



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 2234 OF 2001

HASHAM LALJI PROPERTIES LIMITED.....PLAINTIFF

VERSUS

SIGILAIN LIMITED.....1ST DEFENDANT

THOMAS KIPLAGAT BETT.....2ND DEFENDANT

MILCAH CHEPTUM BETT.....3RD DEFENDANT

ESMAIL HASHAM LALJI.....4TH DEFENDANT

LAPKEIYET TRUST (KENYA) LTD.....5TH DEFENDANT

JUDGMENT

Background:

At all material times, the plaintiff was the registered proprietor of all that parcel of land known as L.R No. 209/4360/58, original Grant No. I.R 11791 and new Grant No. I.R 83451 (hereinafter referred to as “the suit property”).

The suit property is situated along Kijabe Street, Nairobi. The plaintiff acquired the suit property on 7th May, 1969 at a consideration of Kshs.145,000/=. The suit property measures 0.0395 hectares and is developed with a double storey commercial cum residential building comprising of shops on the ground floor and residential flats on the first floor. On 25th October, 1995, a provisional certificate of title was issued in respect of the suit property when it was reported to the Registrar of Titles that the original title got lost.

On or about 19th June, 1997, the title for the suit property was used as a security in court to secure the release on bond of the 4th defendant who had been charged in criminal case No. 1362 of 1997. In circumstances which are not clear from the material on record, the title for the suit property was released by the court to one, Karim Ismail Nurani who was a son of the 4th defendant on 7th October, 1999. The title was replaced in court again in unclear circumstances with a title for L.R No. Moi’s Bridge/Sirikwa Block1/Ziwa/247 owned by the 2nd Defendant. On the same date namely, 7th October, 1999, the suit property was allegedly transferred to the 5th defendant at a consideration of Kshs. 1,200,000/=.

Prior to the transfer of the suit property to the 5th defendant, the Commissioner of Income tax had registered a charge against the title of the suit property on 10th June, 1999 to secure outstanding income tax in the sum of Kshs. 3,000,000/= that was due from the plaintiff. The said charge was lifted on 24th September, 1999 under unclear circumstances before the suit property was transferred to the 5th defendant on 7th October, 1999.

On 18th April, 2000, the 5th defendant surrendered to the Government of the Republic of Kenya the original title for the suit property in exchange for a new Grant No. I.R 83451 which was for a term of 50 years with effect from 1st December, 1999. On 19th May, 2000, about (1) month after a new Grant No. I.R 83451 was issued to the 5th defendant, the 5th defendant transferred the suit property to the 1st defendant at a consideration of Kshs. 2,000,000/=.

On or about 11th July, 2000, the plaintiff which was not aware of the foregoing transactions learnt of the same. The plaintiff sought from the Land Registry a copy of the instrument of transfer through which it was alleged to have transferred the suit property to the 5th defendant. The plaintiff was informed by the Land Registry Superintendent in a letter dated 14th July, 2000 that the purported instrument of transfer was missing from the deed file for the suit property. The plaintiff reported to the police what it considered as a fraudulent transfer of the suit

property to the 5th defendant and subsequently to the 1st defendant. The police through the Criminal Investigations Department lodged investigations on the two (2) transactions.

An inquiry made by the Criminal Investigations Department at the Companies Registry regarding the 5th defendant and the 1st defendant revealed that the 1st defendant was incorporated on 20th December, 1999 while the 5th defendant was incorporated on 23rd September, 2000 and that both companies had their registered offices in Eldoret and that they shared postal address. The implication of that information provided by the Registrar of Companies was that as at the time the 5th defendant purported to acquire the suit property from the plaintiff; surrender the original title; obtain a new title and transfer the property to the 1st defendant, the 5th defendant had not been incorporated. The Registrar of Companies was unable to provide the particulars of the directors of the 5th defendant since the 5th defendant's file was said to be missing at the Registry of Companies. The directors of the 1st defendant were given as the 2nd and 3rd defendants.

After the completion of investigations, the 2nd and 4th defendants were charged of various offences relating to the transfer of the suit property to the 5th defendant and subsequently to the 1st defendant at the Chief Magistrate's Court, Nairobi in Criminal Case No. 2061 of 2000. In a judgment that was delivered on 4th January, 2002 in the said Criminal Case, the court found that all the charges against the 2nd and 4th defendants were not proved and acquitted them under Section 215 of the Criminal Procedure Code.

The present suit:

This suit was filed by the plaintiff on 28th December, 2001 a few days before the determination of the said criminal case. In its plaint dated 27th December, 2001, the plaintiff averred that the suit property was transferred to the 5th defendant and subsequently to the 1st defendant fraudulently and unlawfully through collusion of the 2nd, 3rd and 4th defendants. The plaintiff averred that the surrender of the title for suit property to the Government of Kenya in exchange for a new Grant No. I.R 83451 was similarly fraudulent and unlawful. The plaintiff averred that as a result of the fraudulent and unlawful activities of the 2nd, 3rd and 4th defendants aforesaid, it had suffered loss, injury and damage. The plaintiff averred that the defendants had by their conduct deprived the plaintiff of its rights and title to the suit property whose market value was estimated at Kshs. 15,750,000/=. The plaintiff sought judgment against the defendants jointly and severally for:

1. An order compelling the defendants jointly and severally to surrender the title for the suit property for cancellation of the entries relating to the registration of the 5th and 1st defendants' as the owners thereof.
2. A permanent injunction restraining the defendants jointly and severally from disposing of, selling, alienating, transferring, charging, pledging, leasing, wasting or in any way howsoever interfering with the suit property.
3. Rectification of the register for the suit property by the cancellation of the name of the 1st defendant and registration of the property in the name of the plaintiff.
4. An order compelling the defendants and in default, the Registrar of the High Court to execute the necessary transfer/conveyance for the registration of the suit property in the name of the plaintiff.

The 1st, 2nd, 3rd and 4th defendants (hereinafter referred to as "the defendants" where the context so admits) filed a joint statement of defence which was amended on 12th February, 2002. In their amended defence dated 7th February, 2002, the defendants denied the plaintiff's claim in its entirety. The defendants denied that they colluded to fraudulently and unlawfully transfer the suit property to the 5th defendant and thereafter to surrender the original title for the suit property in exchange for a new grant.

The defendants averred that it was not conceivably possible for the 2nd, 3rd and 4th defendants to transfer the suit property to the 5th defendant. The defendants averred that the 1st defendant purchased the suit property from the 5th defendant for valuable consideration in an open market situation and as such assumed ownership and possession of the suit property under Grant No. I.R 83451. The defendants averred that Grant No. I.R 83451 was issued to the 5th defendant by the President of the Republic of Kenya. The defendants averred that the 1st defendant acquired proper legal and legitimate registered interest in the suit property. The defendants denied the particulars of fraud pleaded against them in the plaint.

The defendants averred that the plaintiff was given an opportunity in criminal case No. 2061 of 2000 to establish fraud against the 2nd and 4th defendants but failed to do so. The defendants averred that a court of competent jurisdiction having found the 2nd and 4th defendants not guilty of fraud and that finding not having been appealed, the allegations of fraud pleaded in the plaint against the 2nd and 4th defendants were unsustainable the issue having been conclusively determined in the criminal case.

The defendants averred that the 1st defendant was a bona fide purchaser of the suit property for valuable consideration from the 5th defendant. The defendants averred that they were not responsible for issuing grants and that the plaintiff had no *locus standi* to maintain this suit in respect of the suit property in that the plaintiff's title over the suit property namely, Grant No. I.R 11791 had expired and the plaintiff did not seek the renewal of the same as a result of which the President of the Republic of Kenya in his discretion issued a new grant in favour of the 5th defendant. The 4th defendant averred that he was a director of the plaintiff and as such was not liable to be sued by the plaintiff. The defendants averred further that no resolution was passed by the plaintiff as a corporate person to file this suit. The defendants averred that the plaintiff's suit disclosed no cause of action and that the same was incompetent, frivolous, vexatious and fatally defective.

At the trial, the plaintiff called two witnesses, Diamond Hasham Lalji (PW1) and Sultan Hasham Lalji Noorani (PW2) while the 2nd defendant (DW2) and the 3rd defendant (DW1) gave evidence on their own behalf and on behalf of the 1st defendant. The 4th defendant died while the suit was pending and was substituted by his son who did not tender evidence at the trial. The 5th defendant never entered

appearance and as such did not defend the suit.

The plaintiff's case:

The plaintiff's case from the evidence of its two witnesses mentioned above was that the plaintiff was at all material times the registered owner of the suit property until 7th October, 1999 when the property was fraudulently transferred to the 5th defendant. The plaintiff contended that it did not sell or transfer the suit property to the 5th defendant. The plaintiff contended that in order to conceal and perpetuate the fraudulent scheme to dispossess the plaintiff of the suit property, the 5th defendant surrendered the original title for the suit property namely, Grant No. I.R 11791 to the Government of Kenya in exchange for a new title namely, Grant No. I.R No. 83451. The plaintiff contended that the 2nd and 4th defendants were the persons behind the fraudulent transfer of the suit property from the plaintiff to the 5th defendant and subsequently to the 1st defendant.

The plaintiff contended that the 4th defendant was a director of the plaintiff company and that the 2nd defendant was an employee of the plaintiff and used to assist the 4th defendant in the management of the plaintiff. The plaintiff contended that the 2nd defendant was linked to the fraudulent transfer of the suit property to the 5th defendant and subsequently to the 1st defendant by the fact that the 2nd defendant was instrumental in the release of the title for the suit property from the court where it was deposited as a security to secure the release of the 4th defendant by giving out a title deed for his own parcel of land as a replacement. The plaintiff contended that the suit property was transferred to the 5th defendant on the same day the title was retrieved from the court. The plaintiff contended further that as at the time the suit property was transferred to the 5th defendant, the 5th defendant had not been incorporated and the same situation obtained at the time the 5th defendant purported to transfer the suit property to the 1st defendant whose directors are the 2nd and 3rd defendant who were a husband and wife.

The plaintiff contended further that prior to the registration of the transfer of the suit property in favour of the 5th defendant, a charge that had been registered against the title of the suit property by Kenya Revenue Authority (KRA) to secure the plaintiff's tax liability was removed without the plaintiff having settled the liability. The plaintiff contended that there was no court order authorising the substitution of the plaintiff's title for the suit property with the 2nd defendants' title as security in the criminal case aforesaid. The plaintiff contended that it had other pending cases with the 2nd defendant relating to its other properties which had been grabbed. The plaintiff averred that the 2nd defendant who worked for the plaintiff as an administrator of its properties took advantage of the 4th defendant who was in poor state of health to interfere with the plaintiff's properties.

The plaintiff contended that the sale of any of its properties could only be sanctioned by its board of directors. The plaintiff contended that its board of directors did not pass any resolution to sell the suit property to the 5th defendant which was not known to the plaintiff. The plaintiff contended that in the Criminal Case No. 2061 of 2000 that was preferred against the 2nd and 4th defendants, they were acquitted out of technicalities and not on merit. The plaintiff contended that it did not receive any payment as proceeds of sale of the suit property. The plaintiff produced the documents attached to its harmonised bundle of pleadings dated 24th April, 2015 as exhibits.

The defendants' case:

As stated earlier in this judgment, of the five defendants, only the 1st, 2nd and 3rd defendants tendered evidence in their defence. The 2nd (DW2) and 3rd (DW1) defendants admitted that they were directors of the 1st defendant. The 1st, 2nd and 3rd defendants (hereinafter referred to only as "the defendants" where the context so admits) contended that the suit property was acquired by the 1st defendant from the 5th defendant. The defendants contended that the plaintiff's claim concerned Grant No. I.R 11791 which was issued on 1st January, 1951 in respect of a lease over the suit property for a term of 50 years. The defendants contended that they acquired the suit property after the plaintiff's lease had expired and a new Grant No. I.R 83451 issued to the 5th defendant on 7th October, 1999. The defendants contended that the suit property was transferred to the 1st defendant on 19th May, 2000 and that the 1st defendant held a leasehold interest in the suit property for 50 years with effect from 1st December, 1999.

The defendants contended that the 1st defendant entered into an agreement for sale with the 5th defendant which was witnessed by an advocate after which the 5th defendant executed a transfer in favour of the 1st defendant on 10th May, 2000. The defendants averred that the 2nd and 4th defendants were charged in court in Criminal Case No. 2061 of 2000 with offences related to the acquisition of the suit property by the 5th and 1st defendants of which charges they were acquitted. The defendants averred that it was the 1st defendant which was paying the land rates and rent for the suit property.

The defendants contended that the postal address, P. O. Box 100 Eldoret which the 1st defendant shared with the 5th defendant belonged to Wareng County Council and could be used by anyone who had no postal address. The defendants contended that the 2nd and 3rd defendants were engaged farming and that it was from the sale of their farm produce that they raised Kshs. 2,000,000/= which they used to purchase the suit property on behalf of the 1st defendant. The defendants contended that the 1st defendant purchased the suit property from representatives of the 5th defendants whom they described as a Mr. Samvir, a white man and a lady who travelled to Eldoret for the transaction. The defendants denied that the 2nd defendant was an employee of the plaintiff at any time or that he collected rent on behalf of the plaintiff.

The defendants admitted that the 1st and 2nd defendants had previous dealings with the 5th defendant from which they had acquired three (3) other properties. The defendants contended that they could not remember the names of the persons who executed the agreement for sale and the instrument of transfer on behalf of the 5th defendant. The defendants contended that the 1st defendant purchased the suit property on a willing seller willing buyer basis. The defendants contended that they paid Kshs. 2,000,000/= for the suit property in cash from the money which the 2nd defendant kept in his house. The defendants contended that it was the son of the 4th defendant who collected the title for the suit property from the court where it was kept as a security.

The submissions by the parties:

After the close of evidence, the parties' advocates made closing submissions in writing. The plaintiff filed its submissions on 2nd November, 2018 while the defendants filed their submissions on 7th August, 2019. In its submissions, the plaintiff contended that all the transactions relating to the suit property which are the subject of this suit were carried out and completed before the 5th defendant was incorporated. The plaintiff submitted that whereas the 5th defendant was incorporated on 23rd September, 2000, it purportedly acquired the suit property on 7th October, 1999, surrendered the original title to the government on 18th April, 2000 and was issued with a new Grant No. I.R 83451 dated 21st March, 2000 on 18th April, 2000 before it transferred the same to the defendant on 19th May, 2000.

The plaintiff submitted that all these transactions were irregular and illegal. The plaintiff submitted that the onus was on the 1st defendant to prove that it had obtained a good and lawful title from the 5th defendant. The plaintiff submitted that no evidence was placed before the court of the existence of any agreement for sale between the plaintiff and the 5th defendant in respect of the suit property. The plaintiff submitted further that the instrument of transfer purportedly executed by the plaintiff in favour of the 5th defendant was also not produced in evidence. The plaintiff submitted that inquiry conducted at the land registry confirmed that the purported transfer was missing from the property deed file kept at the land registry.

The plaintiff submitted that in order to demonstrate that it acquired a valid title from the 5th defendant, the 1st defendant should have taken the trouble to obtain and place before the court as evidence the alleged agreement for sale and instrument of transfer between the plaintiff and the 5th defendant. The plaintiff submitted that the 5th defendant did not own and could not own the suit property as at 10th May, 2000 when it purportedly transferred the same to the 1st defendant. The plaintiff submitted that the 1st defendant did not purchase the suit property in open market as alleged as there was no evidence that the property was advertised for sale.

The plaintiff submitted further that no consideration passed from the 5th defendant to the plaintiff and from the 1st defendant to the 5th defendant. The plaintiff submitted that the 2nd defendant's contention that he paid Kshs. 2,000,000/= in cash to the 5th defendant was not convincing. The plaintiff submitted further that there was no evidence that either the 5th defendant or the 1st defendant was given possession of the suit property even after allegedly paying the full purchase price.

With regard to the Criminal Case No. 2061 of 2000, the plaintiff submitted that the court found the investigation of the offences with which the 2nd and 4th defendants were charged wanting. The plaintiff submitted that the suit property was acquired by the 5th defendant fraudulently and that the other defendants were parties to the fraud.

The plaintiff cited the case of Alberta Mae Gacie v the Attorney General and 4 Others (2006) 2 eKLR and submitted that the 5th defendant having acquired the suit property through forgery and deceit could not claim to have a valid title over the property which it could pass to the 1st defendant. The Plaintiff also cited the case of Iqbal Singh Rai v Mark Lecchini & another [2013] eKLR, and submitted that the 1st defendant's title that was acquired from the 5th defendant who held a fraudulent title was defeasible. In support of this submission, the plaintiff also cited the Court of Appeal case of Arthi Highway Developers Ltd. v West End Butchery Ltd. & 6 others [2015] eKLR. The Plaintiff submitted that while purportedly purchasing the suit property, the 1st defendant did not carry out any due diligence on the 5th Defendant from which it purportedly purchased the property.

The plaintiff submitted that the 5th defendant did not acquire a good tile from the plaintiff and as such could not pass an indefeasible title to the 1st defendant under Section 23 of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). The plaintiff averred that the 1st defendant was not a bona fide purchaser of the suit property. In support of this submission, the plaintiff cited the Ugandan case of Katende v Haridar & Company [2008] 2 E.A. 173 that was cited with approval in the case of Lawrence Mukiri v the Attorney General & 4 Others [2013] eKLR. On the issue as to whether the suit is properly before the court, the plaintiff submitted that the suit was filed on the instructions of the plaintiff.

In conclusion, the plaintiff submitted that it had proved on a balance of probabilities that the suit property was acquired by the defendants irregularly, unlawfully and fraudulently. The plaintiff urged the court to grant the reliefs sought in the plaint.

The defendants' submissions:

In their submissions dated 27th June, 2019, the 1st, 2nd, 3rd and 4th defendants ("the defendants") contended that the 1st defendant acquired a legal, legitimate and bona-fide title, ownership and possession of the suit property from the 5th defendant. The defendants submitted that the 1st defendant was a bona fide purchaser of the suit property for valuable consideration. The defendants submitted that when the 1st defendant purchased the suit property from the 5th defendant, the 5th defendant held a valid title over the suit property. The defendants averred that the plaintiff's interest was extinguished when its lease over the property expired in 2001 and was not renewed.

The defendants submitted that after the expiry of the plaintiff's lease, the plaintiff ceased to have any interest in the suit property. In support of this submission the defendants cited the cases of Goan Institute Nakuru v Said Abdalla Zubedi [2007] eKLR, Nairobi City Council v Chhagal Lala Divani W/O Chhagan Lala & 2 others [2013] eKLR and Charles Mwangi Kogonia v Dharj D. Popat & another [2006] eKLR.

The defendants submitted that the plaintiff's suit was a flawed and illegal attempt to renew the plaintiff's non-existent lease contrary to the law. The defendants submitted that the plaintiff was a stranger to the 1st defendant's title. The defendants submitted that the plaintiff's suit was bad in law and untenable as it was anchored on the plaintiff's indolence and failure to renew a lease.

The defendants submitted further that the plaintiff had no *locus standi* to institute this suit because the plaintiff was non-existent and also on

account of the fact that what the 1st defendant held was a new grant that was issued by the President of the Republic of Kenya to the 5th defendant from whom the 1st defendant acquired the property. The defendants submitted further that the relief sought for the rectification of the register of the suit property could not be issued due to the plaintiff's failure to join the Land Registrar as a party to the suit.

The defendants submitted that if any order was to be issued against the Land Registrar, it would be in violation of his right to be heard and an abuse of the court process. In support of this submission, the defendants cited Article 50 of the Constitution and the case of Republic v National Police Service Ex-parte Daniel Chacha [2016] eKLR. The defendants also cited Halsbury's Laws of England (Judicial Review) Volume 61 (2010 Edition) Paragraph 639 and the cases of Samuel Njagi Mwangi v James Kamau Wainaina [2018] eKLR, Said Juma Chitembwe v Edward Muriu Kamau & 4 others [2011] eKLR and Bellevue Development Company Ltd. v Vinayak Builders Limited & Another [2014] eKLR in support of their submission on the issue.

The defendants submitted further that the suit property was lawfully transferred to the 1st defendant by the 5th defendant. The defendants submitted that after the lapse of the plaintiff's lease, the President had a right to issue a new lease in favour of the 5th defendant from whom the 1st defendant acquired its title. The defendants submitted that the 1st defendant had absolute and indefeasible title over the suit property which could only be challenged on account of fraud, misrepresentation, unprocedurality and corruption. In support of this submission, the defendants cited sections 24, 25 and 26 of the Land Registration Act No. 3 of 2012 and the case of Charles Karathe Kiarie & 2 others v Administrator of the estate of John Wallace Mathare (deceased) & 5 Others [2013] eKLR. The defendants submitted that since the plaintiff was not the registered owner of the suit property, it had no right over the same.

The defendants averred further that the plaintiff's suit disclosed no reasonable cause of action against the defendants on account of the fact that the plaintiff produced no evidence showing that as the previous owner of the suit property, it had applied for the extension of the lease before or after its expiry. In support of this submission, the defendants cited the cases of D.T Dobie & Company (K) Ltd. v Muchina (1980) eKLR, Samuel Ndungu Mukunya v Nation Media Group Ltd. & another [2012] eKLR, Beatrice Wanjiku Muhoho v Honourable Attorney General [2012] eKLR and Yaya Towers Ltd. v Trade Bank Ltd. (In liquidation), Civil Appeal No. 35 of 2000.

In conclusion, the defendants reiterated that the plaintiff's suit disclosed no cause of action against the defendants since the plaintiff was not the proprietor of the suit property and urged the court to strike out and dismiss the plaintiff's suit. The defendants also urged the court to declare the 1st defendant as the lawful and absolute owner of the suit property and to grant it vacant possession.

Analysis of the parties' respective cases, submissions, and the court's determination:

The parties did not agree on the issues for determination by the court. In their submissions, each party framed its own issues. From the pleadings and the issues framed by each party, I will summarise the issues arising for determination in this suit as follows:

- 1. Whether the plaintiff had a *locus standi* to institute this suit.**
- 2. Whether the plaintiff discloses any reasonable cause of action against the defendants.**
- 3. Whether the 5th defendant acquired the suit property fraudulently and unlawfully.**
- 4. If the answer to issue number 3 is in the affirmative, whether the 2nd, 3rd and 4th defendants were involved in the fraudulent transfer of the suit property from the plaintiff to the 5th defendant.**
- 5. Whether the surrender of the original title for the suit property, Grant No. I.R No. 11791 to the government in exchange for a new title, Grant No. I.R No. 83451 was fraudulent and unlawful.**
- 6. Whether the 1st defendant acquired a valid and lawful title in respect of the suit property from the 5th defendant.**
- 7. Whether the plaintiff is entitled to the reliefs sought in the plaint.**
- 8. Who is liable for the costs of the suit?**

Whether the plaintiff had *locus standi* to institute this suit:

As was stated in the case of Alfred Njau & Others v City Council of Nairobi [1983] eKLR that was cited by the defendants, "*locus standi* is the right to appear or be heard". To say that a person has no *locus standi* means that he cannot be heard. In paragraph 12 of their amended defence, the defendants averred that the plaintiff had no *locus standi* to file this suit because its interest in the suit property was extinguished when the lease it had over the suit property pursuant to Grant No. I.R 11791 expired and was not renewed, and a new Grant No. I.R 83451 was issued to the 5th defendant. The defendants reiterated that contention in their submissions.

The defendants' argument as I understand it from their defence is that, the plaintiff had no interest in the suit property which could form a basis for its claim herein. This in my view means that the plaintiff had no cause of action against the defendants. As was stated in the case of Alfred Njau & Others v City Council of Nairobi (Supra), "*locus standi* and a cause of action are two different things." Whereas a cause of action is the fact or a combination of facts which give rise to a right to sue, *locus standi* is the right to appear or be heard. It follows therefore that the fact that the plaintiff had no basis for bringing this suit which is yet to be established does not deprive it of a right to appear and be heard by the court (*locus standi*). I therefore find no merit in the defendants' contention that the plaintiff had no right to be heard in this suit.

Whether the plaintiff discloses any reasonable cause of action against the defendants:

On 19th June, 2012, the defendants brought an application by way of Notice of Motion dated 11th June, 2012 seeking among others, an order for the striking out of this suit on the grounds that the suit was scandalous, frivolous and vexatious and in the alternative that the suit did not disclose a reasonable cause of action and was an abuse of the court process. The application was opposed by the plaintiff. In a ruling delivered on 24th May, 2013, the court made among others the following findings:

“(b) On the issue of no reasonable cause of action, I find that the plaintiff does in fact disclose the act on the part of the Defendants which gives the Plaintiff his reason for complaint. This is disclosed in the plaint wherein the plaintiff states, that though it bought the suit property in 1969, it lost title to the same through acts of the Defendants. This is a reasonable cause of action.

(c) On the question of this suit being scandalous, frivolous and vexatious, this court finds that the matter in contention in this suit being title to a prime property in Nairobi is neither scandalous, frivolous nor vexatious. The Plaintiff demonstrates seriousness in his claim to his lost title over the suit property.

(d) On the question of abuse of the process of the court, this court finds that the issues canvassed in the criminal case differ from the issues raised in the plaint filed in this case. Accordingly, this court finds that this case should be allowed to progress to full hearing.”

With those findings, the defendants’ application was dismissed with costs. That decision of the court was not appealed and the same has neither been set aside nor varied. The issue as to whether or not the plaintiff discloses a reasonable cause of action having been raised earlier by the defendants and fully and finally determined by the court, it is not open for the defendants to raise the same issue once again for determination. In any event, nothing has been placed before the court to warrant a departure from the finding reached herein earlier by the court on the issue.

Whether the 5th defendant acquired the suit property fraudulently and unlawfully:

As I mentioned earlier in this judgment, the 5th defendant was served with summons but failed to enter appearance. The averments made in the plaint against the 5th defendant were not controverted. The 1st defendant’s case was that it acquired the suit property from the 5th defendant. I am in agreement with the submission by the plaintiff that in the absence of the 5th defendant, the onus fell on the 1st defendant to demonstrate on a balance of probabilities that the 5th defendant had a valid title to the suit property which it passed to the 1st defendant. The 1st defendant did not rise to the occasion in this regard.

Apart from producing in evidence the title that was allegedly passed to it by the 5th defendant, the 1st defendant made no effort even with the knowledge that the root of its title was under attack to demonstrate that the 5th defendant had acquired the suit property lawfully. In a letter dated 26th October, 2000 addressed to the Criminal Investigation Department (See page 80 of P.Exh. 1), the Registrar of companies stated that the 5th defendant was incorporated on 23rd September, 2000. This evidence was not controverted. This means that the 5th defendant was not in existence as a legal entity prior to 23rd September, 2000. If the 5th defendant came into existence on 23rd September, 2000, there was no way it could legally acquire the suit property on 7th October, 1999. How the suit property was transferred to the 5th defendant is itself a mystery.

The Registry Superintendent at the Department of Lands, Ministry of Lands and Settlement informed the plaintiff in a letter dated 14th July, 2000 that they did not have in their records the instrument of transfer through which the suit property was transferred from the plaintiff to the 5th defendant (See page 53 of P.Exh. 1). The information that the 1st defendant provided regarding the existence of the 5th defendant was hazy. The 1st defendant did not provide information as to the 5th defendant’s offices and its directors. The 1st defendant’s directors (DW1) and (DW2) could not even remember the persons who executed the instrument of transfer through which the suit property was transferred to the 1st defendant. The 1st defendant’s said directors did not also have the contact details of any of the representatives of the 5th defendant whom they dealt with when acquiring the suit property from the 5th defendant.

In the absence of any evidence that the 5th defendant was in existence as at 10th January, 1999 when it purportedly acquired the suit property from the plaintiff and any evidence of the transaction apart from the entries in the land register, and in the face of a denial by the plaintiff that it sold and transferred the suit property to the 5th defendant, it is the finding of this court that the 5th defendant did not acquire the suit property lawfully. In the absence of any explanation as to how the suit property was conveyed to the 5th defendant, it is apparent that fraud was employed. The conclusion reached by this court as a result of the foregoing is that the 5th defendant acquired the suit property fraudulently and unlawfully.

Whether the 2nd, 3rd and 4th defendants were involved in the fraudulent transfer of the suit property to the 5th defendant:

The plaintiff placed uncontroverted evidence before court showing that the original certificate of title for the suit property was deposited in court as security to secure the release on bond of the 4th defendant who was an accused person in Criminal Case No. 1362 of 1997. The plaintiff also led evidence that was not controverted that the title for the suit property that was deposited in court in the said Criminal Case was released to the 4th defendant’s son, Karim Ismail Nurani on 7th October, 1999 and that the same was replaced with another title which belonged to the 2nd defendant.

The suit property was transferred to the 5th defendant on the same day that the title thereof was released by the court to the 4th defendant's son and replaced with the 2nd defendant's title. On the face of allegations that the 5th defendant was non-existent and that the suit property was transferred to the 5th defendant fraudulently on 7th October, 1999 after the title for the property left court and was replaced with the title for a property owned by the 2nd defendant, the 2nd and 4th defendants had a duty to explain their role in the transaction. The 2nd defendant who subsequently became a beneficiary of the suit property through the 1st defendant had a duty to explain why he gave out his property to court as security in place of the suit property.

The 2nd defendant had an obligation to explain his interest in the release of the title for the suit property from the court. The 4th defendant died in 2007 before the hearing of the suit. He was however substituted with his son; the same Karim Esmail Nurani through a court order that was made on 3rd July, 2009. The 4th defendant did not tell the court the circumstances under which the title for the suit property was collected from the court and how it ended up with the 5th defendant. The 2nd defendant did not also tell the court under what circumstances he offered his property to court as security in place of the suit property. The only inference the court can draw from the 2nd and 4th defendants' silence is that they were privy to the dealings that culminated in the transfer of the suit property to the 5th defendant and since the transaction was fraudulent, they were complicit in the fraud. That said, I am unable to see any direct involvement of the 3rd defendant in the dealings leading to the transfer of the suit property to the 5th defendant.

Whether the surrender of the original title for the suit property to the government in exchange for another title was fraudulent and unlawful:

I have already made a finding that the 5th defendant was not in existence as at 7th October, 1999 and as such could not acquire a property. I have made a further finding that the 5th defendant acquired the suit property fraudulently and unlawfully. Since the 5th defendant was not in existence and did not lawfully own the suit property as at 18th April, 2000, it could not surrender the original title for the suit property in exchange for a new title. As at 18th April, 2000 when it purported to surrender the title, the lawful owner of the suit property was the plaintiff whose lease in respect thereof had not expired.

In my view, the purported surrender was some sort of asset laundering in perpetuation of a fraud initiated by the 5th defendant and its accomplices when they acquired the suit property. It is my finding that the purported surrender of the title for the suit property to the government and the issuance of a new title in favour of the 5th defendant was fraudulent and unlawful.

Whether the 1st defendant acquired a valid and lawful title in respect of the suit property from the 5th defendant:

The 1st defendant had contended that it was a bona fide purchaser of the suit property for value from the 5th defendant without notice of any defects in the 5th defendant's title. The 1st defendant contended that it acquired a new title, Grant No. I.R 83451 over the suit property which was issued to the 5th defendant on 21st March, 2000 after the expiry and non-renewal of the plaintiff's lease over the suit property. The 1st defendant contended that it was a stranger to the plaintiff's lease over the suit property since it acquired its interest in the suit property after the expiry of the plaintiff's lease and the issuance of a new grant by the President of the Republic of Kenya in favour of the 5th defendant.

The 5th defendant purportedly transferred the suit property to the 1st defendant on 19th May, 2000. As observed earlier, the 5th defendant was incorporated on 23rd September, 2000. The 5th defendant was not a legal entity when it purported to acquire the suit property, surrender the original grant, obtain a new grant and sell the suit property to the 1st defendant.

As I have held above, the purported acquisition of the suit property by the 5th defendant from the plaintiff was fraudulent and unlawful, the same as the surrender of the original title to the government and the issuance of a new grant. Being a holder of a fraudulent and unlawful title, the 5th defendant even if it existed at the material time had nothing to convey or transfer to the 1st defendant. In my view, the transfer of the suit property to the 5th defendant, the surrender of the original title, the issuance of a new title and the transfer of the suit property to the 1st defendant were a series of events in one chain driven by the same people all aimed at dispossessing the plaintiff of the suit property.

The 1st defendant had contended that it was an innocent purchaser for value of the suit property and as such he acquired an indefeasible title pursuant to Section 23 of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). In my view, the 1st defendant did not satisfy the conditions for a bona fide purchaser for value. First, as I have mentioned earlier, one of the 1st defendant's directors, the 2nd defendant was privy to the fraudulent transfer of the suit property from the plaintiff to the 5th defendant. Secondly, the 1st defendant did not satisfy the court that it carried out due diligence on the 5th defendant and its title prior to purchasing the suit property assuming that it had no prior notice of the fraudulent transfer of the suit property to the 5th defendant.

Thirdly, when the 1st defendant's directors gave evidence before this court, they created the impression that the 5th defendant was new to them and that it was only introduced to them by one, Mr. Samvir whose contact and physical address they did not have. DW1 and DW2 referred to the representatives of the 5th defendant with whom they transacted as "white man" and "the Europeans." This is far from the truth. The evidence before the court shows that the 1st defendant had dealings with the 5th defendant prior to the transaction the subject of this suit all of which involved land claimed by the plaintiff and in respect of which there were active civil suits pending. This much was admitted by the 2nd defendant in cross-examination.

In Eldoret HCCC No. 6 of 2003, the 5th defendant herein claimed to have acquired L.R No. Eldoret Municipality/Block 3/27 which is said to have initially belonged to the plaintiff, on 10th November, 1999 and transferred the same to the 1st defendant herein on 23rd March, 2000. It is telling that the 5th defendant acquired L.R No. Eldoret Municipality/Block 3/27 on 10th November, 1999 which is about a month after it acquired the suit property on 7th October, 1999 and that the property was transferred to the 1st defendant two (2) months before the transfer

of the suit property to the 1st defendant.

In Eldoret HCCC No. 94 of 2002, the 5th defendant claims to have acquired L.R No. Eldoret Municipality/Block 7/7 which is said to have initially belonged to the plaintiff on 10th October, 1999 which is three (3) days after it acquired the suit property on 7th October, 1999 and transferred the same to the 1st defendant on 10th May, 2000 which is nine (9) days before it transferred the suit property to the 1st defendant. From the evidence before the court, it appears that the two cases mentioned above one of which has been instituted by the plaintiff herein and the other by the 1st defendant, have not been defended by the 5th defendant herein and those behind the 5th defendant have not been disclosed and remains unknown.

The 1st defendant who had purchased other parcels of land from the 5th defendant on 23rd March, 2000 and 10th May, 2000 cannot say that it did not know the 5th defendant when it transferred the suit property to it on 19th May, 2000. After purchasing two (2) properties previously from the 5th defendant, the 1st defendant cannot convince this court that if at all the 5th defendant existed, they did not bother to find out whether it was incorporated, its physical address and its directors. This is part of basic due diligence that has to be carried out when dealing with a limited liability company. In the circumstances of this case, the 1st defendant should have obtained from the 5th defendant some documentation on the history of its title.

Fourthly, I am not persuaded that the 1st defendant gave any consideration for the suit property. The evidence given by DW2 on how he paid Kshs. 2,000,000/= to the 5th defendant cannot be believed. From the evidence on record, the 1st defendant was incorporated on 20th December, 1999. The court was not told of the business the 1st defendant was carrying out. By May, 2000 about 5 months after incorporation, the 1st defendant had purchased three parcels of land, two in Eldoret and one, the suit property, in Nairobi. In fact, the three properties were purchased within a period of two months. DW1 and DW2 did not claim in their evidence that the 1st defendant made any payment for the suit property. The 2nd defendant (DW2) claimed that he was the one who paid for the suit property from the sale of produce from his farm. The court was not told why the 2nd defendant was paying for a property that belonged to the 1st defendant which is a limited liability company. No evidence was placed before the court to prove that indeed, the 2nd defendant (DW2) earned Kshs. 2,000,000/= from his farm.

Although DW2 told the court that he had a bank account at National Bank of Kenya, he claimed that he was keeping money in the house and paid for the suit property in cash. I have also noted that the agreement for sale between the 1st defendant and 5th defendant was made on 13th March, 2000. In the agreement, it is stated that the purchase price of Kshs. 2,000,000/= had already been paid by the 1st defendant to the 5th defendant as at the time of the execution of the agreement. As at 13th March, 2000, the new Grant No. I.R 83451 had not been issued nor registered in the name of the 5th defendant. I wonder how the 1st defendant could have made payment for the suit property even before the title was issued to the 5th defendant.

Finally, no evidence was placed before the court showing that the 1st defendant was ever put in possession of the suit property by the 5th defendant. The agreement for sale dated 13th March, 2000 provided that the 1st defendant would take possession of the property upon the execution of the agreement. Although the 1st defendant is said to have purchased and paid for the suit property in full by 13th March, 2000, it was until 7th August, 2000, about 5 months later that 1st defendant purported to write a letter demanding rent from the tenants on the suit property.

For the foregoing reasons, it is my finding that the 1st defendant was not a bona fide purchaser for value of the suit property from the 5th defendant. Even, if it is assumed that the 1st defendant purchased the suit property innocently without notice of the defect in the 5th defendants' title, the 1st defendant's title cannot not defeat that of the plaintiff, the plaintiff having been the lawful owner of the suit property before the same was fraudulently acquired by the 5th defendant who did not even exist when it purported to acquire the property.

I am not in agreement with the submissions by the defendants that the 1st defendant acquired indefeasible title over the suit property. The 5th defendant having acquired a fraudulent title could not convey a valid title to the 1st defendant. The cases of Alberta Mae Gachie v the Attorney General & 4 others (Supra), Iqbal Singh Rai v Mark Lacchini & another (Supra) and Arthi Highway Developers Limited v West End Butchery Limited & 6 Others (supra) support this finding.

Whether the plaintiff is entitled to the reliefs sought in the plaint:

The plaintiff was the owner of L.R No. 209/4360/58, Title No. 11791. The plaintiff's lease was to expire in the year 2001. Before the expiry of the lease, the defendants fraudulently caused the property to be transferred to the 5th defendant. The 5th defendant thereafter surrendered the lease before its expiry to the government and was issued with a new lease for 55 years under a new Grant No. I.R 83451. The plaintiff's original lease has since expired. In the circumstances, it is not possible to reinstate the plaintiff in the same state in which it was prior to the fraudulent transfer of its property to the 5th defendant and subsequently to the 1st defendant in that the plaintiff cannot be reinstated as the owner of L.R No. 209/4360/58, Grant No. I.R 11791. The title was surrendered, cancelled and a new title issued to the 5th defendant. Does this mean that the plaintiff has no remedy? I do not think so.

The court cannot be helpless on the face of fraud. In the course of their fraudulent acts, the defendants had the plaintiff's lease that was to expire on 1st January, 2001 extended for a further term of 50 years. When the defendants fraudulently acquired the suit property, the plaintiff's lease had not expired and the plaintiff had the liberty to apply for the extension of its lease. It is now 18 years since the lease expired and the plaintiff may find it difficult in having the lease extended as a result of no fault of its own. I have agonised over the most appropriate remedy to grant in this matter. I have considered whether I should cancel Grant No. I.R 83451 and have the plaintiff apply for extension of its expired lease.

I am of the view that the plaintiff would face many challenges. The plaintiff would be required to surrender its old Grant No. I.R 11791 which it does not have and it may not obtain from the Land Registry having regard to the fact that the same was surrendered by the 5th defendant and may have been cancelled when the new Grant was issued. The plaintiff would also be disadvantaged having regard to the fact that several years have lapsed since the expiry of its lease.

I am of the view that to do substantive justice in this matter, the most appropriate relief to grant is that which has been sought by the plaintiff in the plaint. Although the defendants would call it renewing the lease contrary to statute, it will send a bold message to fraudsters and land thieves roaming around with their eyes on leases which are about to expire that the courts would show them no mercy and would not hesitate to confer any advantage or benefit which they have acquired albeit fraudulently to innocent parties. I am of the view that it would be unfair to take the plaintiff back to the stage of lease renewal.

For the foregoing reasons, I am satisfied that the plaintiff is entitled to the reliefs sought in the plaint.

Who should bear the costs of the suit?

Costs as a general rule follow the event. The plaintiff is successful in its claim against the defendants save for the 3rd defendant. No reason has been put forward to warrant a departure from the general rule on costs. The plaintiff shall have the costs of the suit.

Conclusion:

In conclusion, I am satisfied that the plaintiff has proved its case on a balance of probabilities against the 1st, 2nd, 4th and 5th defendants. I therefore enter judgment for the plaintiff against the 1st, 2nd, 4th and 5th defendants jointly and severally as follows:

1. The 1st defendant shall surrender to the Chief Land Registrar within thirty (30) days from the date hereof Grant No. I.R 83451 in respect of L.R No. 209/4360/58.
2. The Chief Land Registrar shall cancel the said Grant No. I.R 83451 in favour of the 5th defendant and entry number one (1) thereon through which the property was transferred to the 1st defendant. The Chief Land Registrar shall do the same in the register and in a copy of the Grant No. I.R 83451 held at the land registry.
3. The Chief Land Registrar shall thereafter register and issue a fresh Grant No. I.R 83451 in favour of the plaintiff in respect of L.R No. 209/4360/58 on the same terms and conditions as the cancelled Grant.
4. A permanent injunction is issued restraining the 1st, 2nd, 4th and 5th defendants from selling, alienating, transferring, charging, pledging, leasing, wasting or in any way howsoever interfering with all that parcel of land known as L.R No. 209/4360/58 original Title No. I.R 11791 and now registered as Grant No. I.R 83451 together with the improvements thereon.
5. The suit against the 3rd defendant is dismissed with costs to be paid by the 1st, 2nd, 4th and 5th defendants.
6. The plaintiff shall have the costs of the suit as against the 1st, 2nd, 4th and 5th defendants.

Delivered and Dated at Nairobi this 21st day of November 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Adan h/b for Mr. Athuok for the Plaintiff

Ms. Njoki h/b for Mr. Katwa for the Defendants

C. Nyokabi-Court Assistant