



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KERICHO**

**CIVIL SUIT NO. 37 OF 2014**

**CHARLES LANGAT.....PLAINTIFF**

**VERSUS**

**MUKESH KUMAR KANTHILAL PATEL.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. This is a case pitting one Charles Langat against Mukesh Kumal Kantilal Patel, who both claim ownership of plot no. Sotik Township/667 within Bomet County. By a Plaint dated 5<sup>th</sup> August 2014 the Plaintiff filed suit against the defendant seeking inter alia an order of vacant possession of the suit property mense profits and unpaid rent for 36 months from July, 2011 at the rate of Kshs. 50,000/- per month. The plaintiff's case is that he bought the property for the sum of Kshs. 1,750,000 in the year 2011 from Kenya Commercial Bank (KCB). This was after the original bidder Mr. Shigali ceded his rights to him as Mr. Shigali was unable to raise the full purchase price. The plaintiff claims that he was issued with a title to the suit property in 2014.

2. The Defendant filed a Defence on 13.8.2014 in which he refutes the plaintiff's claims. He states that he has been in possession of the suit property since 2001. He claims to be the registered proprietor of the suit property having bought it from Mr. Shigali, a former employee and manager of KCB Sotik Branch in 2001. Mr. Shigali's bid was successful and he had paid a down payment but could not raise the balance of the purchase price. The defendant claims that upon signing the agreement, he refunded Mr. Shigali the deposit and paid the balance of the purchase price to KCB, took possession of the suit property in the year 2001 and has lived therein to date. He has constructed an additional three bedroomed house on the suit property. He claims to have acquired a title to the suit property in 2009. He still has the original title to date. He states that he had never had any interruptions from the bank or any other person until 2012 when the plaintiff claimed that he had bought the property and started demanding rent from him, resulting in a number of court cases, including this one.

**Plaintiff's case**

3. The Plaintiff called 4 witness and testified as PW2.

4. PW1 Mr. Martin Oduor Odhiambo stated that he is a businessman running an insurance brokerage and estate management company. He testified that he was engaged by Kenya Commercial Bank (KCB) in the year 2011 to assist them get the title to the suit property.

5. He stated that he was further engaged to manage the property upon getting the title and assist KCB to get the Defendant out of the suit property. He stated that he visited Ardhi House in Nairobi and obtained the file in respect of the suit property. It was his testimony that all the correspondence from KCB and the Ministry of Lands were made through him. He testified that on 8.5.2012, the Ministry of Lands gave him a lease document with instructions to take it for registration at the Bomet Lands Office. He testified that he handed over the documents to the Land Registrar in Bomet who asked him to take them back to KCB for execution. He stated that he later took the documents back to Bomet on 31.5.2012 for registration.

6. He stated that the Registrar then, Mr. Tonui told him that there was another title registered on 18.8.2009 in the name of the Defendant. He testified that he was asked to write a formal letter to the Ministry of Lands. He stated that the title that existed in the name of the Defendant was a forgery and that the lease he had was the genuine lease. It was his testimony that he had also received a demand note on 3.5.2012 in the name of KCB.

7. He further testified that he heard that one Mr. Shigali who was the Manager KCB Sotik Branch was the owner of the suit property. The witness attempted to produce a bundle of documents attached to his affidavit but the Plaintiff successfully objected to their production. He thus did not produce any document in support of his testimony.

8. In cross examination, he said that he had no contract or letter from KCB engaging him to do the agency work he purported to have done for the bank. There was no letter of instructions or even any correspondence from the bank to him. He was unable to explain how he was

given the lease documents by the Ministry of Lands despite the fact that he was not an employee of the government or the bank. He also could not explain how he received the documents from the bank and to whom he took the lease for execution. He stated that he has visited the suit property which comprises 1 bungalow and 3 houses. According to him, the property was valued at approximately 7 million in the year, 2012.

9. He admitted that he had applied to be enjoined in the suit as an interested party but his application was struck out by court. In his application, he had asked for rent allegedly unpaid for a period of 15 years. He had stated however that he was an agent from 1995. He did not produce any document of registration as an estate agent, agency agreement, or insurance broker.

10. He further stated in re-examination that he was the Plaintiff's agent and was involved in the transaction in order to assist the plaintiff to get the title to the property. He stated that there was no cheque paid either by KCB or the Plaintiff in his name. He stated that he did not know Mr. Shigali and had never met or dealt with him.

11. PW2, the Plaintiff testified on 1.3.2017. He testified that he is the owner of the suit property having acquired the title on 20.6.2014. He stated that he was an employee of KCB until December 2014 when he opted for early retirement. He stated that the suit property belonged to KCB and was offered for sale to one Shigali in 2001. Mr. Shigali was then the branch manager, Sotik Branch. The Plaintiff further stated that his own bid to purchase the house was not successful. He told the Court that Mr. Shigali paid the bank only Kshs. 1,100,000/= out of the purchase price of Kshs. 1,750,000/-. He stated that Shigali retired from the bank in the year 2009 and was cleared by the bank.

12. The Plaintiff told the court that in 2011, he approached Mr. Shigali who agreed to cede his rights in the property to him (the plaintiff) and wrote a letter to the bank to that effect in July, 2011. The Plaintiff stated that thereafter he paid the Bank the balance of the purchase price of Kshs. 650,000/- after reimbursing Mr. Shigali Kshs. 1,100,000/-. He produced the sale agreement between him and the bank signed on 23.8.2011.

13. He testified that he visited the house with Mr. Shigali who informed him that he had rented the house to Mr. Mukesh Patel (the defendant). He also visited Mr. Rono, the Advocate for Mr. Mukesh and Mr. Shigali and paid him Kshs. 50,000/-. He further claimed that the title issued to the defendant in 2009 was fake. He stated that PW1 was his agent whom he had engaged to assist him get the title and thereafter manage the property. He did not produce any document or correspondence between him and PW1. He thereafter reported to the bank and the CID Sotik when he was unable to evict the defendant from the premises. He stated that KCB wrote to the Ministry of Lands and filed suit against the Defendant and Mr. Shigali, vide Kericho HCCC NO. 87 OF 2012. He stated that did not know why the bank withdrew that case.

14. In cross examination, he told the court that he had worked for KCB from 1983. He applied for and was granted early retirement in 2014. He stated that he bought the suit property from the bank in 2011 and the bank agent was Mr. Odhiambo (PW1) while his lawyers were Ms. Nyachoti & Co Advocates. He admitted that Mr. Shigali was the successful bidder when the suit property was put up for sale in 2001. He confirmed that when one retires from the bank, he would be cleared including his liabilities and where he has an outstanding loan, an arrangement would be made between such a person and the bank to convert the loan to commercial terms. He stated that he was not able to tell if Mr. Shigali was discharged from any liability with the bank upon retirement.

15. PW3, Mr. Patroba Omolo testified on 20.6.2017. He stated that he is the Land Administration officer in charge of Bomet and Kericho Counties. He testified that he received a letter dated 29/11/11 from the Commissioner of Lands to inspect the suit property whereupon he visited the suit property and prepared a report on 6/12/11 that the property was intact. He stated that the Defendant whom he met told him that he had a title to the property and showed him the title. He stated that he suspected the grant held by the Defendant was fraudulent. He however did not mention this in his report to the Commissioner of Lands. He confirmed that he knew the plaintiff's agent (PW1) and that he was not the bank's agent as was alleged by PW1 himself. It was his testimony that consent to transfer was applied for on 30/5/2012 by an entity called Express General Insurance Brokers Ltd and he issued the said consent on 12/8/2013.

16. He presented documents showing comments that the consent was issued on the 30/5/2012 by the Lands Officer, Kericho/Bureti/Bomet Districts. The attached consent letter was issued on 15/4/14 under an alleged reference application letter dated 3/9/2012. He admitted that as at 30/5/2012, the title in the name of either KCB or the Plaintiff was non-existent. He stated that at the time of application and issuance of the consent, no title existed. He could not explain why he allegedly issued the impugned consent yet he was not the Commissioner of Lands. He declined to comment on his involvement in the property yet there was a Lands office in Bomet. He claimed he did not know when the Land registry in Bomet was established, even though he was the land's administration officer in the said District. He confirmed that the lease issued to KCB was not registered.

17. PW4 Mr. Patrick Kipkoech Chirchir testified that he was an employee of KCB Sotik Branch. He stated that he was the manager operations. He knew the history of the property having joined KCB Sotik in February, 2016. He testified that the suit property had been sold to the Branch Manager Mr. Shigali who paid Kshs. 1,100,000/=. He further stated that that the house was and is still occupied by the Defendant. He confirmed that the branch is also aware that the defendant has all along been in possession of the suit property. He confirmed that the procedure when an employee fails to complete the purchase price is to advertise the property for sale afresh but he explained that since the bank had already sold the property to Shigali there was no need to re-advertise. It was his testimony that he worked with the Plaintiff in the Bank.

18. He could not explain why the current bank manager or any other witness from the legal department did not come to testify. He also could not explain why the bank was not a party to the suit. He stated that he did not know why the bank had withdrawn the case filed against the Defendant. He confirmed that the defendant had never paid any rent to the bank nor had the bank demanded any rent from the defendant.

19. PW5 Mr. Jotham Kipkoech Ngeno testified that he was the Land Registrar, Bomet Land Registry. He produced a letter addressed to the Defendant dated 30/4/2014. He stated that he had worked as a Land Registrar, Bomet since 1999. He stated that he was out of office between 2007 and 2014 on interdiction.

20. He stated that he was requested by his colleague a Mr. Tonui to dispatch the letter to the Defendant. He did not know whether the letter was dispatched or not. He did not know whether the letter was registered or not. He confirmed that for such letters seeking removal of a caution lodged against any dealings in a title, the procedure is to serve the notice on the parties who will be affected by registered mail. It was also a requirement that the notice of intention to remove the caution be advertised in the Kenya gazette. He confirmed that he did not do either. He confirmed that he did not have any receipt or certificate of posting. He also confirmed that he removed the caution on the suit property on the instructions of his colleague Mr. Tonui notwithstanding the fact that all the above mentioned steps and procedures were not followed.

21. He stated that the Defendant never surrendered the original title he had been issued with, but nonetheless, another title was issued to the Plaintiff. He confirmed that the Land Registry did not call for the title from the defendant.

### **Defendant's case**

22. The Defendant testified and called 3 witnesses. DW1 Mr. Daniel Abuya Ontita testified that he was a former Manager, KCB Sotik Branch, He testified that he had worked with the bank for 31 years and had an unblemished record. His testimony was that he took over the Branch from Mr. Shigali. He stated that he was familiar with the suit property where the bank manager used to live. He stated that he in fact lived in the house for almost three months, on arrangement between him, Mr. Shigali and the Defendant who had purchased the house. He moved out once he secured his residence. He stated that he was involved in the handover of the property to the Defendant. He stated that the bank was aware of the sale.

23. He testified that the bank did not at any given time ask for rent or interfere with the Defendant's occupation. He told the court that while Mr. Ontita served as the branch manager, the defendant wrote to the bank complaining about the delay in the issuance of the title to the suit property. He confirmed that the head office in liaison with the branch office deal with issues relating to the assets of the bank including the suit property.

24. He stated that the transfer and eventual issuance of title to the Defendant was done after his tenure. He confirmed that it is not possible for a staff to retire and be cleared where there is an outstanding issue in his file with the bank. It was his testimony therefore that Mr. Shigali could not have retired and been cleared if the issue about the suit property he had sold to the defendant was still pending as alleged by the plaintiff. He confirmed that the defendant was the bonafide and legal owner of the suit property having purchased it for value. He indeed was given the authorization by the bank to dispose all the household goods belonging to the bank (KCB) upon the handover of the property to the purchaser(defendant).

25. DW2 Mr. Rono is an advocate of the High Court of Kenya of over 28 years standing. He testified that he represented both the defendant and Mr. Shigali in the transaction where he drafted and witnessed the sale agreement (Exhibit 2). He also witnessed part payment of the purchase price of Ksh. 1,580,000/- by the Defendant.

26. He testified that he wrote to the bank when there was a delay in obtaining the documents of title asking the bank to directly procure the title in the name of the Defendant (Exhibit 3). He stated that he witnessed the handover of the property to the Defendant by Mr. Shigali and Mr. Ontita (DW1) from the bank. He even bought some of the household goods which were being disposed of. He further stated that sometimes in 2009, a representative of the bank was sent to his office to collect completion documents for the processing of title to the Defendant. He gave out the letter of allotment that he had secured from the Kipsigis County Council and asked the representative to get the rest from the Defendant. The defendant thereafter reported to him that he eventually obtained the title through the bank representative. He concluded by stating that sometimes in the year 2011, Mr. Shigali and the Plaintiff visited him in his office where Mr. Shigali paid him Kshs. 50,000/- which was the balance of his legal fees.

27. In cross examination, he stated that he knew Mr. Shigali in person and that he was selling the property as the beneficial owner. He stated that Mr. Shigali had been issued with a letter of offer by KCB having been the successful bidder and that he had paid the 10% deposit. He further stated that since there was no existing lease issued with respect to the property at the time, he obtained the letter of allotment from the then Kipsigis County Council. He stated that he did not prepare any other conveyancing documents since there was no lease or title at the time.

28. The 3<sup>rd</sup> Defence witness was the Defendant Mr. Mukesh Kanthilal Patel. He stated that he is a business man, humanitarian crusader and philanthropist. He told the court that he was approached by Mr. Shigali in 2001 to purchase his property which he (Mr. Shigali) had successfully bid for and paid a down payment to his employer (KCB). He stated that he was interested in the property and engaged the services of Mr. Rono Advocate (DW2) who drafted the sale agreement and witnessed the payment of the purchase price of Kshs. 1,580,000/- (through account) and Kshs. 170,000/- (cash). He later on paid the balance of Kshs. 250,000/- in two installments of Kshs. 100,000/- and Kshs. 50,000/-. He stated that he knew Mr. Shigali as his bank branch manager. As his banker, he believed that whatever engagements they were involved were above board. He took over the possession of the property sometimes in 2001 and has since lived therein to date. He told the court that he has extended the property by building another three bedroomed house, he has renovated the old house and fenced off the whole parcel. He said that he lives there with his extended family.

29. He stated that upon taking over possession of the suit property in 2001, he kept asking the bank to obtain the title to the property. He wrote to the bank on his own, and also through his lawyer. He stated that sometimes in 2005, a representative from the bank went to him asking for identification documents for purposes of processing the title. He advised him to collect them from Advocate Rono's office. He later on gave out his National Identification card and Passport size photograph. He testified that he did not experience any interference on the land until sometimes in late 2011 when the Plaintiff sent auctioneers to demand for rent. The defendant sued the Mr. Langat in Sotik CMCC. NO. 2012 where he obtained a permanent injunction restraining the plaintiff from demanding for rent. This was the beginning of his problems. In 2012, KCB sued him in Kericho HCCC NO. 87 of 2012, the bank however withdrew the case on 14.3 2015. In a bid to protect his property, he also sued the Plaintiff in HCCC NO. 109 OF 2011 which suit was struck out in 2014. He stated that he reported the matter for investigations by the Director of Criminal Investigations. He also stated that when the bank filed HCCC No. 87/12 against him, he made efforts to see the KCB Chief Executive Officer with his documents to the suit property and he believed that it was upon the investigations that the CEO had promised to undertake that the case was withdrawn in 2015. He stated in cross examination that he could not recall when

but he believed that he had signed all the relevant documents to facilitate the processing of the title in his name, which he still holds to date.

30. The defendant further told the court that his efforts to have Mr. Shigali appear in court as a witness were not successful. He told the court that he registered a caution on the register against any dealings. He did not lift the caution nor receive any notice of intended removal of the caution. He stated that he still possesses the original title issued to him and has continued paying land rent and rates to the county while the Land Registry still reflects him as the registered proprietor. He produced two bundles of documents bundle 1 (exhibit 4) comprising council demand notices and payment receipts for land rates and rent, clearance certificates, two cautions he registered against any dealings on the subject property, valuation report done in July, 2014 to the suit property and other correspondences. Bundle 2 (Exhibit 5) comprises of correspondences between him and KCB, a letter from the Ministry of Lands to the Land Registrar Bomet converting the title of the suit property from the Registered Titles Act to the Registered Land Act, the Certificate of Lease registered on 24/10/2007 in his favour, Certificate of Lease issued upon conversion of the title issued on 21/8/2009 to him, a copy of the green card from Bomet Land Registry, a letter of acceptance of bid for the purchase of the suit property by Shigali, deposit slips for the purchase price among others.

31. He concluded by asking the court to dismiss the plaintiff's case so that he could enjoy peaceful occupation of the suit property. He said he was not interested in the costs of the suit as all he wanted was to be confirmed as the lawful owner of the suit property. He stated that he wished to be protected by the court so that he could peacefully live with his family on the suit property.

### **Parties' Submissions**

32. At the close of the case the parties were given time to file their written submissions and their respective counsels each filed their submissions.

### **Plaintiff's submissions.**

33. Mr. Omuganda, learned counsel for the Plaintiff submitted on two main issues namely:

- i) Who was lawfully registered as the owner of the suit property?
- ii) whether the plaintiff is entitled to the reliefs sought.

Counsel has argued that Mr. Shigali who allegedly sold the suit property to the defendant had no capacity to sell the same as he had no title to it and was therefore incapable of passing title to the defendant. He relied on the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR* where the Court of Appeal held as follows;

***“69....It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof....”***

34. In support of his submission that the Plaintiff has a legitimate title document he relied on the case of *Sophie Wanjiku John v Jane Mwihaki Kimani [2013] eKLR* where it was held as follows;

***“...Having dismissed the defendant's counterclaim, I now turn to the plaintiff's claim. The plaintiff has adduced evidence that she bought the suit land as a bona fide purchaser for value. She has a title deed which was not fraudulently obtained but obtained after a valid sale transaction took place. Her rights to the said property are protected under section 24 and 26 of the Land Registration Act 2012 .The two sections vest in a person who has absolute proprietorship together all rights and privileges and the certificate of title issued to her shall be taken by all courts as prima facie evidence that the person named is the absolute owner. The plaintiff is therefore entitled to the order of vacant possession of L.R No. Ndumberi/Riabai/3784.I therefore enter judgement as prayed for an order of vacant possession of L.R No. Ndumberi/Riabai/3784...”***

35. He also cited the case of *Ahmed Ibrahim Suleiman and another v Noor Khamisi Surur [2013] eKLR* where the court held as follows;

***“...The court of Appeal further in the case of Jaj Super Power Cash and Carry Ltd –vs- Nairobi City Council & 20 Others***

***(Civil Appeal No. 111 of 2002) stated thus:-***

***“This court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.”***

36. Counsel submitted that Mr. Shigali could not have assigned his right to buy the suit property to the defendant without the consent of the bank. It was therefore his submission that the title document acquired by the Defendant was a forgery as he did not follow due process and his documents did not support his claim to the title. In particular he referred to the documents attached to the defendant's replying affidavit in response to the Plaintiff's application dated 10<sup>th</sup> November, 2014. These documents were however not produced as exhibits during the hearing of the main suit.

37. He submitted that there was a glaring discrepancy between the purported sale agreement between the Defendant and Mr Shigali which identified the subject matter of the agreement as Ex KCB Sotik Branch manager residential house known as Sotik Township/7288/94, and

the correspondence by the bank and the Ministry of Lands which identified the property as Land Ref No 7288/102 before it was assigned Title No. Sotik Town/667 after conversion to the Registered Land Act.

38. He further submitted that investigations by the Ministry of Lands confirmed that the Defendant's title to the suit property was a forgery as there was no valid transfer to the Defendant. This was evidenced by the letter from the Ministry of Lands dated 31<sup>st</sup> August, 2012 by the Commissioner of Lands.

39. Counsel submitted that PW-3 who is the Land Administration Officer stated in his testimony that the title to the Defendant was a forgery. He submitted that this constituted a crime under section 155 of the repealed Registered Land Act and Sections 345 to 363 of the Penal Code.

40. Mr. Omuganda submitted that the Defendant was at all times aware that only KCB could lawfully transfer the property to him though he predicates his right to the property on a letter issued by an official of the Chief Land Registrar. He further submitted that the Chief Land Registrar had no power or authority under law to direct that a lease be issued to the Defendant in respect of the private property of KCB.

41. He relied on the The Court of Appeal decision in *Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR*, where the following principles of law were established:

*“The foundation of the appellant’s claim is that the Commissioner of Lands allotted the suit land to the original four allottees who subsequently sold it to the appellant. This may be so; however, the legal question is, was there unalienated government land capable of being allotted to the original four allottees? The trial judge answered this question in the negative. We concur with the court’s finding. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ title to the suit property has its root of title to a grant and title issued in 1907 and 1911. By various deeds of assignment the 1<sup>st</sup> respondent became the registered proprietor of LR No. 209/136/269 registered in 1911 as N64 428/1 20772 while the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are registered proprietors of LR No. 209/136/239 registered in 1907 as N64 425/1 20769. The legal effect of the registrations made in 1907 and 1911 was to convert the suit property at that time from un-alienated government land to alienated government land with the consequence that the suit land became private property and moved out of the ambit and confines of the GLA. This made the suit property unavailable for subsequent allotment and alienation by the Commissioner of Lands or the President of Kenya. The appellant’s title to the suit property was thus anchored on land that was not unalienated government land. We concur with the trial judge’s finding that “the suit land having been owned privately was not GLA land, and was not available for alienation. Its alienation was illegal and void ab initio.”*

*21. We hasten to add that the issue in this case is not a question of double allotment of land. Double allotment occurs when a specific unalienated government land is allotted to two different persons. In this case, there is no unalienated government land to be allotted. What we have is a purported allotment of private property – land that is neither government land nor unalienated government land.*

*24. Guided by the decisions of this Court in Wreck Motors Enterprises vs. Commissioner of Lands, C.A. No. 71/1997 (unreported) , which was upheld in Faraj Maharus vs. J.B. Martin Glass Industries and 3 Others C.A 130/2003 (unreported) and affirming the persuasive authority of Gitwany Investment Limited -v- Tajmal Limited & 2 Others, (2006) eKLR, it is our considered view that the trial court did not err in upholding the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ title to the suit property and cancelling the appellant’s title. The alienation to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents is the grant [that] takes priority; at the time another grant was being made to the appellant, the suit land had already been alienated; there was nothing for the 5<sup>th</sup> respondent to allot and alienate to the original allottees.*

*25. In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5<sup>th</sup> respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum.”*

42. Counsel submitted that the Plaintiff was a legitimate and bonafide purchaser of the property who could not be dispossessed by the Defendant.

43. Regarding the second issue, counsel has submitted that the plaintiff had title and in accordance with section 25 and 26 of the Land Registration Act he was entitled to protection of the same. Mr. Omuganda has punched holes in the defendant's title terming it a forgery and maintained that the plaintiff's title was the genuine one and he is therefore entitled to the orders sought.

44. Counsel also relied on the principle of “*Ex turpi causa non oritur actio* as elaborated in the case of *Scott v. Brown, Doering, McNab & Co (3), [1892] 2 QB 724 Lindley LJ at p.728 where the court observed as follows:-*

*“Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.”*

45. Counsel ended his submissions by urging the Court to find favour with the aforesaid decisions and order the Defendant to vacate the suit premises forthwith.

## Defendants Submissions

46. On the other hand, Mr. Sigei learned counsel for the defendant based his submissions on two issues, namely:

- i) Whether the defendant acquired a good title to the suit property and
- ii) Whether the plaintiff's evidence impeached the defendant's title.

47. It was counsel's submission that upon purchase of the suit property in 2001, the defendant took possession without any interference. He obtained title in 2007 whereafter it was converted to RLA cap 300 (now repealed) and another title issued to him in 2009. He submitted that no fraud had been attributed and proven against the defendant. He further submitted that it was the defendant's testimony that the acquisition of the title in his name was done by the representatives of Kenya Commercial Bank (KCB) and he had no reason at all to suspect or doubt their facilitation of the title process. He argued that the witness from the bank did not rebut the defendant's testimony. He argued that the defendant having lived in the property for a period of over 18 years at the time of hearing of the case, the court ought to make a finding that he was an innocent purchaser for value. He submitted that the defendant's title should not be impeached in the absence of any adverse character attributable to him.

48. He relied on the protection and right to property provided in Article 40 as read with Article 65 of the *Constitution of Kenya*. He also relied on the *Land Registration Act No. 3 of 2012, Land Act, No. 6 of 2012*.

49. He restated the provisions of Section 26 (1) of the Land Registration Act (LRA), 2012, which are to the effect that a certificate of title issued by the registrar upon registration, or to a purchaser of land upon 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 absolute and indefeasible...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.*

50. He also cited Section 80 of the Land Registration Act which stipulates that the court may order the rectification of the register to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration by directing that any subsequent registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake as long as it is proven that the title holder was party to the fraud or misrepresentation.

51. He submitted that the onus was upon the plaintiff to prove fraud as stated in the High Court decision by S. Okong'o J. in the case of *Alfred Sagero Omweri v. Kennedy Omweri Ondieki [2015] eKLR* thus;

***"...The onus was upon the plaintiff to prove fraud."***

52. He further relied on the case of *Kampala Bottlers Ltd –vs- Damanico (U) Ltd East Africa Law Reports [1990-1994] E. A 141 (SCU)*, the Supreme Court of Uganda held that:-

***"..To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof must be heavier than a balance of probabilities generally applied in civil matters"***.

53. Counsel cited the Court of Appeal decision in the case of *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 (2015) eKLR* which upheld the decision of the Environment and Land Court at Nairobi that cancelled all titles and ordered the land to revert back to the original owner after certain crooks fraudulently acquired title to land and later sold the same to other parties.

54. Counsel further relied on the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR* in the Environment and Land Court at Kericho, where the applicant contended that her property was transferred to the 1st respondent through fraud and illegal falsification of the register. She averred that the 1st respondent must have colluded with the Land Registrar (2nd respondent) to have the property transferred into his name, and that false and/or forged documents, must have been presented for registration. In her case, she wanted a rectification of the register so that the title would reflect her name as proprietor. In his judgement, Justice Munyao ordered that the title of the 1st respondent, Nickson Kipkurui Korir, to the land parcel was improperly procured and the same was cancelled.

55. Counsel for the defendant submitted that from the evidence adduced in court and in the context of the foregoing decisions, the plaintiff's alleged title issued in 2014 was obtained in a dubious manner through falsification of documents, receipts, consent, and even issuance of a second title while there existed another title in respect of the suit property. He submitted that there was no allegation in the pleadings by the plaintiff that the defendant committed any fraud but the plaintiff and his witnesses attempted to attribute fraud on the part of the defendant.

56. Counsel submitted that on the contrary, the documents allegedly presented by the plaintiff were all but suspect, and were manufactured for purposes of committing the fraud. He took issue with the evidence of PW1, PW2, PW3 and PW4 terming them questionable in their testimonies. He submitted that PW2 used his office as an employee of the bank to purport to create fake documents to advance his scheme. He submitted that the plaintiff used PW1 a land broker (alleged agent with no registration or license) to process the title. He also used PW4

his colleague from the Sotik branch to advance fake testimonies and internal memos. He argued that this was proved by the absence of the bank's legal department or head office as a party to the suit and even as witnesses.

57. He discredited the evidence of PW3, a land administrative officer, Kericho and Bomet, terming it an attempt to sanitize the plaintiff's misdeeds. He singled out the fact that PW 3 purported to issue a consent to transfer before there existed any title to the property. He argued that PW 3 conducted a survey of the suit property and did a report which deliberately left out vital information on the existence of a title and the fact that the defendant was in possession of the suit property.

58. Counsel submitted that there was no basis upon which the new title was issued. He relied on the case of **Republic –vs- Land Registrar Mombasa & 2 Others Ex-parte Bhangra Limited (2012) eKLR**, where the Honourable Justice Francis Tuiyot held as follows:-

*“ It is common ground, I think that the Land Registrar has no power either under the Constitution or the Registered Land Act (now repealed) to revoke title. A string of decisions have restated this rather uncontested position of the law.*

59. He cited Sections 12 and 13 of the Land Registration Act which provide for the appointment of the Chief Land Registrar. Their general powers are set out under section 14 of the LRA though the Act does not expressly provide for the power to cancel a title.

60. He further argued that there is consensus from the courts that the Registrar cannot revoke title deeds through gazette notice or even otherwise. He submitted that the Registrar cannot arrogate himself the power to cancel any title. He argued that if the Registrar had unfettered discretion to nullify title deeds, it would amount to breach of the rules of natural justice, by allowing the holders of the title deeds to be condemned unheard. He stated that there was need to subject such cases to a judicial process for determination of illegality and fraud.

61. It is counsel's submission that in the instant case, the title issued to the defendant could not be cancelled by the Registrar as purported. He argued that even if the title was fake as alleged, and which the defendant has denied, judicial process ought to have been followed. Counsel faulted the unprocedural issuance of another title against the same property by the Registrar and argued that despite the said Land Registrar being called as a witness, no effort was made by him to authenticate the title allegedly issued to the plaintiff. He urged the court to make a finding that the title issued to the plaintiff was fraudulently obtained title and thus void in law.

62. In addressing the issue as to whether the plaintiff's evidence impeached the defendant's title, counsel submitted that it is trite law that any allegations of fraud must be pleaded and strictly proved as was held in the case of **Ndolo .v. Ndolo (2008) 1 KLR (G&F) 742** wherein the Court stated as follows:

*“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”*

63. Counsel further relied on the case of **Vijay Morjaria .v. Nansingh Madhusingh Darbar & another [2000]eKLR (Civil Appeal No. 106 of 2000)** Tunoi JA (as he then was) stated as follows:-

*“...It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”*

64. This decision was upheld by the Court of Appeal in Nairobi in the case of **Kinyanjui Kamau .v. George Kamau Njoroge [2015] eKLR(Civil Appeal No 132 of 2005)** where it was stated that:

*“to succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding. In the present appeal, there is no such evidence, and the courts below rightly came to the conclusion that the appellant had not made out a case for the grant of the orders he sought.”*

65. Counsel submitted that it has been held time and time again that parties are bound by their pleading and this is the true representation of the legal position. A party cannot be allowed to litigate beyond the scope of his pleading as was correctly held by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR (Civil Appeal No. 219 of 2013)**.

66. Counsel referred to the provisions of **Order 2 Rule 4(1)** of the Civil Procedure Rules which *inter alia* provides:

*“A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud ... or any fact showing illegality ... which he alleges makes any claim or defence of the opposite party not maintainable.”*

67. Counsel further relied on the Court of Appeal in its judgment at paragraph 53 in **Arthi Highway Developers Limited .v. West End Butchery Limited & 6 others [2015] eKLR(Civil Appeal No.246 of 2013)** where the court stated as follows;

*“..It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.”*

68. Counsel submitted that the plaintiff had not met the threshold established in law for impeaching the defendant's title. Being bound by his pleadings, he failed to particularize and establish the allegation of fraud on the part of the defendant. His title by dint of the numerous decisions should therefore not stand. He urged the court to declare the plaintiff's title invalid and cancel it. He urged that register be accordingly rectified to revert to the position reflecting the defendant as the registered proprietor.

69. Counsel further discredited the plaintiff's evidence by arguing that by admitting that he allegedly bought the property from the bank for Kshs. 1,750,000/- in 2011 yet his witness PW1 stated that the property was valued at Kshs. 7,000,000/-, the plaintiff's evidence could not be relied on. Counsel argued that the Bank could not sell its property in 2011 at a price it fetched in 2001.

70. Counsel argued that on the other hand, the defendant and his witnesses were truthful. He submitted that their evidence was not shaken in cross-examination. He submitted that the defendant confirmed that as at July, 2014, the property was valued at Kshs. 13,500,000/- a fact that was not controverted.

71. Counsel cast aspersions on the documents produced by the plaintiff, terming them suspect. He argued that for instance, the clearance certificates and payment receipts including bank slips were not produced by the plaintiff himself but by PW3 the Land Administration Officer without laying any basis. He singled out the letter of consent to transfer dated 15/4/14 making reference to an application for consent dated 3/9/12 whereas the application attached was dated 30/5/12. He pointed out that the consent to transfer was issued when there was no title to transfer. He wondered how all these documents could be signed and certified by the witness himself and urged the court to treat them with contempt and of no probative value.

72. Counsel faulted the plaintiff's failure to call the relevant representatives from the bank as well as Mr. Shigali who was at the centre of the purported sale and stated that the only inference was that these witnesses would have adduced adverse evidence against him.

73. He relied on the case of *Uganda Breweries Ltd vs. Uganda Railways Corporation [2002] 2 EA 634* and upheld in *Pushpa D/O Raojibhai M Patel vs. The Fleet Transport Company Ltd Civil Appeal No. 5 of 1960 [1960] EA 1025*, where the court held that that whether an adverse inference should be drawn from the fact that a particular witness has not been called is a matter, which must depend upon particular circumstances of each case.

74. Additionally, counsel argued that excluding from the suit the bank, the Land Registrar, Bomet as well as Mr. Shigali should be seen as an attempt by the plaintiff to conceal very material information that could have adversely affected his case. He ended by urging the court to dismiss the plaintiff's suit. He did not press for the defendant's costs as the defendant had stated that he did not wish to be awarded any costs.

#### **Issues for Determination**

75. I have carefully considered the pleadings, the oral and documentary evidence, the parties' rival submissions and the various authorities cited to me and in my view the issues that arise for determination are as follows:

- i. Whether the Plaintiff has a good title to the suit property
- ii. Whether the defendant's title is a forgery
- iii. Whether the plaintiff is entitled to an order of eviction against the defendant
- iv. Whether the plaintiff has proved that he is entitled to mesne profits
- v. Who should bear the costs of this suit?

#### **Analysis and determination**

76. On the first point, I must appreciate the thorough analysis made by both counsel in their submissions on the issue of ownership and I need not restate the different positions taken by counsel. Suffice is to say that this is a suit instituted by the plaintiff and the burden was upon him to prove that he has a good title in order to entitle him to the orders for eviction and mesne profits against the defendant. Section 107 of the Evidence Act provides that he who alleges must prove.

77. Curiously, even though the plaintiff has in his submissions gone to great lengths to discredit the defendant's title as being a forgery, he did not deem it necessary to plead, particularize and prove the alleged fraud in his case.

As stated in the **Arthi** case (supra)... ***"fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt."***

Furthermore, in Bullen & Leake and Jacobs, Precedents of Pleadings 13<sup>th</sup> Edition at Page 427:

***"Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that fraud was the cause of the loss complained of. It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly fraudulent conduct must be distinctly alleged and as distinctly proved. General allegations however strong may be the words in which they are stated are insufficient to amount to an averment of fraud of which any court ought to take notice"***

Learned counsel for the plaintiff urged this court to rely on the doctrine *Ex turpi causa non oritur action*. I am of the view that this argument would only be available to the plaintiff if he had pleaded and proved fraud against the defendant to the required standard.

*In the case of Dr. Joseph Arap Ngok V Justice Moiwo Ole Keiwa Civil Appeal No. Nai 60 of 1997 the court commenting on equitable principles stated as follows:*

***“It is our law and the law takes precedence over all other equitable rights of title”***

Based on the above observation by the Court of Appeal whose decisions are binding on this court, the court cannot rely on an equitable doctrine to infer and punish for fraud where the statute, that is, the Civil Procedure Act, clearly requires a party to plead and prove fraud.

78. On the issue of the Plaintiff's title, I am not persuaded that the plaintiff's title is clean, coming as it did three years after the issuance of the defendant's title ostensibly on the ground that “investigations had revealed that the defendant's title was a forgery”. The manner in which the plaintiff's title was issued without acknowledging that the defendant was in possession, and without recalling the title held by the defendant, not to mention the existence of a caution by the defendant, whose purported removal is in doubt all raise red flags.

79. I have had occasion to scrutinize the documents produced by the plaintiff in support of his case and noted that the lease issued on 30<sup>th</sup> April 2012 to KCB is neither signed by the bank directors under the seal of the bank nor is it registered as required. The fact of non-registration of the said lease was acknowledged by PW3, the Land Administration Officer. The question that arises is whether an unregistered lease could be used to pass a good title to the plaintiff.

80. Additionally, the Transfer instrument has a defaced photo and is purportedly signed by the bank's undisclosed Attorney without any explanation as to why the bank directors were unable to sign the same under the company seal as required by the law. The court takes judicial notice that KCB is a reputable bank with a legal department staffed with competent lawyers whose responsibility it is to ensure that such legal lapses do not occur. The fact that this escaped their attention smacks of complicity.

81. The circumstances under which the plaintiff's lease was issued are suspect. The evidence of PW5 the Land Registrar Bomet on the purported removal of the caution placed by the defendant was wanting. He could not confirm if the notice of removal of caution purportedly sent to the defendant was dispatched by registered mail. The absence of a certificate of posting to confirm this leaves me in doubt as to whether it was actually sent. Furthermore, the defendant denies that he received any such notice. It is therefore curious that the new lease was issued to the plaintiff without noting the reason for doing so in the face of the caution.

82. The Plaintiff's evidence that he bought the suit property from KCB after Mr. Shigali assigned his right to him is not credible as there is correspondence between the Bank and the defendant indicating that the bank was aware that the said Shigali had ceded his right to buy the suit property to the defendant. The plaintiff is certainly not a bona fide purchaser for value without notice as he would like this court to believe.

83. The plaintiff's failure to call Shigali as his witness to prove that he bought the property from him is quite telling. The purported purchase price of KShs. 1750,000 paid by the plaintiff in 2011 which is the same as the price allegedly paid by the defendant in 2001 is suspect. The court takes judicial notice that the price of land in town cannot remain static over a ten-year period.

84. The plaintiff must have had a false sense of security that his documents would support his case. I am inclined to agree with the submission of counsel for the defendant that the plaintiff having worked for KCB, colluded with Shigali to manufacture documents aimed at authenticating his purported purchase of the suit property from Shigali and subsequent transfer by the bank to himself. It is also telling that the plaintiff only instituted this suit in 2014. If he had purchased the suit property way back in 2009 as alleged in his evidence, why did he not take immediate possession of the suit property and why did it take him 5 years to institute this suit to evict the defendant who had been staying in the house all these years, with the full knowledge of both the Plaintiff and and KCB without paying a cent either to the plaintiff or KCB? Something just does not add up here.

85. I do not agree with the submission of Mr. Omugunda that Mr. Shigali had no property to pass to the Defendant as the bank authorized him to sell the suit property to the Defendant. This is borne out by the correspondence between the Defendant and the bank and the fact that the bank allowed the Defendant to stay in the suit property without paying any rent. The case of **Arthi Highway Developers** (supra) is distinguishable from this case as the Plaintiff in this case has not established any fraud against the defendant. Like in the case of **Benja Properties Ltd** the Plaintiff's title was issued when there was already another title in the name of the Defendant. The Plaintiff's title is therefore null and void.

86. In arriving at my finding that the plaintiff's title is illegal, null and void, I am guided by the case of **Daudi Kiptugen v Commissioner of Lands Nairobi & 4 others [2015] eKLR** where the court held that it is not enough to wave the certificate of title before this court. A party must prove that the same was lawfully acquired. The court stated as follows: -

***“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and asserts that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.”***

87. On the question as to whether the defendant's title is fake, this is neither here nor there. As held in the cases of *Ndolo .v. Ndolo (2008) 1 KLR (G&F) 742*, *Vijay Morjaria .v. Nansingh Madhusingh Darba r& another [2000]eKLR (Civil Appeal No. 106 of 2000)* and *Arthi Highway Developers Limited .v. West End Butchery Limited & 6 others [2015] eKLR(Civil Appeal No.246 of 2013) supra* the courts have consistently held that fraud is a serious allegation which must be pleaded, particularized and proved on a standard that is higher than on a balance of probabilities. The plaintiff did none of the above to prove that the Defendant's title was a forgery.

88. Arising from my finding above, and in response to issues no. iii, iv and v it is my finding that the plaintiff has not proved his case on a balance of probabilities. As between the Plaintiff and the defendant, the defendant holds a better title. The plaintiff is therefore not entitled to the orders sought.

89. Accordingly, I dismiss the plaintiff's suit in its entirety and direct as follows:

- a) that the Certificate of Lease in respect of land parcel no. Sotik Township/667 issued Charles Kipkurui Langat on 20<sup>th</sup> June 2014 be cancelled forthwith.
- b) That the title issued to Mukesh Kumar Kanthilal Patel is hereby declared as valid.
- c) That the register in respect of the said title be rectified and restored to the name of Mukesh Kumar Kanthilal Patel.
- d) That this judgment be served upon the Land Registrar, Bomet for purposes of ensuring the rectification of the register by cancelling the title to the suit property issued to Charles Langat and restore the name of Mukesh Kumar Kanthilal Patel.
- e) As the defendant categorically stated that he was not interested in costs, I make no order as to costs.

**Dated, signed and delivered, at Kericho this 6<sup>th</sup> day of July 2018**

.....

**J.M ONYANGO**

**JUDGE**

**In the presence of**

Mr. Oboso for Mr. Omuganda for the plaintiff

Miss Ngeno for Mr. Sigei for the defendant

Court Assistant: Rotich