



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 117 OF 2014**

**FALCON GLOBAL LOGISTICS CO. LIMITED.....PLAINTIFF**

**VERSUS**

**MANAGEMENT COMMITTEE OF ELDAMA RAVINE**

**BOARDING PRIMARY SCHOOL.....DEFENDANT**

**JUDGMENT**

By a plaint dated 10<sup>th</sup> April 2014 the plaintiff sued the defendant seeking for the following orders:

- a) An order of a permanent injunction do issue restraining the defendant by itself, its servants, employees agents, assigns or any other person or persons acting under its authority and direction from encroaching, demolishing the plaintiff's structures, further interrupting the plaintiff's works or in any other manner interfering with the plaintiff's quiet possession and enjoyment of its proprietary rights and interests over land known as title No. ELDAMA RAVINE TOWNSHIP BLOCK 111/30.
- b) Damages.
- c) Interest on (b) above
- d) Costs of the suit.
- e) Any other further orders the Hounorable court may deem fit and necessary to grant.

The plaintiff contemporaneously filed an application under certificate of urgency seeking for a temporary injunction restraining the defendant from interfering with the suit land until this matter is heard and determined.

The court granted an order barring the defendant or its agents from taking over, occupying or utilizing the suit land or demolishing the structures. It further barred the plaintiff or any persons from undertaking any developments or constructing on the suit land but the plaintiff was allowed to maintain personnel to guard and secure the premises. The court also directed that the materials confiscated by the police from the suit property be released to the plaintiff forthwith unless the police required the same as exhibits for any criminal complaint.

**Plaintiff's case**

The plaintiff gave evidence through its director known as Suleiman Ibrahim who stated that it is the registered proprietor of Land Parcel No. Eldama Ravine Township Block 111/30 measuring 3.960 hectares or thereabout. The plaintiff further averred that it acquired residual leasehold of a period of 82 years or thereabout from the government of Kenya upon purchasing the suit property from the previous registered owner one Musa Maiyo who consequently registered the suit property in the plaintiffs favour.

The plaintiff stated that the vendor gave him the documents which he presented to his lawyer to carry out a search which revealed that the said parcel of land was registered in the vendor's name Musa Maiyo and that it was a clean title without any encumbrance.

It was the plaintiff's evidence that they entered into a sale agreement and agreed on the purchase price of Kshs. 5million of which he paid Kshs. 1million deposit with a balance of 4million which was subsequently paid. He produced a copy of the sale agreement as exhibit 1 in court. The plaintiff further testified that he paid the rates and was issued with the rates clearance certificate which he produced in court.

The plaintiff also stated that a transfer was later done in his favour and was issued with a certificate of lease which he produced as an exhibit in court. It was further the plaintiff's evidence that he conducted an official search and there was no restriction or caveat on the proprietorship section. The plaintiff produced the following documents in support of the claim;

- a) Certificate of official search dated 19/11/2013 EX 1 (a)
- b) Sale agreement dated 16/11/2013- Ex 1 (b)
- c) Memorandum of registration of transfer dated 20<sup>th</sup> December 2013 EX -2(a)
- d) Official Fee receipt No. 2703118 dated 20<sup>th</sup> December 2013 EX 2(b)
- e) Rates Clearance Certificate Dated 14<sup>th</sup> April 2014, Ex 3
- f) Certificate of Lease dated 20<sup>th</sup> December, 2013 EX 4
- g) Certificate of official Search dated 20<sup>th</sup> December 2013 Ex 5

The plaintiff further stated that he sued the defendant as it has been claiming ownership of the suit land without any documentation to prove the same. He stated that on 9<sup>th</sup> April 2014 the defendant without any colour of right or any legitimate claim, mobilized rowdy mob and with the assistance of the sub-county Commissioner unlawfully invaded the suit property and chased away the plaintiff's workers who were at the time constructing the main gate. That the defendant and the police demolished, confiscated and took to the custody of the police, the plaintiff's building materials.

It was the plaintiff's case that, the acts of the defendant are a blatant infringement of its rights of enjoyment of proprietary interest over the suit property and has occasioned great inconvenience and suffering to the plaintiff. The plaintiff therefore prayed for judgment to be entered in its favour against the defendant as prayed in the plaint plus damages and costs of the suit.

On cross examination by the defence Counsel, the plaintiff stated that he brought the suit in his capacity as a director who has 80% shareholding but did not produce any document to show that he is a director of the company. He also stated that he followed the right procedures in acquisition of the land and the title. The plaintiff also stated that he did not produce any minutes or resolution in court to show that he was authorized by the company to file the suit in court. The plaintiff also admitted that the vendor Musa Maiyo did not show him any allotment letter to the suit land.

#### **Defendant's Case**

The defendant gave evidence through its head teacher who stated that they were given the suit land by retired President Moi who gave them an allotment letter which they got in 2011. The defendant produced the following 10 exhibits,

- (i) Allotment letter
- (ii) PDP no. KBK/30/08/01
- (iii) Letter dated 6<sup>th</sup> July 2011 and b) copy of the cheque
- (iv) Copy of receipt for kshs 6,922 dated 15<sup>th</sup> July 2011
- (v) Letter of no objection from District Land Registrar to District Physical Planner dated 11<sup>th</sup> November 2008.

- (vi) Letter of no objection from Eldama Ravine Town Council to District Physical Planner dated 29<sup>th</sup> October 2008.
- (vii) Letter of no objection from District Education Officer to District Physical Planner dated 28<sup>th</sup> October 2008.
- (viii) Letter of no objection from District Commissioner to District Physical Planner dated 27<sup>th</sup> October 2008
- (ix) a) Copy of the advertisement of the daily nation dated 16<sup>th</sup> October 2008
- b) Copy of the advertisement of the Taifa Leo dated 16th October 2008
- (x) The Kenya gazette volume CX-NO 83 of 24<sup>th</sup> October 2008.

The defendant stated that the school has been in occupation since 1987 and that they came to learn about the plaintiff claiming the suit land in 2014. He also stated that if anyone has documents in respect of the suit land then they should be cancelled. He therefore prayed that the plaintiff's case be dismissed and the defendant's counterclaim be allowed.

On cross examination the defendant admitted that the school land is not registered and that they are in the process of registration. When shown the proprietorship section he confirmed that the land had 3 previous owners and that Musa Maiyo was the previous owner and the plaintiff's name entered as No. 4 in the section.

On reexamination by his Counsel he stated that the process of acquisition of the suit land started in 2008. And that the land was donated by the Retired President. The defendant gave evidence and called 2 witnesses who included a Chairman of the Board of Management of Eldama Ravine primary school and a Physical Planning officer who reiterated the evidence of DW1 and urged the court to dismiss the plaintiff's case.

DW2 on cross examination stated that he was 13 years when the land was acquired and therefore did not know how it happened but only saw the school using the land and that it is an empty space which is 100meters from the school.

DW3 gave evidence on the process of planning and that they stopped preparing PDP plans for individuals in 1997. On cross examination DW3 stated that the suit land has been alienated and he cannot confirm whether it has a title deed. He also stated that his work ends after approval of a plan and does not know what happens thereafter as that is the work of the Land Registrar. He also stated that he does not know when the suit land was registered and that the planning process would not apply to land that has already been registered. The defendant closed its case.

#### **Plaintiff's Submissions**

Counsel for the plaintiff filed written submissions and gave brief facts of the plaintiff's case. Counsel listed the following issues for determination by the court:

- a) Whether the plaintiff acquired valid title to Land Parcel No. Eldama Ravine Township Block 111/30?
- b) Whether there was fraud in the acquisition of land Parcel No. Eldama Ravine Township Block 111/30 and whether the plaintiff was party to the fraud.
- c) Whether the Plaintiff is a bona fide purchaser for value without notice.
- d) Whether the plaintiff's title can be impeached by the defendant on the basis of an allotment letter?

#### **Whether the plaintiff acquired valid title to Land Parcel No. Eldama Ravine Township Block 111/30?**

On this, Mr. Akango submitted that the plaintiff acquired a good title because, the plaintiff acquired residual leasehold interest of a period of 82 years from the government of Kenya upon purchasing the suit property from the previous registered owner one Musa Maiyo and consequently registered the suit property in the plaintiff's favour on 20<sup>th</sup> December 2013. He further submitted that the plaintiff conducted due diligence on the property, paid all rates and other outgoings to the government of Kenya before and after the transaction.

#### **Whether there was fraud in the acquisition of land Parcel No. Eldama Ravine Township Block 111/30 and whether the plaintiff was a party to the fraud?**

On the second issue Counsel submitted that in the statement of defence, the defendant listed the following particulars of fraud on the part of the plaintiff, Musa Maiyo and the District Land Registrar of Koibatek

- (i) Registering the plaintiff as the registered owner of a plot that was not available for registration.
- (ii) Conspiring to defraud the defendant of its lawful plot
- (iii) Effecting registration of a plot without requisite supporting documents from commissioner lands

(iv) Falsifying documents

Mr. Akango submitted that it is trite law that whoever alleges fraud must specifically prove it. He stated that in this case, the defendant had not offered any evidence in support of the allegations of fraud particularized in the defence to show that the plaintiff was fraudulent in acquiring title to the suit land herein.

Counsel cited the case of **Eunice Grace Njambi Kamau and another v. The Hon. Attorney General and 5 others ELC Civil Suit No. 976 of 2012** where the court cited the decision of Tunoi JA (he then was) In Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR Thus;

"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." (Emphasis ours)

Counsel stated that since fraud are serious allegations, the onus is on the party alleging fraud to provide evidence to the court that rises to the standard of proof which was underscored by this Court in **Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR** as being beyond that of a balance of probabilities. In that Appeal, the court rendered itself as follows:

"The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case."

Counsel therefore submitted that in the present suit, no evidence of fraud or any misrepresentation has been tendered to link the plaintiff herein with any fraud or misrepresentation in regard to the acquisition of the subject title. In addition, no evidence has been put forward to suggest that acquisition of the title was illegally procured. It was his submission that the defendant has not demonstrated nor established that the acts by the plaintiff constituted an illegality in the acquisition of the title.

#### **Whether the plaintiff is a bona fide purchaser for value without notice**

On this issue Counsel submitted that the plaintiff is a bonafide purchaser of the suit property without any notice of any defect in title and relied on the case of **Eunice Grace Njambi Kamall And another v. The Hon. Attorney General and 5 others Civil Snit No. 976 Of 2012** where the court cited the case of **Fletcher Vs. Peck 10 U.S 87 (1810)** to illustrate how other jurisdictions have handled the issue of sanctity of title and the plight of innocent third parties. In the said Fletcher Vs. Peck case (Supra) Marshall J had this to say:-

"If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons who are purchasers without notice, for a valuable consideration cannot be disregarded. Titles, which according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be, any concealed defect arising from the conduct of those who had held the property long before he acquired it of which he had no notice that concealed defect cannot be set up against him.

He has paid money for a title good at law, he is innocent whatever may be the guilt of others and equity will not subject him to the penalties attached to that guilt. titles would be insecure, and intercourse between man and man would be very seriously obstructed if this principle be overturned."

Mr. Akango stated that on the observation by Marshall J with regards to bona fide purchaser for value without notice, the principle of bonafides in the case of third parties dealing with property is equally applied by the courts in this country where circumstances permit. Whereas an intending purchaser of a property ordinarily is expected to carry out due diligence to verify the details and particulars of the property, it cannot be expected that the scope of such due diligence would extend beyond what the law provides as being sufficient e.g official searches and inspection of survey records unless there is on the face of it apparent need to carry out further investigation. It was therefore Counsel's submission that the plaintiff herein did carry out such due diligence thus making him a bona fide purchaser for value without notice.

On the definition of a bonafide purchaser, Counsel cited the case of **Lawrence Mukiri v. Attorney General & 4 Others [2013] eKLR** where the court stated what amounts to "bonafide purchaser for value, thus:

... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;

f. He was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner. "

### **Whether the plaintiff's title can be impeached by the defendant on the basis of an allotment letter?**

On this issue Counsel submitted that the plaintiff's title cannot be impeached by the defendant on the basis of an allotment letter because an allotment letter in law is not a document of title. He relied on the case of Shadrack Kuria Kiman V. Stephen Gitau Nganga and Another ELC Case No. 439 of 2017 (Formerly Machakos ELC No. 202 Of2015) where the Court stated as follows:

"The Defendants claim they have letters of allotment to the suit land and that the Plaintiff's Certificate of Lease is fake. They however failed to adduce any evidence to prove this allegation.

I find that the Plaintiff is indeed entitled to be protected by the law from the Defendants' who are interfering with his rights and privileges over the suit lands. Further that the Plaintiff's Certificate of Lease supersedes the Defendants' letters of Allotment which is trite law is not a document of title."

On the defendants evidence DW2 testified and stated that the retired president Moi gave the school the parcel of Land and that they got an allotment letter but no title. However, during cross-examination, he stated that he does not know how the school came to claim the land and that he cannot tell the number (if the school land or the land claimed by the plaintiff.

In addition, while giving his testimony, DW3 admitted that the title if was in force at the time of the purported survey, then the exercise was of no consequence i.e. there was No parcel available for alienation at the time the letter of allotment was issued.

In conclusion Counsel therefore submitted that based on the facts and law that the plaintiff is a bonafide purchaser for value without notice and that the plaintiff has satisfied the conditions for a bonafide purchaser for value without notice. He urged the court to enter judgment as prayed in the plaint.

### **Defendant's Submissions**

The defendant listed the following issues for determination by the court.

- (i) Whether the plaintiff suit is incompetent.
- (ii) Whether the plaintiff is an innocent purchaser for value and has discharged the burden of an innocent purchaser
- (iii) Whether the plaintiff proved his case to be entitled to the relief being sought in the plaint.
- (iv) Whether the defendant has proved his allocation of the suit property and is entitled to the relief being sought in the counter claim.
- (v) Who should bear the costs of the suit?

On the first issue Counsel submitted that the plaintiff's suit is incompetent on the ground that it being a limited liability company did not produce a certificate of incorporation to confirm if indeed Falcon Global Logistics company limited is duly registered company under the Companies Act and is compliant with the Kenyan laws. That PWI never disclosed to the court who other directors of the company are if any as no evidence in form of memorandum and article of association of the alleged company was produced.

Counsel further submitted that the suit as filed by the plaintiff is fatally defective, incompetent, and untenable in law for want of resolution as they did not comply with order 4 rule I of the Civil Procedure Rules and Company law.

Counsel also submitted that it is trite law that where the plaintiff is a limited liability company, the officer authorized to swear an affidavit shall be duly authorized under the seal of the company and no such authority was produced before the court. Further that the firm of Advocates which filed this instant suit is improperly on record, without authority and as such without any legal basis to prosecute the suit.

Counsel cited the case of AFFORDABLE HOMES AFRICA LIMITED vs IAN HENDERSON 2 OTHERS, HCCC No. 524 of 2004, where Njagi J.(as he then was) found that the Board of Directors had not passed a resolution to authorize the institution of the suit. In the circumstances, the learned Judge said;

*"The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds, and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff "*

The issue of lack resolution was also raised in the case of PHILOMENA NDANGA KARANJA 2 OTHERS vs EDWARD KAMAU MAINA, ELC No. 1411 of 2014; where Gacheru J. stated:

*"I have considered the rival submissions, and it is obvious that the suit herein was filed without the resolution of the Board. The 1<sup>st</sup>*

*plaintiff tried to justify that position. However, it is trite law that where a suit is instituted for and on behalf of a company, there should be a company resolution to that effect".*

The learned judge went ahead and dismissed the case on this ground.

Counsel submitted that the rules have gained universal application both in civil and constitutional petitions where the courts from time to time have declared that failure to comply with rules renders the suit fatally defective and this case is not an exception. The only exception is where such resolution is filed before the matter is fixed for hearing of which none was filed. That the requirement under order 4 rule I (4) is not a technical one; but a substantive one, thus it would be wrong for a Court of law to label a substantive statutory requirement as "technical". The drafters of the Civil Procedure Act and Rules thereunder were explicit enough that verifying affidavit of a corporation shall be sworn by an officer duly authorized under the seal of the company to do so.

Counsel finally cited the Ugandan Case, Bugerere Coffee Growers Ltd v Seraduka & Anor. (1970) EA 147 where the Court held, in dismissing the suit that

*"When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. The Court held further that where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action*

He therefore urged the court to dismiss the plaintiff's suit.

On the issue whether the plaintiff is an innocent purchaser for value and has discharged the burden of an innocent purchaser, Counsel stated that it's now settled principle of law that where the plaintiff's title is disputed like in the instance case then it's upon the plaintiff to demonstrate how the title was acquired and due diligence steps taken before the suit property was acquired. That the person who testified on behalf of the plaintiff company alleges that the company acquired the suit land by way of purchase from one Musa Maiyo in the year 2013 which agreement was made and witnessed by the same Advocate representing the plaintiff company who is supposed to be a potential witness in this matter.

He stated that no basis at all was laid by the PW1 as to why the alleged seller was not called to court as a witness to confirm if at all there was a valid sale agreement between him and the company before court. That no receipts were produced before court or any evidence for that matter to confirm how the alleged purchase price was paid. He submitted that the omission herein was deliberate and that the court should take judicial notice of the same.

That the land in question being a leasehold interest, the process of acquisition is properly laid down step by step and every step is properly documented. It is now settled principle of law that a party who alleges to be an innocent purchaser must demonstrates steps taken before the acquisition of the property.

Counsel cited the case of Suleiman Rahemtulla Omar & another v Musa Hersi Fahiyi & 5 others [2014] eKLR where the Court of Appeal defined the duties bestowed upon a person claiming bonafide purchaser's interest. It was held that the appellant could not rely on the doctrine of bonafide purchaser since they failed to carry out sufficient due diligence before entering into the sale agreement. He therefore submitted that the alleged seller one Musa Maiyo had no title to pass to the plaintiff and it was incumbent upon the plaintiff to conduct due diligence before entering into the sale agreement which he did not.

It was Counsel's further submission that the plaintiff did not lay,

- Any evidence before court that the alleged Musa Maiyo applied for allocation of plot known as ELDAMA RAVINE TOWNSHIP BLOCK 111/30.
- No evidence that the application by Musa Maiyo was approved
- No evidence that an allotment letter was issued to Musa Maiyo in respect to EL-DAMA RAVINE TOWNSHIP BLOCK 111/30.
- No evidence that Musa Maiyo the alleged seller accepted the allotment letter and complied with its terms.
- No evidence that a lease document was prepared in the name of Musa Maiyo and forwarded to Land Registrar for registration
- Lastly there is no evidence before court that Musa Maiyo was issued with certificate of lease

Mr Wabwire submitted that the plaintiff did not bother to call any person from Koibatek District Lands Registry to authenticate the validity of the purported certificate of lease that was registered at the District Lands offices and issued to the plaintiff.

That Article 40 of the Constitution of Kenya empowers this honourable court to protect the rights of a proprietor in so far as only where the property in question was legally and lawfully acquired and Counsel therefore submitted that the plaintiff illegally and unlawfully acquired

ELDAMA RAVINE TOWNSHIP BLOCK 111/30 and that the court should declare the plaintiff's title a nullity since due process was not followed. The requirement of due process is underpinned by several provisions of the law and the Constitution which must be met at all times.

Further Counsel submitted that it's provided under section 26(1) of the Land Registration Act which is the applicable law herein that,

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

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

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

Counsel finally cited the case of Daudi Kiptugen —vs- Commissioner of Lands & 4 Others (2015) eKLR: where Justice Sila Munyao stated that

"It is not enough that one issues 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 constricted 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 (some) backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein."

Counsel submitted that the plaintiff has not proved his case at all and thus not entitled to the orders sought and should be dismissed with costs that the defendant counterclaim be allowed as prayed as it has been proved vide documentary evidence.

### **Analysis and determination**

I will not belabor much in restating the facts of this case as Counsel for both the plaintiff and the defendant have put in comprehensive submissions in respect of their client's cases.

The first issue that I must deal with in this case is as to whether this suit was filed with authority and resolution of the company. The plaintiff is a limited liability company and there is a requirement that the officer authorized to swear an affidavit shall be duly authorized under the seal of the company and no such authority was produced before the court.

The verifying affidavit just stated that the deponent was duly authorized to swear the affidavit but there was no company resolution under seal authorizing the filing of this suit. The verifying affidavit was also not dated even though it was signed and attested to. Further the firm of Advocates which filed this suit did also not produce any authority to file the suit.

To emphasize the necessity for a company resolution to back the institution of the suit, **Odunga J.** in his Judgement in the **Leo Investments** case referred to the holding of **Hewett, J.** in **Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd HCCC No. 391 of 2000** as follows:

*"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect. .... As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."*

The requirement of a resolution to enable parties file suits is for purposes of safeguarding the operations of a company which is a juristic person that operates via its directors but this must be done with authority. If this was not in place then aggrieved parties would just be incurring or initiating processes without the knowledge or authority of the company. This is to bring order and sanity in the operations of a company.

In the current suit there is no evidence that there was such resolution sought and obtained from the company to authorize the filing of this suit. This is not a technicality as it goes to the core of company management. A director of a company cannot wake up and decide to file a suit without such resolution. This issue was raised during cross examination but the plaintiff did not see it prudent to rectify the anomaly by seeking ratification of what had happened without authority.

The court is alive of the provisions of section 1A and 1B of the Civil Procedure Act the provisions of *Article 159 (2) (d)* of the *Constitution* that justice shall be administered without undue regard to procedural technicalities. Courts should also not compromise procedures laid down for the smooth adjudication of matters in an adversarial system to bend backwards to accommodate parties who have no regard for procedures. Having said that I find that the suit by the plaintiff is incompetent before the court.

Even though the plaintiff's suit is incompetent the court has to deal with the issues in order to determine the counterclaim filed by the

defendant. The plaintiff indicated that he bought the suit property from one Musa Maiyo who was enjoined in this suit at the instance of the defendant as an interested party. The said Musa Maiyo was served with the suit papers but he never filed any papers to shed light on the transaction between him and the plaintiff. The case therefore proceeded without him.

The said Musa Maiyo was a crucial witness in this case and that is why the defendant endeavored to bring him on board to explain how he acquired the disputed parcel of land. The best the plaintiff could have done was to urge the court to issue witness summons to the said Musa Maiyo to come to court and explain how he acquired the title and whether he had a good title to pass to the plaintiff as it were. This was not done. The defendant disputed the process of acquisition of the suit property and that is why they gave elaborate process of how they acquired the suit property.

It was incumbent upon the defendant who alleged that the plaintiff's title was procured irregularly to lead evidence to prove that the plaintiff was part of the fraud or misrepresentation. The defendant called a witness from the department of Physical Planning who gave evidence on the process and steps for acquisition of part development plans which accompany allotment letters. The defendant also gave evidence and produced several letters and approvals to explain the process they went through to acquire the suit land. This was in a bid to prove that the plaintiff, Musa Maiyo and the District land Registrar Koibatek either conspired jointly or severally to defraud the defendant which is a public primary school of their land.

The documents and the processes that the defendant went through to acquire the suit land as produced in court are an elaborate process which cannot be done in a one off transaction. The same started in 2008 and the process is still ongoing as the defendant stated that they are awaiting issuance of titles.

There is something that is not adding up in plaintiff's acquisition of the suit plot from one Musa Maiyo. The agreement indicated that the purchase price was Kshs five Million (5,000,000/) of which Kshs. 1,000,000/ was paid on execution of the agreement. It was a term of the agreement that the balance was to be paid within 120 days after the date of execution of the agreement. Even though the vendor was not there to dispute whether he was paid the balance of the purchase price as stipulated in the agreement, it would have been proper for the plaintiff to produce an acknowledgement that the said money was paid as a bona fide purchaser for value. It was also unfortunate that the advocate who witnessed the sale agreement was the one who represented the plaintiff in this matter. Not that it is wrong but sometimes it is good to let another Counsel take over in case you might be required to give evidence as a witness especially where the authenticity of the contents of agreement are under attack.

The fact that the plaintiff pleaded that it was a bonafide purchaser for value who honestly intended to purchase a property offered for sale, it was incumbent upon the plaintiff to establish that it conducted due diligence before buying the suit property. The plaintiff produced a copy of an agreement dated 22<sup>nd</sup> November 2013 which was signed by two directors. It indicated that the agreement was signed and sealed with a common seal of the said purchaser Falcon Global Logistics Co. Ltd but the same was not affixed. The plaintiff also never called any official from the lands registry to authenticate the genuineness of his title. When the authenticity of your title is in question, you have to rebut such allegations with evidence to the contrary. This was not the case.

The plaintiff should be aware that the amendment in the land laws as to indefeasibility of title on the grounds of registration as per section 26 of the Land Registration Act has now changed the landscape. A title can be cancelled if there is evidence that the same was obtained fraudulently or through misrepresentation. This was a more reason why the plaintiff had a task of establishing that the title to the suit land was acquired procedurally.

The defendant gave evidence including documentary evidence to establish the process of how they acquired the suit land and are in occupation to date. The process was elaborate from allocation, gazzatement, no objection letters from different government departments which gave credibility to the evidence of the defendant. The plaintiff took the matter casually and did not see it prudent to call the seller to fortify his case with how he acquired the land. Why did this witness not come to court to shed light on this case even after he was enjoined in the case as an interested part. Did he actually acquire the land procedurally or unprocedurally? Did he take the plaintiff's money while he knew that he did not have a good title to pass?

Section 80 of the Land Registration Act provides as follows:

*"80. (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.*

*(2). The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default."*

This section gives the court powers to order for rectification of a register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. Is there a way parallel processes can be ongoing in respect of the same parcel of land where one is elaborate and one does not have all the requisite steps undertaken in respect to acquisition of land? When the plaintiff was buying the land from the vendor, there must have been some initial documents of acquisition that were given to the plaintiff to ascertain that the vendor was the bona fide owner of the suit land. The plaintiff admitted that when he was buying the suit property, Musa Maiyo did not show him the allotment letter. This case to my mind is a case where the plaintiff was taken for a ride by one Musa Maiyo who sold a property where he did not have a good title to pass to the plaintiff. The remedy for the plaintiff would be at the doorstep of one Musa Maiyo who purportedly sold to him the land.

When the plaintiff filed this suit, he was aware that the defendant was also claiming ownership of the land and it would have assisted the court if the plaintiff would have gone a step further to prove his case on a balance of probabilities as required by law. Even though the courts

should take the production of a title document is prima facie evidence that the person named on the title is the proprietor of the suit land, Section 26 of the Land Registration Act provides that if it can be proven that the title was procured irregularly by fraud, misrepresentation or mistake then the same can be impeached.

From the evidence on record, together with the documents produced by both the plaintiff and the defendant, I find that the plaintiff has not proved his case on a balance of probabilities and that the plaintiff's suit is incompetent for lack of a board resolution and authority to file the suit. The plaintiff could have redeemed itself by rectifying the anomaly but chose not to do so and thus not entitled to the orders sought.

Having said that I therefore dismiss the plaintiff's suit with costs to the defendant. The plaintiff may not have been party to the fraud, or misrepresentation, that led to issuance of titles to itself, but it cannot escape mention, that the title must have been acquired illegally and unprocedurally. The same cannot be allowed to stand and the only remedy is to have it cancelled. I find that the defendant has proved its counterclaim against the plaintiff therefore enter judgment as per the counterclaim for the defendant with costs.

**Dated and delivered at Eldoret this 11<sup>th</sup> day of October, 2018.**

**M.A ODENY**

**JUDGE**

Judgment read in open court in the presence of Mr. Kipkurui holding brief for Akango for Plaintiff and Mr. Odongo holding brief for Wabwire for defendant.