **Lloyd Masika Ltd** was appointed by the Plaintiff to carry out Valuation of the suit property. For a Valuation to be done, the property must have been visited. It is clear therefore that the Plaintiff must have been informed by its Valuer where the suit property was situated. Further the court pointed out earlier, that **Kitusuru Ltd** was in possession of a Certificate of title. That title was issued by the Commissioner of Lands. Therefore **Kitusuru Ltd** did not purport to have a title but infact it was in possession of the said title or Grant issued by the relevant Ministry but the court has held earlier it was irregularly acquired.

From the available, evidence when the Plaintiff accepted to purchase the suit property and in return instructed **Kilonzo & Co. Advocates**, it is evident that **Mr. Mutula Kilonzo Advocate,** wrote on behalf of Plaintiff to **Mr. Kirundi Advocates** on **28th August 1995** and stated:-

> ***"Although the parcel of land is registered in the name of Kitusuru Ltd, we are aware of the interest of the beneficial owner and we insist on a condition of the sale that the proceeds of such sale should be paid to a Nominee of both the registered owner and the beneficial owner M/s Maucho Co. Advocates"***

From the above letter and others that followed, it is clear that NSSF was very much aware of what was happening. It cannot claim fraud on the part of **Kitusuru Ltd** alone. If there was fraud, NSSF the Plaintiff herein was deeply in it. Further there is no evidence that NSSF did inquire from the Commissioner of Lands on the viability of the transaction and then the said Commissioner of Lands misled it or gave false misrepresentation to the Plaintiff. What is clear herein is that the Plaintiff, some Government officials in cahoots with other parties who are not in this suit colluded in having the transaction herein carried out in such hasty. The Plaintiff therefore was not an innocent purchaser without **Notice** and cannot claim that the Defendants did perpetuate fraud on it.

Perhaps what should have happened herein is for this particular transaction to have been subjected to a criminal investigation by the relevant Government Investigators, so that the perpetrators of the alleged fraud both on the Plaintiff's side, the Government officials who gave a go ahead to excise land from Karura Forest, the Commissioner of Lands who allotted land that was not yet degazzetted and the two Companies that were involved, and those other parties not sued herein would have been investigated and whoever was found culpable ought to have been charged accordingly. The Plaintiff cannot feign ignorance when it was involved in the alleged fraud and/or spending pension funds without due diligence.

Though PW1 alleged that there was political pressure and interference from the Political Class at that time, the Court has noted that the persons who were involved in the negotiations and approvals of the transactions were never called as witnesses to confirm the said political pressure. Further there was no evidence of any resistance of such political pressure by the Board of Trustees and/or Management of NSSF and/or any evidence of coercion from any quarters. PW1 told the court she was not present when the sale agreement was signed and she could certainly not be in a position to confirm what happened before the approval and authorization of the said transaction.

'Fraud' is a serious allegation and must be strictly proved. See the case of **Emfil Ltd v Registrar of Titles Mombasa & 2 Others (2014) eKLR, the Court of Appeal held that:-**

> ***"Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities."***

What came out from the evidence of the 1st and 2nd Defendants is that these were business buddies who later fell out and then decided to wash their dirty linen in public. Infact they seem to know more than what they told this court. Their evidence would have been important in the said criminal investigation.

6. Whether the 1st & 2nd Defendants were properly sued?

It is not in doubt that the sale agreement herein was between the Plaintiff and **Kitusuru Ltd**. Therefore the privity of contract was between the said two entities. However, **Kitusuru Ltd** was dissolved in the year **1995.** This suit was filed in the year **2004**. The Plaintiff sued the 1st and 2nd Defendants who were Directors of the dissolved **Kitusuru Ltd.** It is clear that a Company has legal personality and it can sue and be sued in its own capacity. The Company is separate from its shareholders and Directors. See the case of **Salomon V Salomon (1897) AC 22:-**

> ***"The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act"***

However, there are instances when the Corporate Veil can be lifted. See the case of **Michael Kyambati…Vs…Principal Magistrate, Milimani Commercial Courts, Nairobi & Another [2016] eKLR**, where the Court stated;

> ***"It follows that the mere fact that one is a director or shareholder of a corporation does not,*** *ipso facto****, make the director or shareholder liable for the actions or omissions of the Company unless the circumstances are such that the corporate veil of the Company can be lifted. The case of Mugenyi & Company Advocates vs. The Attorney General [1999] 2 EA 199 following***

<u>Palmers Company Law Vol. 1 (22 ed)</u> lists 10 instances under which the veil of corporate personality may be lifted or as is sometimes put, look behind the company as a** *legal persona* **and these are:-

1. Where companies are in the relationship of holding and subsidiary companies;

2. Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors on the ground that business continued after the membership had dropped below the legal minimum, to the knowledge of the shareholder;

3. In certain matters relating to taxation;

4. In the law relating to exchange control;

5. In the law relating to trading with the enemy;

6. In the law of merger control in the United Kingdom;

7. ***In competition of the European Economic Community;***

8. In abuse of law in certain circumstances;

9. Where the device of incorporation is used for some illegal or improper purpose; and

10. Where the private company is founded on personal relationship between the members.

<u>Salomon vs. Salomon</u> (supra) and <u>Jones & Another vs. Lipman & Another [1962] 1 WLR 833</u> it was held that whereas a registered company is a legal person separate from its members this veil of incorporation may, however, be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask or device for enabling the Directors to hide themselves from the eyes of equity. Therefore if a company is thought to be a mere cloak or sham, a device or a mask which the defendant holds to his face, in an attempt to avoid recognition by the eye of equity, the court will grant Summary Judgement even against the person behind the said company.

I agree with the defence submissions and the judicial precedents cited that since the decision in Salmon and Salmon and Co. Ltd (1897)A.C. 22HL, courts have upheld the doctrine of the corporate veil and limited liability of a company. However, I agree with the applicant the same courts have also pierced the corporate veil to see what is happening behind it if there is evidence that the corporate veil is being used to shield fraud and improper conduct on the part of the shareholders and/or the controllers of the Company."

However in this case, the Plaintiff sued the 1st and 2nd Defendants on allegations of fraud. That was done before the Corporate Veil of **Kitusuru Ltd** was lifted or before the piercing of the veil. The said **Kitusuru Ltd** was dissolved in the year **1996**. However, the Plaintiff did not invoke the provisions of **Section 339 (5) & (6)** of the **Company's Act (repealed)** whereby they would have applied for restoration of **Kitusuru Ltd** and later applied for lifting of the corporate veil of the said Company and have the Directors sued in their respective personal capacities. The court finds that the 1st and 2nd Defendants were not properly sued.

7. <u>Whether the Plaintiff is entitled to the Orders sought?</u>

The Plaintiff's suit is based on allegations of fraud allegedly perpetuated upon it by the Defendants. The Plaintiff has sought for various prayers among them that the Grant issued to it was defective. This court held and found that **Kitusuru Ltd.** acquired the Grant to the suit property irregularly. It did not have a good tile to pass to the Plaintiff. Without a good title, the Plaintiff's Grant is not lawful and therefore this Court finds that prayer no.(a) and (b) of the Plaintiff's claim is merited.

However, the bone of contention is whether the Plaintiff is entitled to refund of purchase price paid in the tune of **Kshs.292,500,000/=.**

The Plaintiff's witness No.1 **Hope Mwashumbe** wanted this court to believe that the Plaintiff was misled by the letter of offer written to it by **Kirundi & Co. Advocates**. However, it is clear the said letter was only a letter of offer. The Plaintiff had an option of either accepting it or rejecting the same. In this case, the Plaintiff gave a counter-offer and accepted to purchase the suit property as is evident from the letter dated **28th August 1995.** Infact from that letter, the Plaintiff seemed to have known more about the transaction and that is why its advocate gave conditions of the sale proceeds. Further, it is clear that the Principle of **'caveat emptor'** applied herein which in essence means ***<u>'Let the buyer be aware'</u>***. It means the buyer alone is responsible for checking the quality and suitability of goods before a purchase is made.

Further PW1 also informed the court that at the time of purchase **Kitusuru Ltd** did not inform NSSF that the suit property was in Karura Forest. However it is clear that the Plaintiff was represented by both internal and external Lawyers who are competent professionals. The Plaintiff did not enter into the said transaction as unrepresented party and without proper information. The Plaintiff as a purchaser who was ready to part with **292 Million** needed to carry due diligence before purchasing the suit property. Without having undertaken due diligence, the Plaintiff cannot allege that it was a bonafide purchaser for value without notice. See the case of Samuel **<u>Kamwere..Vs..Land Registrar, Kajiado (2015) eKLR</u>**, where the court held that:-

> ***"In order to be considered a bonafide purchaser for value, he must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property".***

The Plaintiff ought to have visited the suit property to ascertain where it was. See the case of **Esther Ndege Njiru & Another…Vs… Leonard Gatei (2014) eKLR**, where the Court held that:-

> ***"Whereas the law respects and upholds sanctity of title, the law also provides situation when tile shall not be absolute and indefeasible. The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a Certificate of search. Article 40(6) of the Constitution removes protection of title to property that is found to have been unlawfully acquired. This provision of the Constitution coupled with the provision of Section 26(1)(a)&(b) of the Land Registration Act places a responsibility to the purchasers of titled properties to ascertain the status of a property beyond carrying out an official search……. It is essential to endevour to ascertain the history and/or root of the title".***

Further the Plaintiff ought to have carried a search and even inquire from the Commissioner of Lands on the state of the suit property before purchasing it. See the case of **Ngere Tea Factory Co. Ltd…Vs…Alice Wambui Ndume (2018)eKLR**, where the Court held:-

> ***"Since the Plaintiff was the one buying the land, the clear duty on their part as the purchaser in the contract of sale of land was to conduct due diligence and inform itself of all the relevant aspects concerning the property that he was seeking to purchase. The rule of 'caveat emptor' applies to contract for the sale of land and this responsibility on the part of the Plaintiff is clearly explained in Halsbury's Laws of England, Fourth Edition. Volume 42 at Paragraph 51 which states:-***
>
> ***"Defects of quality may either be patent or latent. Patent defects are such as are discoverable by inspection and ordinary vigilance on the part of the purchaser and latent defects are such as would not be revealed by any inquiry which the purchaser is in a position to make before entering into the contract for purchase".***

PW2 also informed the court that even after purchase of the suit property, **NSSF** as a purchaser did not take possession of the suit property until **2003.** Was this action of a serious purchaser who had parted with **292 Million?** The sale agreement that was entered between the parties was subject of Law Society Conditions of Sale **(1989).** Vacant possession is one of such conditions.

The Plaintiff failed to carry out due diligence and it cannot blame anyone for its own mistakes. See the case of **Suleiman Rahimtulla Omar & Another…Vs…Musa Hersi Fahiye & 5 Others (2014)eKLR**, where the Court of Appeal held that:

> ***"the doctrine of bonafide purchaser cannot apply since they failed to carry out sufficient due diligence before entering into the Sale Agreement."***

Further PW1 told the court that this transaction was discussed and approved by the Board of Trustees of **NSSF**. None of the parties who participated in the said negotiations and authorization gave evidence. It is clear that **NSSF** was represented by several trustees in its Board and one of them was Permanent Secretary, Treasury and also Permanent Secretary of the relevant Ministry in Charge of Labour at that time. The Plaintiff cannot feign lack of proper guidance. What is clear is that the Plaintiff Management herein was part of the conspiracy that resultant in loss of colossal sum of the workers' pension money. Infact **NSSF** took action when they realized they could not take possession of the suit property and that was when a new Government regime came into power in the year **2003**.

As the court stated earlier, **NSSF** Management was not innocent in the whole transaction. What should have happened is that the Management Board that was in place during the transaction should have been held personally liable and **surcharged** for the loss. The Plaintiff cannot try to recover the said money which was lost due to its own negligence and/or fraudulent action of the persons who were entrusted to take care of the workers pension.

The court will rely on the case of **Nabro Properties Ltd…Vs…Sky Structure Limited & 2 others (2002) 2 KLR 300 as was quoted in the case of Thrift Homes Limited vs Kays Investyment Limited (2015) eKLR,**where the court held;

> ***"It was a maxim of law recognized and established that no man shall take advantage of his own wrong and this maxim which is based on elementary principles is fully recognized in courts of law and equity and indeed admits of illustration from every branch of legal procedures. The reasonableness of the well being manifest……. that a man shall not take advantage of his own wrong to gain the favourable interpretation of law''***

As was submitted by the Defendants, the Plaintiff was the author of its own misfortune and is not entitled to refund of the purchase price from any of the Defendants herein. The doctrine of ***'Pari delicto potior'*** applies herein which means that if both parties are equally at fault, the court will not involve itself in resolving one side's claim over the other. See the case of **Hassan Zubeidi…Vs…Patrick Mwangangi Kibaiya & Another (2014) eKLR**, where the Court held that:-

> ***"Even assuming the clause was not there and the 1st Respondent was in breach, it would simply be a case of in 'pari delicto' whereat the court will not ordinarily involve itself in resolving one side's claim over the other and will be guided by the practice of law to leave them where it finds them..."***

The Plaintiff herein largely contributed to the loss suffered because it failed to carry **due diligence**, before the purchase of the suit property. The Plaintiff failed to ascertain where the land was before paying the purchase price or maybe the Plaintiff's management knew all the

intricacies involved in the whole transaction and therefore, it was deeply involved and cannot now seek the assistance of the law to recover what it lost consciously. In the case of **SEC…Vs…LEE 720 F.Supp 2D 305(S.D.N.Y.2010)**, Judge George B Daniels held as follows:-

> ***"To successfully apply the doctrine of 'pari delicto', the Plaintiff must be an active, voluntary participant in the wrongful conduct and the Plaintiff's wrongdoing must be at least substantially equal to that of the Defendant…."***

As the court found that the Plaintiff was the author of its own misfortune, then its wrondgoing is substantially equal to that of Vendor and the 3rd Defendant herein. The Plaintiff has not come to this court with clean hands and it is very clear that **'he who comes to equity must come with clean hands'**.

8. Who is to pay costs of the suit?

As provided by Section 27 of the Civil Procedure Act, costs is awarded at the discretion of the court. However, costs ordinarily follow the events. The Plaintiff's is the one who filed this suit. The court finds that it was the author of its own misfortunes and therefore should not have tried to cover its action by filing of this suit. The Defendants are the successful litigants and are therefore entitled to costs of this suit.

Having now carefully considered the available evidence, the exhibits, the written submissions and the relevant provision of law, the court finds that the Plaintiff's suit only succeeds in prayer No.(a) & (b) of declaring that the Grant held by it is *null* and *void.*

However, the Plaintiff's main claim of refund of the purchase price is not merited and the said prayers are dismissed entirely with costs to the Defendants.

It is so ordered.

***Dated, Signed* and *Delivered* at *Thika* this *22nd day* of *November 2019*.**

L. GACHERU

JUDGE

22/11/2019

In the presence of

Mr. Mwangi for Plaintiff

Mr. Halima holding brief for M/s Naeem for 1st Defendant

Dr. Kamau Kuria for 2nd Defendant

No appearance for 3rd & 4th Defendants

Jackline - Court Assistant.

Court – Judgment read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

22/11/2019