



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 1784 OF 2007**

**(FORMERLY NAIROBI HCCC NO. 141 OF 2006)**

**HENRY ORYEM OKELLO**

**(Suing in his capacity as the Legal Representative of**

**LABULE OKELLO LUTWA (DECEASED).....PLAINTIFF**

**VERSUS**

**SUKHDEV SINGH LALY.....1<sup>ST</sup> DEFENDANT**

**LAZARUS KIBUI NDEGWA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The Plaintiff seeks delivery of vacant possession of L.R. No. 209/8000/136 together with the improvements on it; mesne profits at the rate of Kshs. 50,000/= per month or such amount that the court may assess with effect from June 2000 until vacant possession is handed over to the Plaintiffs; interest; and costs in the plaint filed in court on 15/2/2006.

2. The Plaintiff resides at Kampala, Uganda and is suing in his capacity as the personal representative of the late Labule Okello Lutwa also known as General Tito Okello Lutwa. Initially, Erisanwero Opira, who had been appointed as a personal representative alongside the Plaintiff, was the 2<sup>nd</sup> Plaintiff in the suit. He died before the suit was heard leaving Henry Okello as the only Plaintiff. The Defendants were residents in Nairobi at the time this suit was filed.

3. The Plaintiff avers that his father Labule Okello Lutwa was the registered owner of L.R. No. 209/8000/136 (original number 209/8000/41/1) situated at Nairobi together with the buildings and outhouses erected on it ("the Suit Property"). Labule Okello Lutwa died domiciled in the Republic of Uganda on 3/6/1996 and appointed the Plaintiff by his last will dated 14/3/1996 to be his executor. The probate of the will was granted to the Plaintiff and Erisanwero Opira by the High Court of Uganda at Kampala and subsequently resealed by the High Court of Kenya at Nairobi.

4. The Plaintiff discovered in June 2000 that the 1<sup>st</sup> Defendant was occupying the Suit Property without his consent. Despite demand being made of the 1<sup>st</sup> Defendant, he refused to give vacant possession. The Plaintiff claims that the Defendant was in illegal and wrongful possession of the Suit Property and had no right or title to it. Initially, only the 1<sup>st</sup> Defendant was sued. The 2<sup>nd</sup> Defendant was added to the suit upon realisation that the 1<sup>st</sup> Defendant was the 2<sup>nd</sup> Defendant's tenant. The 1<sup>st</sup> Defendant moved out of the house after the filing of this suit.

5. The Plaintiff claimed that the Defendants' trespass and continued occupation of the Suit Property had occasioned financial loss and inconveniences to the Estate of the late Labule Okello Lutwa. Consequently, the Plaintiffs seeks mesne profits in respect of the Defendants' unlawful occupation of the Suit Property at the rate of Kshs. 50,000/= per month with effect from June 2000 until the Defendant vacates the Suit Property.

6. In his defence filed in court on 7/4/2006, the 1<sup>st</sup> Defendant denied the Plaintiff's claim and also denied that the Plaintiff had capacity to commence these proceedings. The Defendant challenged the resealing of the grant relied on by the Plaintiff arguing that the grant sealed was invalid. The Defendant also pleaded that the suit is barred by statute and that the Plaintiff's title had been extinguished. The 1<sup>st</sup> Defendant asked the court to dismiss the suit with costs to the Defendant. The 1<sup>st</sup> Defendant was represented by Mwaniki Gitau & Co. Advocates.

7. The 2<sup>nd</sup> Defendant filed his defence on 27/10/2009 pursuant to the court order of 13/10/2009. He denied that the Plaintiff was the legal

representative of Labule Okello Lutwa. He averred that he had been in possession of the Suit Property since 10/5/1993 following the sale by the registered proprietor Labule Okello Lutwa. He averred that Labule Okello Lutwa had surrendered the original certificate of title to him upon the sale of the Suit Property and that he took over the tenancy of one Michael Gilbert and subsequently let out the Suit Property to other tenants including the 1<sup>st</sup> Defendant.

8. He maintained that the 1<sup>st</sup> Defendant was in the Suit Property as his lawful tenant. He stated that on 29/12/1999, a fire gutted down the Suit Property and as the owner he paid for the damage and renovation and nobody staked a claim to it. He termed the Plaintiff's claim baseless and mischievous. The 2<sup>nd</sup> Defendant denied that the Estate of the late Labule Okello Lutwa had suffered loss or damage as alleged by the Plaintiff and urged the court to dismiss the suit with costs to him.

9. The 1<sup>st</sup> Defendant filed a Notice to Co-Defendant on 11/6/2010 pursuant to Order 1 Rule 21 of the Civil Procedure Rules claiming that he is entitled to contribution or indemnity from the 2<sup>nd</sup> Defendant.

10. The Plaintiff called five witnesses to testify on his behalf. The first witness was Ramesh Parekh Manilal. He confirmed that the Plaintiff asked him to find him a residential property in Nairobi which he wished to purchase. When he learnt that plot number 209/8000/136 with a house on it was up for sale, he informed the Plaintiff who negotiated directly with the owner of the property. The Plaintiff then instructed Mr. Parekh of Shah & Parekh Advocates to handle the transaction. The Plaintiff asked him to look after the property and rent it out and collect rent. At the time of purchase of the property, a tenant by the name Michael Gilbert lived in the house. The tenancy continued and Mr. Ramesh Parekh would collect rent and bank it in the Plaintiff's account. When Mr. Gilbert left the country, he recommended that Mrs. Porter could rent the premises. Sometime in 1997 the Plaintiff wished to sell the Suit Property and he asked Mr. Ramesh Parekh to request Mrs. Porter to move out of the house. Since Mr. Ramesh Parekh had nobody to look after the house, he acceded to Mrs. Porter's request to have her housemaid stay in the house for few months after she moved out.

11. Mr. Ramesh Parekh learnt later on when he went to see the property that there had been a fire which had damaged the roof of the servant quarters. However, there was no damage to the main house and to the guest room. Mr. Ramesh Parekh informed the Plaintiff and the insurance company through Unicorn Insurance Brokers Limited. A few days later when he went to see the house, he found the main gate locked and a four-wheel drive vehicle bearing a United Nations registration number plate parked in the compound. He hooted but nobody came to open the gate. He later came to learn that Laly Singh, the 1<sup>st</sup> Defendant was occupying the house. He knew the 1<sup>st</sup> Defendant's father's shop. When the Plaintiff came to Nairobi he took him to see the 1<sup>st</sup> Defendant at his father's shop. The Plaintiff informed him that he wished to throw the 1<sup>st</sup> Defendant out of the Suit Property. Mr. Ramesh Parekh directed him to the firm of Shah & Parekh Advocates to deal with the matter.

12. On cross examination, the witness stated that he started dealing with the Suit Property in 1985. He used to travel to Kampala a lot to do business and Colonel Tito Okello was introduced to him by friends when he expressed interest to purchase the property in Kenya. Since he could not travel, his son Henry who was in the U.K. would travel to Nairobi and handle the transaction. He confirmed that he had authority from the Plaintiff to deal with the Suit Property. He confirmed that he had introduced the Plaintiff to the original proprietor at the time of purchase of the Suit Property. He stated that he did not know the 2<sup>nd</sup> Defendant and that the 1<sup>st</sup> Defendant was not their tenant. He confirmed that the house was occupied by a maid from 1997 when Mrs. Porter moved out of the house.

13. The Plaintiff gave evidence. He adopted his witness statement. He stated that he was the eldest son of Labule Okello Lutwa whose other name was General Tito Okello Lutwa. His father instructed him to buy a property in Nairobi in 1985. He instructed Ramesh Manilal Parekh to look for a property for him. Mr. Ramesh Parekh showed him L.R. No. 209/8000/136 (the Suit Property) situated in New Muthaiga, Nairobi and introduced him to the owners, Surrinder Singh Babra and his wife Romesh Kumary Babra and they negotiated and agreed on the price. He instructed Mr. Hasmukh Parekh of Shah and Parekh Advocates to finalise the sale transaction. He paid the purchase price directly to the owner and was subsequently informed that the Suit Property had been transferred and registered in the name of Labule Okello Lutwa, one of the names his father used. He instructed Mr. Hasmukh Parekh to keep the title documents as his attorney and further instructed Mr. Ramesh Manilal Parekh to manage the property.

14. His father died on 3/6/1996 at Kampala and was buried on 7/6/1996 in his ancestral village of Lapana, Nam Okora, Kitgum District, Uganda. Before his death, he made a will on 14/3/1996 under the name of General Tito Okello Lutwa while hospitalised in Nsumbya Hospital, Kampala appointing the Plaintiff and his Uncle Erisanweri Opira as the executors of his will. After obtaining probate of the will in the High Court of Uganda at Kampala in Cause No. 327 of 1996, the executors appointed Mr. Hasmukhrai Manilal Parekh Advocate to get the probate resealed in the High Court of Kenya; which was done in Nairobi High Court Cause number 3071 of 2002.

15. The Plaintiff instructed Ramesh Parekh in 1997 to get the tenant to vacate the Suit Property since he wished to sell it.

16. The Plaintiff produced copies of the title for the Suit Property which shows at entry no. 8 that title was issued to Surrinder Singh Babra and Romesh Kumari Babra as joint tenants on 17/8/1983. The next entry made on 25/11/1985 reads transfer to Labule Okello Lutwa for Kshs. 1.1 million, area 0.2631 hectares. The L.R. No. is indicated as 209/8000/136 (original no. 209/8000/41/1). The copy of the transfer drawn by Shah & Parekh Advocates dated 19/11/1995, confirms that the Suit Property was being transferred to Labule Okello Lutwa of P.O. Box 40465 Nairobi. Another entry was made on 19/11/2001 indicating that a provisional certificate of title was issued vide Gazette Notice No. 4744 of 20/7/2001. The certified copy of the title is dated 2/2/2007.

17. There were two Powers of Attorney produced. In the one dated 22/4/1986 witnessed by F.H. Kashif, Advocates and Commissioner for Oath in Khartoum, Sudan, Labule Okello Lutwa appointed Henry Okello Oryem holder of Uganda passport No. D/00492 issued in Kampala to be his Attorney to administer all his real estates situated in Kenya and to sell mortgage and otherwise deal with the property.

18. A copy of the last will of General Tito Okello Lutwa made on 14/3/1996 appointing his brother Erisanweri Opira and son Oryem Henry Okello to be his executors failing whom he appointed Obwona Charles Okello, listed several properties and dependants among other provisions. The will bequeathed the assets to the children of Labule Okello Tito. A copy of passport no. G000261 issued to Lutwa Tito

Okello confirming that he was a Ugandan citizen was also produced in evidence. It stated that he was born in 1914 in Kitgum and resided in Uganda.

19. The Plaintiff produced a copy of the Memorandum and Articles of Association in respect of a company known as Labule Okello Lutwa and Sons Limited which was incorporated in Uganda. The Memorandum of Association shows that Major General Tito L.O. had subscribed for 550 shares and signed the memorandum as a subscriber. His signature also appeared on the Articles of Association.

20. The Plaintiff also produced a copy of the grant issued by the High Court of Uganda at Kampala in Probate and Administration Cause no. 327 of 1996 confirming that administration of the last will of General Tito Okello Lutwa was granted to the Plaintiff and Erisanwero Opira as executors. It is dated 22/7/1996. The Plaintiff produced a Notice of Resealing of Grant for General Tito Okello confirming that the probate registry of the High Court of Kenya had resealed the grant of probate granted by the High Court of Uganda at Kampala on 26/7/1996. The reseat form presented in the High Court of Kenya at Nairobi, Probate and Administration Cause number 3071 of 2002 was presented by Hasmukhrai Manilal Parekh and stated that General Tito Okello Lutwa died on 3/6/996.

21. On cross examination by the 2<sup>nd</sup> Defendant, the Plaintiff confirmed that he was not resident in Kenya on 20/7/2001. He did not know about the gazette Notice which the 2<sup>nd</sup> Defendant was referring to. He stated that his father authorised him to register the Suit Property in the name of Labule Okello Lutwa. The power of attorney which he produced in evidence was issued in Sudan where his late father fled to and sought refuge after the coup in Uganda. He confirmed that the power of attorney read Labule Okello Lutwa while the passport bore the names Lutwa Tito Okello. He confirmed that although the names appearing in the letters of administration, in the passport and on the title were different, they were his father's names and he was known by all those names. He was certain that the signatures appearing in his father's last will, the passport and the power of attorney dated 22/4/1986 executed in Khartoum Sudan were the same and that they were his father's signature.

22. It was his evidence that when they discovered that someone was residing in the Suit Property, he asked his lawyers to recover possession of the Suit Property since he was studying at the University in the U.K. The purpose for resealing the grant was to enable him transact on the Suit Property and his father's other businesses in Kenya. He stated that between 1997 and 2004 he could not take any steps with respect to Suit Property in Kenya because the grant had not been resealed in Kenya.

23. Susan Porter gave evidence for the Plaintiff. She stated that she was a tenant in the Suit Property up to February, 1997. She moved into the house when a friend of theirs called Michael Giliberti was leaving Kenya and asked if they were interested in staying in the Suit Property. Mr. Giliberti introduced her to Mr. Ramesh Parekh who agreed to accept her as a tenant. She used to pay rent to Mr. Parekh in cash. She never dealt with any other person over the house and only knew Mr. Ramesh Parekh. She denied ever being the 2<sup>nd</sup> Defendant's tenant whom she stated that she had never met. She denied writing the letter dated 5/7/2006 indicating that she handed over the house keys to the 2<sup>nd</sup> Defendant. It was also her evidence that her husband John Porter never dealt with the 2<sup>nd</sup> Defendant. She produced a copy of the Affidavit she swore on 22/6/2007 on how she came to be in possession of the Suit Property, the mode of paying rent and the fact that when she moved out of the house, she left the keys in the possession of her house help who continued to stay in the premises. She wrote the letter of recommendation for her house help called Norah whom she left in the house.

24. She could not recall signing a lease agreement but stated that her husband knew Mr. Ramesh Parekh personally. She used to pay rent for the house. She denied issuing the cheques copies of which were produced by the 2<sup>nd</sup> Defendant. On the utility bills from the Kenya Power and Lighting Company Limited (KPLC), she clarified that she never cancelled the contract with KPLC for the supply of electricity to the Suit Property. The bill dated 28/12/1999 was not her bill since she moved out in February, 1997. She stressed that her husband never gives out a copy of his passport to anybody and did not know how the copy of her husband's passport found its way to the documents filed in this case. She confirmed that when she moved out of the house she requested Mr. Parekh to allow Norah her house help to continue living in the quarters so that she could look after the house.

25. Mr. Hasmukhrai Manilal Parekh, the remaining partner in the firm of Shah & Parekh Advocates gave evidence. He confirmed that in 1985 the late Labule Okello Lutwa instructed him through the Plaintiff to complete the transfer of the Suit Property in favour of Labule Okello Lutwa. He completed the registration of the transfer and a certificate of title was issued in favour of Labule Okello Lutwa. He kept the title documents in his office on Aga Khan Walk, Nairobi. At the time of the bomb blast in August 1998, the offices of Shah and Parekh Advocates were damaged and the law firm lost many files and documents.

26. He was informed that Labule Okello Lutwa died at Kampala, Uganda on 3/6/1996. The Plaintiff asked him to have the probate of the will of the late Labule Okello Lutwa issued by the High Court Kampala, Uganda resealed in Kenya. He acted for the Plaintiff in getting the probate resealed by the High Court of Kenya at Nairobi in succession cause No. 3071 of 2002.

27. In 2004 the Plaintiff instructed him to file suit against one Singh who was occupying the Suit Property illegally. His firm filed suit on 15/2/2006 against the 1<sup>st</sup> Defendant who at the time was staying in the Suit Property. He confirmed that he did the conveyance for Labule Okello Lutwa in 1985. He clarified that L.R. No. 209/8000/41 was the mother title and that a portion of it being L.R. No. 209/8000/136 was the subject matter of the conveyance and this suit.

28. He stated that even though the Suit Property was not mentioned in the will, he relied on the residual clause of the will which made provision for the residue and remainder of the estate of Labule Okello Lutwa.

29. When he did a search later on he discovered that a provisional certificate of title for the Suit Property was issued on 19/11/2001 pursuant to Gazette Notice No. 4744 of 20/7/2001. His firm instructed investigators known as Accident and General Investigation to find out who was living in the house when the Plaintiff instructed him to eject the person who was occupying the Suit Property. The investigations confirmed that the 1<sup>st</sup> Defendant was living in the house. The 1<sup>st</sup> Defendant and Mr. Mwaniki Gitau Advocate, who acted for the 1<sup>st</sup> Defendant did not tell him who the owner of the house was. He learnt of this when the 2<sup>nd</sup> Defendant filed an application to join the suit. He stated that the postal address of 40465 Nairobi given in the transfer of the Suit Property prepared by his firm belonged to Ramesh Parekh and was used

because the purchaser, Labule Lutwa, a Ugandan citizen who was residing in Sudan at the time did not have a postal address in Kenya.

30. Mr. Parekh Advocate became aware that the 1<sup>st</sup> Defendant was evicted from the Suit Property when the 1<sup>st</sup> Defendant filed an application against the 2<sup>nd</sup> Defendant for wrongfully evicting him. The advocate stated that he first came to know that Labule Okello Lutwa went by other names when the probate from Uganda came into his hands.

31. He confirmed that he wrote to Mwaniki Gitau & Company Advocates on 7/10/2004 seeking to know if the 1<sup>st</sup> Defendant had authority to lease the Suit Property since they considered him a trespasser. Mwaniki Gitau & Company Advocates responded on 8/10/2004 stating that they were seeking instructions from their client and would revert soon but in the meantime they wished to be furnished with documentary evidence of the capacity of the client of Shah & Parekh Advocates. The 1<sup>st</sup> Defendant failed to disclose whom he had leased the Suit Property from when he was asked to provide this information.

32. As far as the advocate was concerned, the Defendants were conspiring to deprive the Plaintiff of the Suit Property that is why the 1<sup>st</sup> Defendant applied to be released from this suit but the court declined. He referred to the 1<sup>st</sup> Defendant's application in which he claimed he had spent Kshs. 20 million to improve the Suit Property and wondered how a tenant paying rent of Kshs. 25,000/= could have expended Kshs. 20 million to improve the Suit Property. He maintained that one of the issues the court has to determine is who the owner of the Suit Property is and who was in occupation at the time the suit was filed.

33. The valuer whom Shah & Parekh Advocates instructed to inspect the Suit Property and ascertain its market value testified. He produced his report which tabulated the monthly rents for the Suit Property from 2000 to 2011. The valuer stated that the rental value for the Suit Property in 2017 would be Kshs. 160,000/= per month. Its market value stood at Kshs. 40 million as at 13/5/2011 while in 2017 it would be in the range of Kshs. 110 million.

34. The investigator who was tasked to ascertain who was residing in the Suit Property also gave evidence. He stated that most of the times the house was locked. The investigator, Maldip Singh Kalsi confirmed that he found the 1<sup>st</sup> Defendant in the house and was able to recognise him since he used to see him in their temple. He stated that the 1<sup>st</sup> Defendant informed him that he was a tenant and that the documents were with Mwaniki Gitau Advocates. The occupant did not tell him who the owner of the house was.

35. The 2<sup>nd</sup> Defendant called two witnesses. Mr. Sylvester Okello who has previously worked as a court clerk in several law firms confirmed that he knew the 2<sup>nd</sup> Defendant and that they had been friends from the mid-1980s. Sometime in 1993, the 2<sup>nd</sup> Defendant informed him that he wished to buy a property in Thigiri Gardens off Thigiri Road comprising a 5 bedroomed double-storeyed house and other developments for Kshs. 3.2 million. He stated that he accompanied the 2<sup>nd</sup> Defendant to the offices of Njenga Njau & Company Advocates when he went to make payment for the Suit Property. He claimed that he met an old man in the offices of Njenga Njau & Company Advocates who the 2<sup>nd</sup> Defendant introduced to him as Labule Okello Lutwa, the proprietor of the property he intended to purchase. He witnessed the execution of the agreement by the 2<sup>nd</sup> Defendant after which the 2<sup>nd</sup> Defendant handed over banker's cheques for Kshs. 3.2 million to the purchaser in his presence and was then given the original title for the Suit Property together with an executed transfer form.

36. The 2<sup>nd</sup> Defendant gave evidence. He stated that he purchased the Suit Property on 10/5/1993 from the registered proprietor Labule Okello Lutwa. The sale was conducted by Njenga Njau & Company Advocates who represented both parties. Mr. Sylvester Okello was his witness in sale transaction. He claimed that he paid the consideration of Kshs. 3.2 million for the Suit Property and that he took possession of the property. He was given the original title to the property plus the executed transfer which he was to lodge at the Lands office once he had the funds to pay the transfer fees. He claimed that he became the proprietor of Suit Property from May 1993 which he let out to willing tenants one of whom was the 1<sup>st</sup> Defendant in this case.

37. He claimed that a fire gutted down the Suit Property and damaged part of the premises on 29/12/1999. He claimed he lost the original title around February 2000 during a robbery by a gang of three men who passed themselves out as policemen and took away the title claiming they were investigating ownership of the Suit Property. He applied for a duplicate certificate of title from the Registrar of Lands and the application was advertised in the Kenya Gazette Vol. CIII No. 45 of 20/7/2001.

38. The 2<sup>nd</sup> Defendant produced several documents. The General Power of Attorney is dated 15/3/1998 and states that Labule Okello Lutwa of P. O. Box 55678, Nairobi or P. O. Box 7368 Kampala, Uganda had appointed the 2<sup>nd</sup> Defendant, Mr. Lazarus Kibui Ndegwa of ID No. 7322649 of P. O. Box 63469 Nairobi to manage his property located along Thigiri Road, Thigiri Gardens in New Muthaiga, Nairobi. As the appointed agent with his company Sampan Enterprises, he was to deal with the property known as L.R. No. 209/8000/136 original 209/8000/41/1 I.R. No. 25656. The Power of Attorney empowered the donee to inspect the premises, pay outstanding bills and allocate a tenant and or prosecute trespassers. Further, to organise for funds for improvement of the property for repairs and to look for a buyer on condition that the sale price would be more than 8 million shillings. This Power of Attorney was registered as No. 34787/1 having been presented on 28/6/2000. He produced a copy of the power of attorney dated 15/3/1998.

39. The 2<sup>nd</sup> Defendant stated that he approached Okello Lutwa whom he had purchased the Suit Property from to give him a power of attorney over the Suit Property. He denied knowing the Plaintiff and also denied that he had a cause of action against him over the Suit Property. He claimed that he had been in occupation of the Suit Property since 10/5/1993 and had had various tenants on the Suit Property the first of whom was Michael Gilbert whom he inherited from the previous proprietor Labule Okello Lutwa. He confirmed that the 1<sup>st</sup> Defendant was his tenant.

40. On cross examination, the 2<sup>nd</sup> Defendant maintained that the fire incident occurred on 29/12/1999 and not 24/10/1999 as stated in Labule Lutwa's Affidavit which he tendered in evidence. He also stated that the original title got burnt in the fire. When he was shown the photograph on the passport of Lutwa Tito Okello, he confirmed that that was not the man who sold him the Suit Property. On the issue of Susan Porter not knowing him, he stated that he used to deal with her husband John Porter. He denied that the 1<sup>st</sup> Defendant carried out any

renovation on the Suit Property. The 1<sup>st</sup> Defendant did not call any witness.

41. Parties filed and exchanged submissions which they highlighted. The 1<sup>st</sup> Defendant maintained that the issue for determination was that the 1<sup>st</sup> Defendant was a tenant and claimed no ownership over the suit premises. Further that he cannot deliver possession as claimed by the Plaintiff having been evicted from the house by the 2<sup>nd</sup> Defendant way back in 2011. He further submitted that since the 2<sup>nd</sup> Defendant has been benefiting from the Suit Property in terms of rent, ownership and possession, the 1<sup>st</sup> Defendant is not liable to pay mesne profits to the Plaintiff. The 1<sup>st</sup> Defendant submitted that he made it clear in 2004 to the Plaintiff that he was the 2<sup>nd</sup> Defendant's tenant. The Defendant urged that the Plaintiff's claims against him should be dismissed since the Plaintiff did not prove collusion between the Defendants.

42. The 2<sup>nd</sup> Defendant maintained that no demand is made against him in the Amended Plaint. He argued that the Plaintiff has not proved that Labule Okello Lutwa was also General Tito Okello, his father. He maintained that there was no conclusive evidence that Labule Okello Lutwa was also known as General Tito Okello. He maintained that the provisional certificate of title over the Suit Property was issued to him through a lawful process and that the Plaintiff never objected to the advertisement he caused to be placed in the Kenya Gazette over the Suit Property. The 2<sup>nd</sup> Defendant urged the court to dismiss the suit arguing that there was no evidence that the Plaintiff purchased the Suit Property in 1985.

43. The 2<sup>nd</sup> Defendant also submitted that the Amended Plaint was not supported by a verifying affidavit and ought to have been struck out. He took exception to the use of the word "African" appearing in the correspondence between the investigator and the firm of Shah and Parekh Advocates. He maintained that Mr. John Porter was introduced to him by a Mr. Michael Gilbert as a tenant to take over the Suit Property. He relied on the copy of the passport of Mr. John Porter. It was his evidence that it became impossible to call Mr. John Porter as a witness after his wife testified for the Plaintiff in the matter.

44. He contended that he had proved that he purchased the Suit Property from the registered proprietor, Mr. Labule Okello Lutwa and relied on the sale agreement, copies of transfer, copy of certificate of title and copy of the provisional certificate of title which according to him were not controverted by the Plaintiff. He relied on a copy of the extract from the Law Society of Kenya showing that the status for the advocate who dealt with the sale transaction between him and Mr. Labule Okello Lutwa, Mr. Njenga, Njau registered as P105/1152/80 indicated that he was deceased by 2017.

45. The Plaintiff's advocates submitted that the issues the 2<sup>nd</sup> Defendant drew included the issue as to who is entitled to vacant possession of the Suit Property.

46. The issues for determination are: -

- a) Who is in possession of the Suit Property?
- b) Is the Plaintiff the legal representative of Labule Okello Lutwa?
- c) Is the grant of probate which was issued in Kampala, Uganda valid? Was it properly resealed by the High Court of Kenya at Nairobi?
- d) Is General Tito Okello the same as Labule Okello Lutwa?
- e) Does the 2<sup>nd</sup> Defendant hold a valid title to the Suit Property?
- f) Who owns the Suit Property?
- g) Should the 1<sup>st</sup> Defendant pay the mesne profits claimed by the Plaintiff?

47. The Plaintiff in the Amended Plaint dated 2/8/2013 seeks judgement against the 1<sup>st</sup> Defendant for the delivery up of vacant possession to the Plaintiff of the Suit Property based on the fact pleaded at paragraph 6 of the Amended Plaint that the 1<sup>st</sup> Defendant was occupying the Suit Property. The 1<sup>st</sup> Defendant submitted that he cannot possibly give vacant possession of the Suit Property having been evicted from the Suit Property by the Defendant in 2011. The 2<sup>nd</sup> Defendant confirmed this fact. The 1<sup>st</sup> Defendant argued that the suit should be dismissed on the ground that the Plaintiff failed to amend the Plaint to show that he was seeking the orders for vacant possession against the 2<sup>nd</sup> Defendant who admitted that he is currently occupying the Suit Property.

48. The 2<sup>nd</sup> Defendant confirmed that he is in possession of the Suit Property. He evicted the 1<sup>st</sup> Defendant from the premises in 2011. The 1<sup>st</sup> Defendant did not disclose in his defence that he was the 2<sup>nd</sup> Defendant's tenant. He also failed to disclose this fact when the Plaintiff inquired before filing this case.

49. The 2<sup>nd</sup> Defendant did not challenge the Plaintiff's evidence that his father General Tito Okello died in Uganda in 1996. The Defendants neither challenged the grant of probate issued by the High Court of Uganda to the Plaintiff nor did they demonstrate that the resealing of that grant in Kenya was not properly done. The court finds that the grant of probate over the estate of General Tito Okello Lutwa was properly issued.

50. The main dispute in the case is whether General Tito Okello Lutwa is the same person referred to as Labule Okello Lutwa. The Plaintiff maintains that both names refer to one and the same person, that is, his deceased father. Both Defendants denied that General Tito Okello

Lutwa is also known as Labule Okello Lutwa. The Plaintiff relied on his father's names which appeared in the passport as Lutwa Okello Lutwa together with his father's will stated to be the last will of General Tito Okello Lutwa. The will makes reference to the assets and shares in the company known as Labule Okello Lutwa and Sons Limited. The Plaintiff produced a copy of the memorandum and articles of association of this company which listed Major General Tito L.O. as a shareholder in the company.

51. The Plaintiff testified that he acted on his father's instructions in purchasing the Suit Property in Nairobi and having it registered in the name of Labule Okello Lutwa. The court finds the Plaintiff's assertion that his father used the names Tito Okello Lutwa at times and Labule Okello Lutwa at other times believable. General Tito Okello was a notable public figure in Uganda. If the 2<sup>nd</sup> Defendant wished to confirm whether or not this was the same person he claims sold him the Suit Property, then he would have sought assistance from the Ugandan High Commission. On a balance of probabilities, the court finds that Tito Okello Lutwa was also known as Labule Okello Lutwa.

52. It is not in dispute that the Suit Property was registered in the name of Labule Okello Lutwa. The 2<sup>nd</sup> Defendant claims that he purchased the Suit Property from Labule Okello Lutwa in 1993. The witness he called stated that the 2<sup>nd</sup> Defendant introduced him to an old man as Labule Lutwa Okello from whom he was purchasing the Suit Property and that this man handed over the title documents to the 2<sup>nd</sup> Defendant after he tendered to him the banker's cheque for the purchase price. The 2<sup>nd</sup> Defendant did not provide any form of identification from Labule Okello Lutwa whom he dealt with. A copy of his passport would have shown who he dealt with.

53. The 2<sup>nd</sup> Defendant did not show how he came to learn that Labule Okello Lutwa, a Ugandan, was selling his property and whether he had been living in Nairobi. The 2<sup>nd</sup> Defendant claimed he took over the tenancy of Michael Gilberti when he purchased the Suit Property. He did not produce any evidence to support this claim. If it were so, then Michael Gilberti would have notified Susan Porter the tenant who took over the premises on the Suit Property when he moved out that she would have to deal with the 2<sup>nd</sup> Defendant as the owner of the premises. Susan Porter denied knowing or dealing with the 2<sup>nd</sup> Defendant. She testified that she dealt with Ramesh Parekh, the Plaintiff's agent who was managing the property.

54. The 2<sup>nd</sup> Defendant also produced a copy of the sale agreement dated 10/5/1993 which states that the purchaser would remit the full purchase price of Kshs. 3.2 million before taking possession of the Suit Property.

The court has looked the receipts dated 8/2/1993 for Kshs. 1.2 million and 10/5/1993 for Kshs. 2 million only issued by Njenga Njau & Company Advocates acknowledging receipt from Mr. Lazarus Ndegwa and being payment for the purchase of L.R. No. 209/8000/136. They were produced by the 2<sup>nd</sup> Defendant. There is also an acknowledgement dated 10/5/1993 which appears to be signed by Labule Okello Lutwa confirming receipt of the full amount of Kshs. 3.2 million for the sale of the Suit Property. The copy of the transfer produced by the 2<sup>nd</sup> Defendant is dated 10/5/1993 and gives the address of Labule Okello Lutwa as 7368 Kampala Uganda or 40465 Nairobi. There is a signature against the name Labule Okello Lutwa and it is witnessed by Njenga Njau and Company Advocates who drew the transfer which is not registered at the land's office.

55. This evidence contradicts the evidence given by Sylvester Okello who testified for the defence. He stated that the 2<sup>nd</sup> Defendant tendered a banker's cheque for Kshs. 3.2 Million to Labule Okello Lutwa on execution of the sale agreement in the office of Njenga Njau Advocate. The copies of the receipts issued by Njenga Njau & Company Advocates produced by the 2<sup>nd</sup> Defendant acknowledging receipt of the legal fees of Kshs. 200,000/=; and the sums of Kshs. 1.2 Million dated 8/2/1993 and Kshs. 2 Million dated 10/5/93 show that the 2<sup>nd</sup> Defendant paid cash. This would mean the 2<sup>nd</sup> Defendant paid the purchase price to Njenga Njau Advocates and not Labule Okello Lutwa as the 2<sup>nd</sup> Defendant claimed. There is no evidence that the funds were released to Labule Okello Lutwa. This also contradicts the evidence of Sylvester Okello who testified that the 2<sup>nd</sup> Defendant paid the purchase price for the Suit Property vide banker's cheque. Being Ugandan, one would have expected Labule Okello Lutwa to have preferred payment of this large sum of money by wire transfer to his account in Uganda or Kenya if he held a bank account in Kenya instead of cash.

56. The General Power of Attorney which the 2<sup>nd</sup> Defendant relied on as giving him authority to deal with the Suit Property dated 15/3/1998 was registered on 28/6/2000. If the 2<sup>nd</sup> Defendant purchased the Suit Property from Labule Okello Lutwa and took possession in 1993, then property ought to have passed to him in May 1993 and there would have been no need for Labule Okello Lutwa to have granted the 2<sup>nd</sup> Defendant a power of attorney over the Suit Property in 1998.

57. The Plaintiff contested the General Power of Attorney which the 2<sup>nd</sup> Defendant claimed that Labule Okello Lutwa had given to him. The Plaintiff stated that he knew his father's signature and that the signature appearing on the General Power of Attorney was not his father's. He further argued that the General Power of Attorney was dated 15/3/1998 yet his father died on 3/6/1996. He also disowned the affidavit dated 7/5/2001 stated to have been sworn by Labule Okello Lutwa and which was produced by the 2<sup>nd</sup> Defendant saying his father could not have sworn that affidavit as he was dead by then.

58. The Plaintiff is Ugandan and could not be expected to have read the Kenya Gazette Notice no. 4744 of 20/7/2001 of the loss of Labule Okello Lutwa's title over the Suit Property that the 2<sup>nd</sup> Defendant caused to be published in the Kenya Gazette. The 2<sup>nd</sup> Defendant averred in the affidavit he swore on 10/5/2001 that the certificate of title over the Suit Property was burnt in the fire that broke out at Thigiri Gardens. In his evidence in court he stated that robbers attacked him around February 2000 and took away the title alleging they were investigating the ownership of the title. These different accounts the 2<sup>nd</sup> Defendant gives of how he lost the original title deed cast doubt as to his honesty. It also raises doubt as to whether he ever had the original title which he claims Labule Okello Lutwa gave him in May 2003.

59. The court prefers the evidence of the Plaintiff that after his father's death, he had to wait until he obtained grant of probate of his father's estate before instructing his advocate Mr. Parekh to evict the occupant from the Suit Property. After Susan Porter moved out of the Suit Property leaving her house maid to guard the house as had been agreed between her and Mr. Parekh, it is not clear when the house was left vacant. The next activity seems to be the inquiry by the Plaintiff's advocates as to who was in occupation of the Suit Property in June 2004.

60. From the evidence adduced, the court is not satisfied that the 2<sup>nd</sup> Defendant has a valid claim to the Suit Property. He did not call the person known as Labule Okello Lutwa who he claims sold him the Suit Property to give evidence to show that this person is different from General Tito Okello Lutwa.

61. The 1<sup>st</sup> Defendant was in occupation of the Suit Property at the time this suit was filed until 2011 when he was evicted by the 2<sup>nd</sup> Defendant. He was paying rent to the 2<sup>nd</sup> Defendant who was not the owner of the Suit Property. The 2<sup>nd</sup> Defendant ought to pay the Plaintiff rent for the period he was in possession of the Suit Property and the rent he collected from the tenants he had in the Suit Property including the 1<sup>st</sup> Defendant.

62. The court finds that the Plaintiff has proved his case on a balance of probabilities. Judgement is entered for the Plaintiff against the 2<sup>nd</sup> Defendant as prayed in the Plaint in terms of prayers (a), (b), (c) and (d). Mesne profits will be calculated from the date of filing suit until vacant possession is handed over to the Plaintiff.

**Dated and delivered at Nairobi this 26<sup>th</sup> day of July 2018.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Onsando for the Plaintiff

Ms. Masaka holding brief for Ms. Nyang for the 1<sup>st</sup> Defendant

Mr. Lazarus Kibui Ndegwa

**Mr. V. Owuor- Court Assistant**