



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 204 OF 2017**

**(formerly Machakos HCCC NO. 243 of 2012)**

**PETER NJOROGE NG'ANG'A.....PLAINTIFF**

**VERSUS**

**KENYA REINSURANCE CORPORATION LIMITED**

**(Statutory manager for UNITED**

**INSURANCE COMPANY).....1<sup>ST</sup> DEFENDANT**

**UNITED INSURANCE COMPANY LIMITED...2<sup>ND</sup> DEFENDANT**

**TITLE IN CROSS-ACTION**

**KENYA REINSURANCE CORPORATION**

**LIMITED AS THE STATUTORY MANAGER OF**

**UNITED INSURANCE COMPANY**

**LIMITED.....PLAINTIFF**

**-VERSUS-**

**PETER NJOROGE NG'ANG'A.....1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL (for and on behalf of the**

**LAND REGISTRAR, KAJIADO REGISTRY AND CHIEF**

**LAND REGISTRAR).....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

By a Plaint dated the 9<sup>th</sup> July, 2012 and filed on 9<sup>th</sup> July, 2012, the Plaintiff prays for judgement against the defendants in the following terms:

- a. A permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves, their servants or agents or otherwise howsoever from, interfering, wasting, disposing, alienating, entering onto or remaining on or continuing in occupation of the suit property;
- b. Aggravated Damages against both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants
- c. Costs of the suit
- d. Further or other relief as the court may deem fit.

All the Defendants were served with summons to enter appearance and filed one joint Defence including a Counterclaim dated the 6<sup>th</sup> June, 2013 where they admitted advertising land parcel number Kajiado/Kaputiei – North/ 4243 (hereinafter referred to as the ‘suit land’) for sale and receiving a demand letter from the Plaintiff . They contend that they purchased the suit land and a title deed was issued on 28<sup>th</sup> August, 1999. They insist the Plaintiff’s purported ownership of the suit land is a product of illegality, irregularity and fraud as the Defendants have never offered it for sale nor sold it. They reiterate that they did not adhere to the demand letter through good faith and the Plaintiff cannot suffer any loss over the suit land as the same does not belong to him.

In the counterclaim filed on 6<sup>th</sup> June, 2013, the Defendants pray for judgement against the Plaintiff in the following terms:

- a) The Plaintiff’s suit be dismissed with costs.
- b) A declaration do issue that the transfer of the title deed over all that piece of land known as LR Number Kajiado/Kaputiei – North/ 4243 to the Plaintiff is invalid, null and void ab initio.
- c) An order do issue directing the land Registrar, Kajiado Lands Registry and or such other competent person(s), office or institution to recall, revoke, cancel and or nullify the Title Deed given on 14<sup>th</sup> March, 2012 in favour of the Plaintiff over all that parcel of land known as LR. Number Kajiado/Kaputiei – North/4243.
- d) An order of rectification do issue against the Land Registrar, Kajiado Lands Registry to rectify the records and or register at the Lands Registry, Kajiado and or any such successor land registry so as to reflect or read United Insurance Company Limited as the registered proprietor of all that piece of land known as LR. Number Kajiado/Kaputiei – North/4243.
- e) A permanent injunction do issue restraining the Plaintiff by himself, servants, agents employees and or any other person howsoever from trespassing, encroaching onto, remaining on and or in any other way whatsoever interfering with all that parcel of land known as LR Number, Kajiado/Kaputiei – North/ 4243.
- f) Damages
- g) Interests on prayer (f) hereinabove.
- h) Costs of the counterclaim to be borne by the Defendants in the counterclaim.
- i) Any other relief that this court may deem just and fit to grant.

The Plaintiff filed a Reply to the Defendant’s Defence and Counterclaim where he reiterated his claim and stated that he is a stranger to the allegations made in the Defence and Counterclaim. He contended that the original title deed to the suit land is being held as security by the Cooperative Bank of Kenya for having advanced him a facility which enabled him complete the purchase of the said land. The Plaintiff denies each and every allegation of fraud, misrepresentation, illegality and or irregularity made against him and insists he is the registered proprietor of the suit land inclusive of the developments thereon. He reiterates that before embarking on the purchase of the suit land, his lawyer conducted due diligence on his behalf wherein they conducted an official search that confirmed the suit land was registered in the name of MARTIN KARUMBA KOIYET, ID 13086057. Further that by a contract in writing dated the 15<sup>th</sup> September, 2011 MARTIN KARUMBA KOIYET sold the suit land to him for a consideration of Kshs. 21,500,000/=. He contends that he was financed by a loan from the Cooperative Bank of Kenya which paid the said MARTIN KARUMBA KOIYET the purchase price in full, the transfer documents were duly executed with the suit land successfully registered in his favour. He reiterates that he is the absolute proprietor of the suit land and the counterclaim is devoid of merit and should be dismissed with costs.

The Defendants filed a reply to the Defence to the Counterclaim where they also reiterated the facts of their case and maintained that any transaction in respect of the suit land by the Plaintiff/1<sup>st</sup> Defendant including his accomplices were a product of fraud, illegality, irregularity and thus have no legal consequences, null as well as void ab initio. Further that the said Defence is evasive and does not raise a triable issue.

All the parties filed their respective witness statements and list of documents and the matter proceeded to full hearing.

### **Evidence of Plaintiff**

**PW1:** Martin Koiyet Karumba confirmed during his examination in chief that he sold the suit land to Peter Njoroge Nganga. He averred that United Insurance Company Limited wanted to buy his land and he gave his title deed for land parcel Kajiado/Kaputiei North/772 which they kept at their offices. He stated that the lawyers for United Insurance Company Limited prepared the sale agreement and he went to the private land control board who declined to issue them with consent because he was selling 70 acres but they said they could only issue consent for sale of 50 acres. He insisted that after that there was no other agreement he entered into with them.

He reiterated that United Insurance Company Limited never returned to him his title to Kajiado/Kaputiei North/772 which was subdivided into nine (9) plots and also produced Kajiado/Kaputiei North 4243 which is the suit land herein. He contended that he has the original sale agreement with him and proof of ownership of the suit land which he confirms selling for 21,500,000/-. Further that he was paid the purchase price and signed the transfer, after which they got consent from the land control board. Sometime in 2012, he was informed that United Insurance Company Limited was selling the land and had placed an advertisement in the newspaper. He contended that United Insurance Company Limited paid him some money for Kajiado/Kaputiei North/772 which he did not refund to them.

During cross examination he averred that Kajiado /Kaputiei North /772 was 120.09 hectares but he was only selling 70 acres which the

private land control board declined to grant consent and stated that he should only sell 50 acres. He confirmed that he had agreed to sell United Insurance Company Limited land sometime in 1994 and that Land parcel no. Kajiado/Kaputiei North/772 was subdivided into eight (8) plots. He however could not recall the other numbers, did not avail the mutation forms in court nor could he remember when he subdivided the land. He reiterated that he went to the Land Control Board for the sale of 70 acres out of Kajiado/Kaputiei North/772. Further that they never entered into a fresh agreement with United Insurance Company, which did not return his title deed for parcel number Kajiado/Kaputiei North/772.

He averred that he never refunded United Insurance Company Limited part of the purchase price they had paid him and neither could he remember the amount, which he had been paid. He contended that in 2011 he met Peter Njoroge Nganga, who wanted to buy 50 acres of land and he got the title deed to the suit land (Kajiado/Kaputiei North/4243) re-issued to him because United Insurance Company Limited already had it. He confirmed being re-issued with the title deed to the suit land on 28<sup>th</sup> March, 2011. Further that the re-issue was as a result of a gazette notice by the government printer. He further confirmed that the suit land was a subdivision from Kajiado/Kaputiei North/772.

He learnt about the United Insurance Company Limited's title deed over the suit land through the Plaintiff and that all the nine (9) titles produced were resultant subdivisions from Kajiado/Kaputiei North/772 but he could not recall their numbers off head. He reiterated that when the Plaintiff approached him to purchase the suit land, he already had the reissued title. He contended that he never contacted United Insurance Company Limited after the private land board. Further that they also never contacted him. He referred to the title deed held by the United Insurance company limited, over the suit land and confirmed it was issued on 27<sup>th</sup> August, 1999. He claims it is a lie that on 27<sup>th</sup> August, 1999 a title deed was issued to United Insurance Company Limited's name as the same was still registered to him.

He referred to the Certificate of official search dated 1<sup>st</sup> February, 2011 where it indicated that the suit land was registered in the name of United Insurance Company Limited while on the section of inhibition, cautions and restrictions, it showed that a caution was registered by the Statutory Manager United Insurance Company Ltd under receivership. He averred that they registered a caution over the suit land because they did not conclude the transaction.

At re-examination he confirmed they went for the private land control board with the United Insurance Company Limited lawyers but the board refused to allow him sell 70 acres of land but only let him sell 50 acres. Further that he met the Plaintiff in 2011 and sold him the suit land.

**PW2 : Peter Njoroge Nganga.**

He stated that he is a business man who bought the suit land from Mr. Martin Karumba Koiyet for Kshs. 21.5 million, and signed a Sale agreement dated the 15<sup>th</sup> September, 2011. Before he purchased the suit land, his lawyers undertook due diligence to establish the authenticity of the title and he was informed it was clean. He referred to the Certificate of Official Search that indicated that Martin Karumba Koiyet was the proprietor of the suit land. He stated that he obtained a loan from Cooperative Bank of Kenya Ltd to purchase it, and the land was charged to it on 14<sup>th</sup> March, 2012 for Kshs. 2, 100,000 and a further charge of Kshs.5,050,000/-.

He executed forms to apply for consent of the land control board and transfer of the suit land to him, which was successful as he was issued with a title deed. He insisted that in the Land Registration document, it confirmed the suit land belongs to him and in the encumbrance section, it shows charge to Co-operative bank. He reiterated that the suit land was handed over to him in 2012 where he has been in occupation since then and undertakes farming. He contended that he spotted an advertisement in the Nation Newspaper dated the 25<sup>th</sup> June, 2012 indicating his parcel of land was being sold and consulted his lawyers who sent a demand letter to the Receiver Manager United Insurance Company Limited that responded vide their letter dated the 3<sup>rd</sup> July, 2012. His lawyers advised him to proceed to court to stop the sale and he got orders from court to stop it. He sought the Court's intervention to declare him as the owner of the suit land as he undertook due diligence before he purchased it and did not doubt the genuineness of the seller.

During cross examination he confirmed entering into a Sale Agreement on 15<sup>th</sup> September, 2011 with Mr. Martin Karumba Koiyet where he paid Kshs.21,500,000 after which he obtained a transfer in his favour. He was referred to the Transfer Form which indicated the consideration was Kshs.9 million. Further that he saw the response from United Insurance Company Limited in their list of documents, and insisted he was seeing the caution dated the 9<sup>th</sup> December, 2009, placed by the Mumut Ole Sialo Kenya Re Company Limited Statutory Manager for United Insurance Company Limited on the suit land for the first time.

He noted that the caution was registered on 27<sup>th</sup> January, 2009 while the certificate for official search was dated 1<sup>st</sup> February, 2011 which indicates the proprietor of suit land is United Insurance Company Ltd, while in the section for prohibitions, cautions and restrictions, it indicates caution by Statutory Manager United Insurance Company Limited on receivership.

He reiterated that Mr. Martin Karumba Koiyet never told him of any previous dealings with a third party over the suit land and only did so in 2016 when they were recording their respective witness statements. Further, that he never involved the police when he realized there were two titles to the suit land. He said they never concluded the dealings. He averred that the seller told him he had misplaced the original title after he had bought the suit land, but did not explain how United Insurance Company Limited got into possession of a title.

In re-examination he insisted he came into contact with the suit land in 2011 and did a search. He reaffirmed that this was not the first time he had purchased land. He explained the process of buying land to include a search, drawing a sale agreement and obtaining title to land. He reiterated that he did all this for the suit land. He explained that when one does a transfer, there is a government valuation as well as a market rate valuation and it is not strange if a transfer indicated a different value from the sale agreement.

The Plaintiff thereafter closed his case.

**Defence Evidence**

## **DW1: CHRISTOPHER ONYANGO.**

DW1 in his examination in Chief adopted the witness statement signed by Mr. Mumuti Ole Sialo dated the 6<sup>th</sup> June, 2013 who was a previous Statutory Manager. He confirmed working at the United Insurance Company Limited under statutory management as the Operations Manager where he reports to the Policy Holders Compensation Fund who are the current Statutory Managers.

During cross examination he stated that he could not confirm who sold the suit land to the United Insurance Company Limited and that he would not be able to know if a search was done before the purchase. Further he noted that they had a title to the suit property that made him believe that due process was adhered to; and according to his knowledge for one to obtain title signed by the Registrar, there has to be a Sale Agreement as well as consideration paid. He explained that the Company had undergone changes and at the time of handing over to the former Statutory Manager, it is the title deed for the suit land that was handed over as evidence of ownership.

He stated that their title deed was issued in 1999 before the Plaintiff obtained his. Further that the previous Statutory Managers also registered a caution over the suit land at the Land's Office. Since there was a caution on the land, this should have been taken into account by the Plaintiff before proceeding to buy the said suit land.

He noted that on the Certificate of Official Search furnished by the Plaintiff, it stated that Martin Karumba Koiyet was the proprietor of the suit land and there was no caution registered on it.

He averred that it was possible the Plaintiff could be in possession of the suit land because the Company, which is under statutory management, has many title deeds/lands, which they are not able to man/ guard on a day to day basis. Further that if there is an encroachment they would not know. He contended that the Plaintiff wrote to them claiming proprietorship of the suit land and they withdrew the advertisement for its disposal. He insisted that since their title was genuine, it meant the Plaintiff's was obtained fraudulently.

During re-examination, he confirmed there is a counterclaim which they lodged between themselves, the Plaintiff and Land Registrar. Further that the Statutory Manager has lodged a claim against Land Registrar Kajiado, and the claim is in respect of the suit land. He referred to a copy of the title deed dated the 27<sup>th</sup> August, 1999 over the suit land that measures 22.23 hectares which is in the name of United Insurance Company Limited. He noted that the title document in the name of Martin Karumba Koiyet in the Plaintiff's bundle of documents was issued on 28<sup>th</sup> March, 2011. He reiterated that previous Statutory Managers had registered cautions over the suit land and referred Court to the Search dated the 1<sup>st</sup> February, 2011 which showed suit land belonged to United Insurance Company Limited. Further that the Plaintiff is in possession of the suit land without their consent.

The Defendants thereafter closed their case.

## **Evidence of Mr. Nyandoro, the Principal Land Registrar – Kajiado, DW2**

During his examination in chief, he confirmed that the records for the suit land have been missing from the registry archives.

He stated that it is not clear as to how they have been missing but as at 2015 when the registry was organized, the records were not captured in the image system but he checked on the presentation register and the two titles that were presented to him, He retrieved the presentation registers of 27<sup>th</sup> August 1999 and 14<sup>th</sup> March, 2012 respectively.

He contended that according to the presentation Register a transfer was received in respect of Kajiado/Kaputiei North/4243, with the transferor being Martin K. Koiyet whereas the transferee was United Insurance Company Limited. Further that this was a clear indication that their Registry received transaction from United Insurance Company Limited but since Land Register is missing, he cannot confirm or verify if they were duly registered. He reaffirmed that this transaction was captured under day book no.543. He explained that he was also shown a second title deed in the name of Martin Karumba Koiyet issued on 28<sup>th</sup> March, 2011 but this transaction was never captured in the Presentation Book. Further, that his understanding was that the title deed being reissued, would have been reissued in case of loss or destruction and that could have only been possible through a Kenya Gazette Notice. However, with the missing of the record from the presentation book, it leaves a gap that cannot be filled on how the reissuance was effected.

He states that the third title in respect of the suit land issued to Peter Njoroge Nganga, was captured in the presentation register. It was received in the land registry on 14<sup>th</sup> March, 2012 with the transaction captured under daybook 874 as being a transfer, and the transferor is Martin Karumba Koiyet while the transferee is Peter Njoroge Nganga. He confirmed that these are records indicate transactions were received but they were not able to verify.

He reiterated that in the circumstances of the missing documents, the challenge could be how Martin Karumba Koiyet managed to receive a second title, which he later transferred to Peter Njoroge Nganga while the original one was still held by United Insurance Company Limited.

He contended that the records went missing before Peter Nganga Njoroge came into the picture and there seems to have been a reconstruction, of Land Register, Green Card and File. Further, that reconstruction and reissuance of title could be the challenge being faced in court.

He averred that the Land Registrar who did the transaction in 2012, Mr. Koskei is no longer in the public service and could have been in a better place to explain to court on how the reissuance was done. Further, that there are two titles and if we are to go by the Land Register on presentation book, it clearly shows transactions were received which is a reflection that the process was registered. He confirmed title of United Insurance Company Limited was issued first on 27<sup>th</sup> August 1999 while the Plaintiff's title was issued on 14<sup>th</sup> March, 2012 as well as the one re issued to Martin Koiyet on 28<sup>th</sup> March, 2011. He said it is only Martin Koiyet who could demonstrate on how he sold suit land to

two parties, and the process it entailed. He opined that after United Insurance Company Limited went under, there are many cases of missing documents within the Land's Office relating to it and cases in court.

During cross-examination he reiterated that he would leave it to court to determine issue of title. He confirmed that as per the Presentation Book, United Insurance Company Limited title takes precedence; and his position remained the same as to how Martin K. Koiyet sold the suit land twice. He explained that the ingredients of title entailed evidence of transfer recorded, availability of consent to transfer and stamp duty paid. He insisted the missing documents could not have gone missing without a reason, and Mr. Martin K. Koiyet who was reissued with a fresh title was better placed to explain the anomaly. He said there are very many cases where United Insurance Company Limited titles are missing.

The defence thereafter closed their case.

Both the Plaintiff and the Defendants filed their respective submissions where they each reiterated their claims. The Plaintiff further relied on various cases including **Arthi Highway Developers Limited Vs West End Butchery Limited & 6 others. Civil Appeal No. 246 of 2013; Esther Ndegi Njiru & 2 Another Vs. Leonard Gatei ELC Civil Suit No. 128 of 2011; Lawrence Mukiri Vs Attorney General & 4 others ELC Suit No. 169 of 2008; Alice Chemutai Too Vs Nickson Kipkurui Korir & 2 others ELC Civil Suit No. 51 of 2014 (O.S)** and **Agnes Naipanoi Pasha Vs Stephen K. Wangombe & 2 others High Court Civil Suit No. 123 of 2011**. The Defendant relied on the case of **Alice Chemutai Too, Nickson Kipkurui Korir & 2 others [2015] eKLR**. I have considered the respective submissions of the two parties.

### **Analysis and Determination**

After perusal of the pleadings including documents and witness statements filed and upon hearing the testimony of PW1, PW2, DW1, DW2 and DW3 I frame the following issues for determination:

- Who is the legitimate proprietor of the suit land.
- Is the Plaintiff entitled to the prayers sought in the Plaint.
- Are the Defendants entitled to the orders sought in the counterclaim
- Who should bear the costs of the suit?

On the first issue as to whom the suit land legitimately belongs, I note that both the Plaintiff and United Insurance Company Limited hold titles to the suit land. The United Insurance Company Limited's title deed is dated the 27<sup>th</sup> August, 1999 while the Plaintiff's title deed is dated the 14<sup>th</sup> March, 2012. Both the Plaintiff and the 1<sup>st</sup> Defendant were sold the suit land by one Martin Karumba Koiyet who was PW1. PW1 confirmed in court that he sold the suit land to the 1<sup>st</sup> Defendant first but they failed to secure the consent of the Land Control Board. Further that they did not conclude the transaction as the 1<sup>st</sup> Defendant did not pay the whole purchase price, although he had given them his title deed. He contended that he obtained a re issuance of his title on 28<sup>th</sup> March, 2011 and sold the suit land to the Plaintiff who paid him, the full purchase price, they obtained the consent of the Land Control Board, with the title being transferred to the Plaintiff.

DW3 who was the Land Registrar who presented the Land Records in court stated that it was not clear how Martin K. Koiyet was reissued with the title to the suit land as there are no records. I note PW1 did not furnish court with the gazette notice nor the Statutory Declaration that provided reasons why he sought for reissuance of the title deed. Further according to the Certificate of official search issued on 1<sup>st</sup> February, 2011 it indicated the suit land was registered in the name of United Insurance Company Limited while at the inhibition, cautions and restrictions section, it showed there was a caution registered by the Statutory Manager United Insurance Company Ltd under receivership. I note this is shortly before the title deed was reissued to PW1. The Land Registrar further confirmed that the Presentation Book that contains all the transactions relating to land, which only had records of the Transfer to the 1<sup>st</sup> Defendant and the Plaintiff respectively but not for the reissuance of title to PW1.

Section 33 of the Land Registration Act provides that; **'(1) Where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a replacement certificate of title or certificate of lease, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease.**

**(2) The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the chargee that the certificate of title or a certificate of lease has been lost or destroyed.**

**(3) If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a replacement certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspapers; whichever is first.'**

From evidence of PW1 and the Land Registrar, it is not clear as to whether the above provisions were adhered to. What is baffling is how the title deed to the suit land was re issued by the Land Registrar, and yet the same is not captured in the presentation book. From the evidence presented, I can decipher that the reissuance of the title deed to PW1 was not proper since he has not provided evidence to prove otherwise. Further, the Land Registrar was categorical in his evidence that it is only Mr. Koskei the then Land Registrar and Martin Koiyet (PW1) who could shed light on this transaction as he was unable to do so, from the records available at the lands office. I find an element of collusion

between the then Land Registrar Mr. Koskei and Mr. Martin Koiyet in reissuing the title deed to the suit land.

As to whether PW1 had a good title to pass to the Plaintiff, I wish to interrogate the evidence presented. PW1 stated that he sold the suit land to the Plaintiff using the reissued title, where they executed a Sale Agreement and obtained the consent of the Land Control Board after which the Land was transferred to the Plaintiff. This is evident from the entry 874 in the Presentation Book. PW1 further explained to court that the transaction between the 1<sup>st</sup> Defendant and himself was not concluded as the Land Control Board declined to grant the consent to transfer the suit land. However, I note PW1 stated that he only sold land parcel number Kajiado/Kaputiei North/772 and not the suit land. Later he stated that the 1<sup>st</sup> Defendant got itself registered on the suit land on 27<sup>th</sup> August, 1999 and had in its custody the original title deed. The transfer was confirmed by the Land Registrar who stated that the same was registered in the Presentation Book No. 543, with the transferor being Martin K. Koiyet. None of the parties provided any evidence that the title to the 1<sup>st</sup> Defendant was cancelled not surrendered. From the foregoing, I find that there is dishonesty on the part of the PW1 who was a vendor, who knew very well he had transferred suit land to the 1<sup>st</sup> Defendant and proceeded to again sell the same to the Plaintiff. I can only term him as a fraudster who intended to benefit twice from the suit land hoping not to be caught.

Further in the case of **Agnes Naipanoi Pasha Vs Stephen K. Wangombe & 2 others High Court Civil Suit No. 123 of 2011**, Justice Msagha observed that.....' **The court cannot countenance a situation whereby a party obtains a property through a criminal act, transfer the same to a third party and hold that the third party has a valid title.'**

In relying on the facts above including the authority, I find that PW1 Martin Koiyet did not have a good title to transfer to the Plaintiff as he had already sold land to the 1<sup>st</sup> Defendant. Further he failed to divulge important information to the Plaintiff about his dealings with the 1<sup>st</sup> Defendant. He could not even respond to simple questions as to how much of the purchase price he had been paid. It is interesting to note that he admitted taking the 1<sup>st</sup> Defendant to the Land Control Board for transfer of the suit land but on being asked as to whether he refunded the monies to the 1<sup>st</sup> Defendant, he confirmed not doing so as United Insurance Company Limited never asked for it. I further note that PW1 did not provide proof from the land control board that they denied to grant the consent to transfer land to 1<sup>st</sup> Defendant. United Insurance Company Limited registered a caution in December, 1999 which PW1 does not explain how the same was removed to pave way for his title. It is against the foregoing that I find that PW1 did not have a proper title to pass to the Plaintiff, however the Plaintiff proceeded to be registered as proprietor of the suit land, charged it to Cooperative Bank of Kenya and took possession. Section 26(1) of the Land Registration Act, provides that:

**'The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. '**

Based on the legal provisions above, what needs to be deciphered is whether the Plaintiff was part of the fraud to acquire the title to the suit land. From the evidence presented, there is no conclusive proof that the Plaintiff was part of the collusion with PW1 and the then Land Registrar to acquire title. The Land Registrar confirmed in court that there was no evidence to prove this and the records went missing before Peter Nganga Njoroge the Plaintiff herein came into the picture. Further that there seemed to have been a reconstruction, of Land Register, Green Card and File. It is the Plaintiff's contention that except for the title deed held by the 1<sup>st</sup> Defendant, it failed to furnish court with documentation to prove ownership of the transaction that led to their title. My holding is that the Presentation Book is a key document that provides documentary proof of the transactions that have been conducted in a Land Registry. Failure to furnish court with the Sale Agreement and Consent cannot be a ground to negate one party's title. In the current scenario, it was the evidence of the Land Registrar that the transaction that led to the transfer of the suit land to the 1<sup>st</sup> Defendant was indeed captured in the Presentation Book, with the evidence of Sale also being corroborated by PW1.

In the case of **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR Justice Sila Munyao** held that:

**' It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012 where I stated as follows :-**

**"...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 that 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 or 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 their titles by subsequent transactions. "I stand by the above words and I am unable to put it better that I did in the said dictum.'**

Further, Section 80 (2) of the Land Registration Act provides that **'The register shall not be rectified to affect the title of a proprietor,**

**unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.'**

In relying on the facts above and this authority, in so far as the Plaintiff did not participate in the fraud and claims to have taken possession of the suit land, I find that his title is not protected by section 26(1) of the Land Registration Act as PW1 did not have a good title to transfer to him. Further based on the records at the Lands Office, there is no evidence that the 1<sup>st</sup> Defendant's title was cancelled so as to pave way for the Plaintiff's title. It is against the foregoing that I find that the 1<sup>st</sup> Defendant is the legitimate holder of the title to the suit land.

As to whether the Plaintiff is entitled to prayers sought in the Plaint, based on my finding above, I note that the Plaintiff is not the legitimate owner of the suit land, hence cannot claim for a permanent injunction as against the Defendant over the suit land and damages. I find that the Plaintiff is not entitled to the prayers sought. Further that he can seek his remedies from PW1 who sold him the suit land knowing fully well, he did not have the capacity to do so, as the 1<sup>st</sup> Defendant's title had not been cancelled.

As to whether the 1<sup>st</sup> Defendant is entitled to the prayers sought in the counterclaim, I find that since it is the legitimate owner of the suit land having acquired it in 1999 with a title deed being issued to it, it is indeed entitled to the prayers sought.

However, in terms of the aggravated damages sought, I find that the Defendants failed to canvass any evidence to prove any losses they incurred. In so far as the Plaintiff provided an undertaking as to damages on 18<sup>th</sup> December, 2012 but since the same was not proved, I will not award any to the Defendants. It is against the foregoing that I find that the Defendants have established their case on a balance of probability and proceed to make the following order:

1. The Plaintiff's suit be and is hereby dismissed.

**2. A declaration be and is hereby issued that United Insurance Company Limited is the legal owner of Land Parcel Title No.KAJIADO/ KAPUTIEI NORTH/ 4243**

3. A declaration be and is hereby issued that the transfer of the title deed over all that piece of land known as LR Number Kajiado/Kaputiei – North/ 4243 to the Plaintiff is invalid, null and void ab initio.

4. The Land Registrar Kajiado be and is hereby directed to recall, revoke, cancel and or nullify the Title Deed issued to Peter Nganga Njoroge on the 14<sup>th</sup> March, 2012 for land parcel number Kajiado/Kaputiei – North/4243.

5. The Land Registrar Kajiado be and is hereby directed to rectify the records and or register at the Lands Registry, Kajiado and or any such successor land registry so as to reflect and/or read United Insurance Company Limited as the registered proprietor of Land Parcel Number Kajiado/Kaputiei – North/4243.

6. A permanent injunction is hereby issued restraining the Plaintiff by himself, servants, agents employees and or any other person howsoever from trespassing, encroaching onto, remaining on and or in any other way whatsoever interfering with all that parcel of land known as LR Number, Kajiado/Kaputiei – North/ 4243.

7. The costs of the suit are awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**Dated signed and delivered in open court at Kajiado this 5th day of March, 2018**

**CHRISTINE OCHIENG**

**JUDGE**

**Present:**

Cc Mpoye

Omulama for Plaintiff

N/A for Defendants