



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. NO.75 OF 2008

MARIA ROSITA CARDOZO (Suing through here appointed Agent

MASAI MARA SOPA LODGE LIMITED.....PLAINTIFF

VERSUS

ROBERT KIBAGENDI OTACHI.....1st DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....2nd DEFENDANT

JUDGEMENT

By an *Amended Plaintiff* dated **29th June 2012**, the Plaintiff herein brought a claim against the Defendants and sought for the following orders.

- a. A declaration that transfer of the property known as Nairobi/Block 90/235 to the 1st Defendant was and is null and void***
- b. An order directing the 1st Defendant to deliver the Certificate of Lease improperly issued to him to the 2nd Defendant for cancellation.***
- c. An order directing the 2nd Defendant to cancel the Certificate of Lease improperly issued to the 1st Defendant in respect to Nairobi/Block 90/235.***
- d. An order directing that the title to the property Nairobi/Block 90/235 does revert to the original and rightful owner, Maria Rosita Cardozo, the Plaintiff herein.***
- e. Costs of this suit and interest thereon.***
- f. Any other relief this Court may deem fit.***

In the *Statement of Claim*, it was averred that the Plaintiff was and is the proprietor of all that parcel of land known as ***Nairobi/Block 90/235***, for a term of **99 years** from the **1st January 1978**. That the ***Certificate of Lease*** was issued on the **29th April 1986**, and the Plaintiff has since been paying both the land rent and land rates over the suit property.

Further, the Plaintiff averred that the suit property was registered in the names of **Maria Rosita Cardozo** and **Victor Antony Cardozo**, but the said **Victor Antony Cardozo** died on **24th August 2004**. Therefore the suit property being held in joint tenancy, then it immediately vested in the Plaintiff by virtue of right of Survivorship.

It was further alleged that the Plaintiff donated the Power of Attorney over her interest in the suit property to **Masai Mara Sopa Lodge Limited** on **23rd April 2007**, and the said Power of Attorney was duly registered in the Register of Powers at the **Nairobi District Land Registry** as **No.16**. Further that the 1st Defendant **fraudulently transferred** the interest and title in the suit property to himself without the knowledge, consent, and/or authority of the Plaintiff on **8th April 1997**.

The Plaintiff further particularized the fraud perpetuated by the 1st Defendant and further averred that by virtue of the said fraud, the 1st Defendant did not acquire good title to the suit property as the purported transfer was and is null and void. The Plaintiff therefore prayed for an order that the Court do direct the 2nd Defendant to rectify the Register as provided by the law.

The claim by the Plaintiff is opposed by each of the Defendants herein. The 1st Defendant filed his **Statement of Defence** dated **21st May 2008**, and denied all the allegations contained in the Plaintiff. He denied that he was aware of any Power of Attorney donated to the Plaintiff regarding the 1st Defendant's suit property and did put the Plaintiff to strict proof thereof. Further, he contended that he is the registered owner of the suit property and did also allege that he has been paying land rent and rates over the suit property ever since the same was transferred to him. It was his averment that he is a purchaser for value without Notice and any defect if any or at all did not vitiate his acquired legal rights in the suit premises.

The 1st Defendant also denied the particulars of fraud and contended that he has a clean title over the suit property. It was therefore the 1st Defendant's contention that the Plaintiff is not entitled to the relief sought in Paragraph 7 of the Plaintiff and he further contended that if the Plaintiff's claim is upheld, the same will deprive him his right to ownership of the said suit property. The 1st Defendant therefore urged the Court to dismiss the Plaintiff's suit.

The 2nd Defendant filed its **Defence** on **8th September 2008**, and denied all the allegations made by the Plaintiff. 1st Defendant further alleged that it was a stranger to all those allegations made by the Plaintiff and did put the Plaintiff to strict proof. It also denied that it was aware of any Power of Attorney donated to the Plaintiff regarding the suit land and did put the Plaintiff to strict proof thereof. The 2nd Defendant also denied all and every allegation of fraud and did put the Plaintiff to strict proof thereof.

It was the allegation of the 2nd Defendant that the records at **Nairobi Lands Registry** indicated that the Lease in respect of **LR.No.Nairobi/Block 90/235**, was executed in favour of the 1st Defendant. Further that the said Lease was duly registered on **29th April 1986**, and there are no documents to show another Lease subsequent to the first one, or allotment was ever prepared in respect of land parcel **Nairobi/Block 90/235**, in favour of the Plaintiff and or any other person. Further the 2nd Defendant denied receiving the **Notice of Intention to Sue** as alleged by the Plaintiff and it was their allegation that the Court lacks jurisdiction to entertain the suit.

After the close of the pleadings, several applications were filed among them an application dated **16th July 2008**, seeking an order to compel the 1st Defendant to provide the Plaintiff with better particulars. Further, the 1st Defendant filed an application dated **6th October 2008**, seeking to have the suit struck out for being an abuse of the Court process. A Ruling was delivered on **23rd September 2010**, wherein the said application was dismissed and the suit therefore was to proceed for hearing and be decided on merit.

The viva voce evidence was therefore taken and the suit commenced for hearing on **31st May 2011**,

wherein the Plaintiff called one witness.

Plaintiff's Case

PW1 – Shahid Shanawaz Wissanji, gave evidence and stated that he is a **Director** of **Masai Mara Sopa Lodge Limited**. He testified that he had the authority of the Company through the Board Resolution to represent the Company. He also testified that **Maria Rosita Cardozo** is a family friend who is an elderly woman and who is currently residing in Canada. He stated that **Maria Rosita Cardozo** donated Power of Attorney to **Masai Mara Sopa Lodge Limited** in respect of the suit property **LR.Nairobi/Block 90/235**, in which the Company has the original title to the property. He produced the original title which showed that the property was owned by **Victor Antony Cardozo** and **Maria Rosita Cardozo**. He further testified that **Victor Antony Cardozo** passed on a few years ago. On **3rd June 2015**, after PW1 was recalled to testify, he produced **Death Certificate** and **proof** of **Death for Victor Antony Cardozo**, as **exhibit No.2** in Court. He alleged that **Antony Cardozo died in Canada in the year 2004**.

To him, after the death of **Victor Antony Cardozo**, the property is now **owned solely** by **Maria Rosita Cardozo**, as the said property was jointly owned by the two as joint tenants. The title further showed the interest was a leasehold interest for **99 years** from **1st January 1978**. He further testified that the property is in Loresho before the **Lions Eye Clinic**, and it is fenced with barbed wire, and it is vacant with some grown vegetation. He recalled that in the **year 2007**, **Maria Rosita Cardozo** went to the property and she complained that she was harassed by some people who claimed to own the property. Thereafter, they carried a search and realized that the property was registered in the name of **Robert Kibagendi Otachi**, as was evident from their official search. Therefore, they placed a caution on the title of the suit property in **April 2008**, and the said Notice was served on **Robert Kibagendi Otachi** by the Land Registrar. A title had been issued in favour of the **1st Defendant** and the Plaintiff therefore filed this suit.

He further testified that **Maria Rosita** has never transferred the property to **Robert Kibagendi Otachi**, the **1st Defendant** herein. He urged the Court to allow their prayers as per the **Plaint**. It was his testimony that the title to the **1st Defendant** was improperly issued as the Plaintiff still has the original title in the name of **Maria Rosita**. It was his further testimony that the title to the **1st Defendant** was issued on **8th April 1997**, which was **11 years after** the title had been issued to **Maria Rosita Cardozo** and **Victor Antony Cardozo**. He identified the receipts for payment of land rates by their Company on behalf of **Maria Rosita**. Further that the **1st Defendant** had claimed that he bought the property from **Esono Aguesomo E** and **Teresita Esono Suguitan**, but the Plaintiff did not know the above stated persons. To him, the said persons had no interest in the suit property as the **Lessees** were **Victor Antony Cardozo and Maria Rosita Cardozo**. PW1 produced the bundle of documents as exhibits No.1 in Court.

In cross-examination, he stated that the Board authorized the filing of this suit but he did not have a copy of the said resolution in Court. He further admitted that the receipts for the payment of rates were from the **year 1991 to 1996**, but he did not have receipts for prior to **1991**. Further that they did not pay the land rates **from 1997**, because the land was in someone else's name. He further confirmed that he was not aware whether **1st Defendant** has been paying land rates due to the suit land. He reiterated that **Victor Antony Cardozo**, was deceased and the Power of Attorney was given to their Company by **Maria Rosita Cardozo**. It was his testimony that he did not know anything about the sale of the suit land to **Robert Kibagendi Otachi**, or the **Sale Agreement** as stated by **1st Defendant**. He therefore testified that the sale to **1st Defendant** was fraudulent, because the property was never sold by the real proprietors as the **Sale Agreement** does not refer to the Plaintiff but to other **3rd** parties. He also admitted that the Plaintiff has no structure on the suit land. To him, he did not know how the property changed from the name of the Plaintiff to the **1st Defendant**. He also reiterated that they stopped paying land rates because the demand Notices stopped coming in the names of the Plaintiff but instead, the said demand Notices were in the name of **Robert Kibagendi Otachi**.

1st Defendant's Case

DW1 – Robert Kibagendi Otachi, testified that he did not know the Plaintiff herein. However, in **January 2008**, three people visited him at **Nairobi Block 90/235**, which is the suit property, situated at **Loresho Estate**. The three persons were a lady and two men. That the said persons asked him what he was doing on the property and he explained that it was his property and he had purchased it. It was his testimony that he had purchased the suit property from **Esono Anguesomo** and his wife **Teresita Suguitan** at the cost of **Kshs.2.3 million**. He further testified that he bought the property in the **year 1997**, after

he saw the same having been advertised in the **Daily Nation of 20th January 1997**. That the said property was being sold by **Rainbow Estate Agents**. At the offices of Rainbow Estate, he was shown the Certificate of Lease in the names of two owners and he later met the two proprietors at the Agents office. The two proprietors confirmed that the property was theirs and he did carry an official search and confirmed that the suit land was owned by the two. He therefore proceeded with the transaction and a Sale Agreement was prepared by his advocates. The parties thereafter signed the Sale Agreement and after payment of the full purchase price, the suit property was registered in his name. He was thereafter issued with **Certificate of Lease**, dated **8th April 1997**, which he produced in Court as exhibit. He also stated that he took possession of the suit property as soon as he received the title and he is still in possession to date. Further that he has been paying land rates and rent over the suit property and he identified the payment receipts to that effect.

It was his testimony that he had also taken a **loan of Kshs.800,000/=** from **Barclays Bank of Kenya**, and used the **title** of the suit property as **security**. The 1st Defendant further alleged that all that time, no one claimed the suit property from him. It was his testimony that he has never transferred the suit property to **Victor Antony Cardozo** and **Maria Rosita Cardozo**, but the same was transferred to him by **Mr. Esono** and his wife, **Teresita**.

The 1st Defendant further alleged that before the suit was filed, he did not receive any Demand Notice from the Plaintiff. He produced his bundle of documents as **Defence exhibit No.1**. He urged the Court to dismiss the Plaintiffs suit with costs. In cross-examination, he reiterated that he bought the suit property from **Mr. Esono** and **Teresita** as per **the Sale Agreement**. He however did not have the original of the Sale Agreement as his advocate misplaced it. He also confirmed that as per the Certificate of Official Search, **Esono** and **Teresita** were the registered owners of the suit property. It was his further evidence that all the documentations were done by **Mr. Buti Advocate**. Further that he was informed by the Lands office that somebody had placed a caution on the suit land.

The 2nd Defendant did not call any witness, but Plaintiff recalled PW1 who gave evidence **on 3rd June 2015** and produced a Certificate of Death and Proof of Death as **exhibit No.2**.

After the close of *viva voce* evidence, parties filed their respective Written Submissions. The **Law Firm of Hamilton Harrison & Mathews & Co. Advocates** for the Plaintiff filed their first set of **Written Submissions** on **6th December 2011**, and further Written Submissions on **9th June 2015**. The Plaintiff submitted that **Maria Rosita Cardozo**, is the rightful owner of the suit property which she donated to **Masai Mara Sopa Lodge Limited**, through the Power of Attorney. Further that since her husband **Victor Antony Cardozo**, who was a joint tenant died in the **year 2004**, the suit property vested on **Maria Rosita Cardozo**, as a sole proprietor by virtue of the principle of *Jus accrescendi* or survivorship in Joint tenancy. Further, that since the Plaintiff was registered as proprietor on **29th April 1986**, without any encumbrance and the 1st Defendant on **8th April 1997**, then the Plaintiff's Certificate is the first in time and should prevail. The Plaintiff relied on the case of **Christopher Mwangi Kioi...Vs...The Chief Land Registrar & 2 Others (Unreported)**. Where the Court held that:-

“Where there are two certificates of title issued and in existence, unless the Court is shown the invalidity of the first title and this is proved, the 1st title remains valid and the second title would be cancelled. That title can only be defeated as provided for by Section 28 of the Registered Land Act.

The Plaintiff further relied on the case of *Iqbal Singh Rai...Vs...Mark Lecchini & Another (unreported)*, where the Court held that:-

“A fraudster cannot transfer a valid title to another party even if that other party becomes the registered proprietor. The fraudulent transfer would be declared null and void and the second title would be cancelled.”

The 1st Defendant filed his first set of ***Written Submissions*** on ***19th December 2011***, and submitted that the Plaintiff was not able to prove fraud on the part of the Defendants. Further that the Plaintiff did not produce the Company Resolution to confirm that they authorized the filing of this suit. The 1st Defendant relied on the case of *Kyanzavi Farmers Co. Limited ...Vs... Mangu Ngolo, HCCC No.128 of 2008 (unreported)*, where the Court held that:-

“Non-production of a resolution authorizing the institution of a suit render such a suit incompetent.”

Further in the case of *Gatimu Farmers Co. Limited...Vs...Solomom Mbugua & Another (2004) eKLR*, the Court observed that ***“there was no resolution of the Company authorizing the Plaintiff to file the suit and the suit was dismissed.”*** The 1st Defendant filed further submissions on ***15th June 2015***, and reiterated his earlier filed Written Submissions and urged the Court to dismiss the Plaintiff’s case as it had not been proved on the required standard.

The 2nd Defendant filed their ***Written Submissions*** on ***11th August 2015***, and submitted that the Plaintiff did not prove the allegation of fraud to the required standard. They relied on Section 107 of the Evidence Act which provides that:

“whoever desires any court to give judgement as to any legal right on liability dependent on the existence of facts which he asserts must prove those facts”.

Further, 2nd Plaintiff relied on the case of *Samuel Samita Namunyu... Vs...Philmon Machina Ndiwa & 3 Others (2014) eKLR*, where the Court held that:

“Fraud is a very serious allegation and one that warrants and attracts serious consequences under the law. it is trite that for fraud to lie, the alleging party should prove the existence of that fraud not on a balance of probabilities but a much higher standard of proof albeit below beyond reasonable doubt.”

Further they relied on the case of *Njuwangu Holdings Limited...Vs...Langata KPA, Nairobi & 5 Others(2014) eKLR*, where the Court held that:-

“The standard of proving fraud in Civil Cases, the Courts have

consistently held, is higher than on a balance of probability. An allegation of fraud is a serious indictment against a party to whom it is made and

though the standard of proof is not beyond a reasonable doubt as in Criminal Cases, it is no doubt near there but is certainly higher than on a balance of probability ad thus when a party in a Civil matter makes an allegation of fraud against a party he should be prepared to tender and adduce evidence to prove the allegation to the required standard”

It was the 2nd Defendant’s submission that the Plaintiff did not prove fraud and so the Register should not be rectified as prayed by the Plaintiff. The 2nd Defendant therefore urged the Court to dismiss the Plaintiffs suit with costs.

This Court has now carefully considered the available evidence and the exhibits thereto. The Court has

also considered the respective Written Submissions and the cited authorities together with the relevant provisions of the law and the Court will now render itself as follows:-

There is no doubt that the suit property herein **Nairobi Block 90/235**, has two Certificates of title. The first Certificate of title was issued on **29th April 1986** and it is in the names of **Victor Antony Cardozo** and **Maria Rosita Cardozo**. The second Certificate of title is in the name of **Robert Kibagendi Otachi**, the 1st Defendant which was issued on **8th April 1997**. The Plaintiff in her claim has alleged that the suit property is owned by herself. That she never sold the same to anyone and particularly to the 1st Defendant. The Plaintiff therefore urged the Court to declare her as the rightful owner of the suit property and order rectification of the Register accordingly.

However, on the part of the 1st Defendant, he has stated that he is the rightful owner of the suit property having purchased the same from **Mr. & Mrs. Esono**. It was his evidence that he is a *bona fide* purchaser for value without notice. He urged the Court to dismiss the Plaintiff's suit. On the part of the 2nd Defendant, it stated that the suit property is registered in the name of the 1st Defendant and that Plaintiff was unable to prove fraud on the part of 2nd Defendant. However, the 2nd Defendant further submitted that if the Court was to direct that it rectify the Register, it was ready to abide by the Court order.

Having now considered the available evidence and the respective positions taken by the witnesses herein, the Court finds that the issues for determination are as follows:-

i. Did the Plaintiff have a right to bring the suit alone without inclusion of Victor Antony Cardozo?

ii. Could Maria Rosita Cardozo donate Power of Attorney to the Masai Mara Sopa Ledge Limited alone?

iii. Did the Plaintiff have capacity to bring the suit without the Company's resolution?

iv. Did the Plaintiff serve the Notice to the 2nd Defendant as provided by Section 13A of the Government Proceedings Act.

v. Has the Plaintiff herein proved fraud on the part of the Defendants?

vi. Who is the rightful owner of the suit property?

vii. Is the Plaintiff entitled to the prayers sought?

viii. Who is to bear costs of the suit?

Before the Court embarks on determination of the above stated issues, the Court will point out that there are indeed **two sets of Certificates of title**. At the end of the analysis of the above issues, the Court is supposed to arrive at a finding on which of the two, is the valid Certificate of title that should be upheld by the Court.

1) Did the Plaintiff (Maria Rosita Cardozo) have a right to bring this suit alone in exclusion of Victor Antony Cardozo?

It was the Plaintiff's evidence that the suit property herein is **owned by Maria Rosita Cardozo and Victor Antony Cardozo** and that their **Certificate of title** was issued on **29th April 1986**. The said Certificate of title was produced as exhibit. Further that **Maria Rosita Cardozo** is an elderly lady who **lives in Canada** and that her **husband, Victor Antony Cardozo died** in the **year 2004**. A **Death Certificate** and proof of death was produced as **exhibit No.2**.

PW1 stated that when **Maria Rosita Cardozo** visited the suit property in the **year 2007**, she found that it

had been invaded by other people and an official search was carried out, and the said **Maria Rosita** noted that the suit property had been **registered in the name of Robert Kibagendi Otachi**, the 1st Defendant. The said **Maria Rosita** then donated Power of Attorney to the

Masai Mara Sopa Lodge Limited, who filed the suit on behalf of the said **Maria Rosita Cardozo**. The 1st Defendant has alleged that **Maria Rosita Cardozo** could not file the suit in exclusion of **Victor Antony Cardozo** who is a **Joint tenant**. The Plaintiff had alleged that **Victor Antony Cardozo died** in the year **2004**. Indeed a **Death Certificate** and **Proof of Death** were produced as **exhibits** in Court. It is indeed correct that a Joint tenant cannot bring a suit alone in exclusion of the other tenant. **Halsbury Law of England 4th Edition Volume 39 Para 530** states as follows:-

“...and it follows that in actions as to the joint estate, one tenant may not sue or be sued without joining the other”.

Further as submitted by the 1st Defendant, in the case of **R. M. Fairclough and Sons Ltd...Vs...Berliner (1931) Ch.60**, the Court held that:-

“that relief against forfeiture, where there are joint lessees, cannot be granted on the application of only one of them.”

However, as submitted by the Plaintiff, it is evident that the suit property was **jointly owned** by **Victor Antony Cardozo** and **Maria Rosita Cardozo**. Upon **demise** of **Maria Rosita’s husband, Victor Antony Cardozo, she became** the **sole proprietor** of the property by virtue of the principle of **Jus accrescendi**. It is evident that where a property is held by two persons as joint tenants, upon the demise of one of them, the residuary interest vests in the sole surviving tenant and this is what is referred to as the **doctrine of jus accrescendi** or **survivorship**. As was rightly submitted by the Plaintiff, the right of survivorship is one of the most significant features of joint ownership. Therefore, in the instant suit, it is evident that **Victor Antony Cardozo**, who was a **joint tenant** in **Nairobi Block 90/235, died** in the year **2004** as per **Exhibit No.2**. Therefore **Maria Rosita Cardozo**, is the surviving tenant and a **sole proprietor**. She therefore had a right to bring this suit alone as the doctrine of **jus accrescendi** applies herein.

ii) Could Maria Rosita Cardozo donate the Power of Attorney to Masai Mara Sopa Lodge Limited alone?

It is evident from the Plaintiff’s bundle of documents that **Maria Rosita Cardozo** donated Power of Attorney to **Masai Mara Sopa Lodge Limited**. The said Power of Attorney is dated **23rd April 2007**, and was received at the Lands Registry **on 31st May 2007**. In the said Power of Attorney, **Maria Rosita Cardozo** **appointed Masai Mara Sopa Lodge Limited** to be her Attorney and generally in relation to the interest in **Nairobi/Block 90/235**. The said **Masai Mara Sopa Lodge Limited**, was authorized by **Maria Rosita Cardozo**, to do anything and everything that she could do over the suit property. For that reason, the Plaintiff filed this suit. The 1st Defendant has submitted that **Maria Rosita Cardozo** could not appoint **Masai Mara Sopa Lodge Limited** as her Attorney through the said Power of Attorney because the suit property was jointly owned and she could not donate that power alone. However, as the Court has observed, the other joint owner, **Victor Antony Cardozo died** in the year **2004**. The **surviving tenant** or owner, **Maria Rosita Cardozo** became the sole proprietor through the doctrine of **jus accrescendi**. **Maria Rosita Cardozo** as the sole proprietor therefore **had the right to donate** the Power of Attorney to **Masai Mara Sopa Lodge Limited**, in respect of the suit property in **exclusion of Victor Antony Cardozo who is deceased**. Though the 2nd Defendant alleged

that it was not aware of the said Power of Attorney, it is evident that the same was **registered** with the **Ministry of Lands** under the **Registered Land Act, Cap 300** (now repealed). **Black Law Dictionary 9th Edition** describes Power of Attorney as:-

“An instrument granting someone authority to act as agent or attorney in fact for the grantor.”

The Court has noted that ‘The Power of Attorney’ herein was registered at the Lands Registry. There is no doubt that **Maria Rosita** as a sole proprietor of the suit property had power to donate the Power of Attorney alone to **Masai Mara Sopa Lodge Limited**. **Masai Mara Sopa Lodge Limited** rightly brought this suit to Court on behalf of **Maria Rosita Cardozo**. This position is recognized by the law. Order 9 Rule 2(c) provides that:-

“The recognized agents of parties by whom such appearances, applications and acts may be made or done are:-

a. Subject to the approval of the Court, in any particular suit, persons holding Power of Attorney authorizing them to make such appearance and applications and do such acts on behalf of the parties”.

Maria Rosita Cardozo, appointed **Masai Mara Sopa Lodge Limited**, its Attorney for the purpose of filing this suit and the said **Power of Attorney** was registered under Cap 300 (now repealed). The said **Maria Rosita Cardozo** as the sole proprietor of the suit property rightly appointed the said donee, and she had the power to do so alone as a sole proprietor.

iii) Did the said Masai Mara Sopa Lodge Limited have capacity to bring the suit without resolution of the Company?

It is evident that Courts have severally held that for a suit brought by the Company, resolution authorizing the institution of the suit is mandatory. The 1st Defendant has relied on several decided cases. In the case of **Gatimu Farmers Co. Ltd...Vs...Solomon Mbugua & Another (2004) eKLR**, the Court dismissed a suit where there was no resolution of the Company authorizing the filing of the suit. The Court noted that the Plaintiff’s witness, PW1 testified that the Company had passed a resolution authorizing him to sign documents on behalf of the Company. The said averment is contained in his **Supplementary Affidavit** sworn on **19th November 2009**.

Further the Court has noted that this suit is brought on behalf of **Maria Rosita Cardozo**. The Company is acting as a donee of the Power of Attorney. **Maria Rosita Cardozo** is the **Plaintiff but suing through her appointed agent**. There is evidence that the said agent was appointed through the Power of Attorney dated **23rd April 2007**.

The Court finds that **Masai Mara Sopa Lodge Limited** being an agent is not the plaintiff *per se*. Therefore failure to attach the said resolution of the Company is not fatal to the Plaintiff’s suit.

vi) Did the Plaintiff serve the Notice to the 2nd Defendant as provided by Section 13A of the Government Proceedings Act?

The 2nd Defendant alleged that this suit is incompetent as the Plaintiff did not serve the 2nd Defendant with Notice pursuant to Section 13A (2) of the Government Proceedings Act, Cap 40 Laws of Kenya. However, the Court has considered the Plaintiff’s bundle of documents and there in indeed a **Notice** to the Attorney General pursuant to Section 13A (2) of the Government

Proceedings Act, The said Notice was received at the Attorney General’s office on **25th January 2008**, as is evident from the receiving stamp on the said Notice.

Further, it is evident that the office of the Attorney General sent the said **Notice of Intention to Institute Civil Proceedings** to the **Permanent Secretary, Ministry of Lands**, with attention to **Mr. Steven K. Mweru**. Therefore the 2nd Defendant cannot be heard to allege that the Plaintiff breached the law by failing to serve the Notice of Intention to Institute Civil Proceedings against the Attorney General pursuant to Section 13A (2) of the Government Proceedings Act. Indeed, it is evident that the **Plaintiff served** the said **Notice** to the Attorney General on **25th January 2008**.

v) Did the Plaintiff herein prove fraud on the part of the Defendants

The Plaintiff in her **Amended Plaintiff** alleged that the 1st Defendant fraudulently proceeded to transfer the suit property to himself without the knowledge of the Plaintiff. The Plaintiff therefore did not allege fraud on the part of the 2nd Defendant but alleged such fraud on the part of the 1st Defendant. The **particulars of fraud** that the Plaintiff has alleged **on the part of the 1st Defendant** are:-

i. Transferring the interest in the suit property to himself without the knowledge, consent and /or authority of the Plaintiff.

ii. Obtaining the title to the suit property in his name without the knowledge, consent and/or authority of the Plaintiff.

As was submitted by the 2nd Defendant **'Fraud' is defined as "a false representation of a matter of fact – whether by works or conduct, by false or misleading allegations or by concealment of what should have been disclosed – that deceives and intends to deceive another so that the individual will act upon it for her or his legal injury."**

It is evident that if any registration of a suit property is obtained by fraud, the Court would have no option but to annul such registration. However, Courts have also held that fraud is a very serious allegation which must be proved on a higher standard than on a balance of probability but lower than

beyond a reasonable doubt. See the case of **Njuwangu Holdings Limited ...Vs... Langata KPA, Nairobi & 5 Others (2014) eKLR**, where the Court held that: -

"the allegations of irregularity and/or fraud remain just that until established and/or proved. The standard of proving fraud in Court cases is higher than on a balance of probability. An allegation of fraud is serious involvement against a party to whom it is made and though the standard of proof is not beyond a reasonable doubt as in Criminal cases, it is no doubt never there but is certainly higher than on a balance of probability".

Therefore, since the Plaintiff has alleged fraud on the part of the 1st Defendant, she needed to prove the said allegation on a standard higher than balance of probability.

It is evident that the **Plaintiff Certificate** of title was issued on **29th April 1986**. No evidence that the same was ever cancelled, revoked or annulled. The Plaintiff has alleged that she never sold her suit property to any other person. To her, she is still the registered owner. However, it is evident that the **1st Defendant** has a **Certificate** of title issued on **8th April 1997**. There are official documents showing that the 1st Defendant has been **paying land rent and rates** over the suit property **from the year 1997**. The Certificate of title is issued by the Ministry of Lands. Unfortunately, the 2nd Defendant did not call witnesses to shed light on how this Certificate of title was issued to the 1st Defendant. It is also evident that the 1st Defendant did not produce the transfer and evidence of payment of stamp duty. However, as the Court has found, the Certificate of title was issued by the Ministry of Lands and not the 1st Defendant himself. The 2nd Defendant has also alleged that the records at the Ministry of Lands reflect the 1st Defendant as the registered owner of the suit property. Therefore this registration must have been done by officials from the Lands office. Whether that was done fraudulently or not, there is no evidence that the same was done by the 1st Defendant. It is indeed true that the interest on the suit property was transferred to the 1st Defendant without the knowledge of the Plaintiff. But was that transfer done fraudulently? There is no evidence from the Ministry of Lands to that effect. The Court therefore finds that the Plaintiff **did not prove** on the required standard the **particulars of fraud** on the part of the **Defendants**, and **particularly, the 1st Defendant**.

vi) Who is the rightful proprietor or owner of the suit property?

As the Court had observed earlier, there are *two Certificates of title* over *Nairobi Block 90/235*. The *first one* is held by *Maria Rosita Cardozo* and *Victor Antony Cardozo* issued on *29th April 1986*. The *2nd* Certificate of title is held by *1st Defendant, Robert Kibagendi Otachi*, issued on *8th April 1997*. The Plaintiff has alleged that she never sold her suit property to anyone. The *1st Defendant* alleged that he is a *bona-fide* purchaser for value and therefore his title is absolutely indefeasible. The two Certificates of Lease were issued under the Registered Land Act, Cap 300 (now repealed). The two Certificates having been issued under Cap 300 Laws of Kenya (now repealed), were subject to Section 27 of the said Act which provided:-

27(a) “The Registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging appurtenant thereto”

Therefore, the Plaintiff and *1st Defendant* having the Certificates of title over the suit property are vested with absolute ownership of the suit property. However, it is evident that these Certificates of title are over the same parcel of land. It is trite that no parcel of land can be owned and held by two different persons possessing different Certificates of title. One of the Certificates of title must be the rightful one. Further Section 26(1) of the Land Registration Act provides:-

“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.

The Plaintiff herein alleges that her Certificate of title was the first in time. Her title has never been cancelled or revoked. Therefore, she is the absolute and indefeasible owner of the suit property. It is evident that the Plaintiff herein was the first registered owner of the suit property. Section 28 of the Registered Land Act Cap 300 (now repealed) provides:-

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of Court shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever but subject”

The Plaintiff herein having acquired the suit property in the *year 1986* and having alleged that she never sold the said suit property or parted with it, then her right ought not to have been defeated except as provided by the Law. The above position has been replicated in Section 25(1) of the Land Registration Act, 2012 now in force which provides:-

25.(1) The rights of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-

a. to the leased, charges and other encumbrances and to the conditions and restrictions if any, shown in the register; and

b. to such liabilities, rights and interests as affect the same and are declared by Section 28 and to require noting on the register, unless the contrary is expressed in the register.

Though both the Plaintiff and the 1st Defendant are in possession of the Certificates of title, the Court is called upon to determine which of the two is the valid Certificate of title. Even if the Court found that the Plaintiff was not able to prove fraud on the part of the 1st Defendant, it is alive to the fact that under Section 26 of the Land Registration Act, 2012, a Certificate of title can be challenged on several grounds. These grounds are fraud or misrepresentation to which the person is proved to be party or if the Certificate of title has been ***acquired illegally, unprocedurally or through a corrupt scheme***. Even if the court has found that there was no evidence of fraud on the part of the 1st Defendant, the Court is called upon to determine whether his Certificate of title was acquired illegally, unprocedurally or through corrupt scheme.

A look at Section 26(1) of the Land Registration Act shows that it is clear that a Certificate of title is absolute and indefeasible if it is acquired legally, procedurally or regularly. However, if the same is acquired illegally, unprocedurally or through corrupt scheme, then it can be impugned. Indeed the process of acquisition and history of the root of the title is very crucial in determining whether a Certificate of title is valid. It is not sufficient to dangle the said Certificate of title and claim that the ownership is absolute and indefeasible. In the case of ***Munyu Maina ...Vs...Hiram Gathiho Maina, Civil Appeal No.239 of 2009***, the Court held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

It is evident that the Plaintiff was the first registered owner of the suit property.

Her interest could not be defeated except as provided by the law. The 1st Defendant has alleged that he ***purchased*** the suit property from ***Mr. & Mrs. Esono***. He did not call them as witnesses. There was no evidence from the Ministry of Lands to confirm whether the Plaintiff had relinquished her interest by the time the 1st Defendant allegedly purchase the suit property. The 1st Defendant did not produce the transfer form which showed that indeed the suit property was transferred to him by ***Mr. & Mrs. Esono***. There was no evidence of payment of the stamp duty. Further his Certificate of title shows that the ***Lessee*** were ***Victor Antony Cardozo*** and ***Maria Rosita Cardozo***. The Green Card which shows the history of entries over the title were not produced by any of the parties herein. The Court therefore finds that there was no evidence that the Plaintiff’s title had been defeated by operation of the law as at ***8th April 1997***, when the 1st Defendant acquired his Certificate of title. The Plaintiff’s Certificate of title had not been cancelled or revoked. It was the first in time. Therefore, the Court finds that the ***Plaintiff’s title*** is the ***valid***

Certificate herein. The 1st Defendant’s title was not acquired procedurally, or regularly but illegally or irregularly, since the Plaintiff’s title had not been cancelled. The 1st Defendant’s title therefore can be challenged and impugned. Further, the Court will be guided by the Maxims of Equity which states that:-

“When two equities are equal, the first in time shall prevail.”

The Plaintiff’s Certificate of title is the first in time. Therefore, the same shall prevail. See the case of ***Gitwany Investment Ltd..Vs..Tajmal Ltd & 3 Others, Nairobi HCC No.1114 of 2002***, where the Court relied in the words of the ***Court of Appeal*** in ***Wreck Motors Enterprises..Vs..Commissioner of Land C.A No.71/1997*** where it was held that:-

“.....like equity keeps teaching us, first in time prevails so that in the event such as this one, unlike by mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and

procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity”

The same position was held in the case of ***Christopher Mwangi Kioi...Vs...The Chief Land Registrar & 2 Others (Unreported)[supra]***. Where the Court held that:-

“Where there are two certificates of title issued and in existence, unless the Court is shown the invalidity of the first title and this is proved, the 1st title remains valid and the second title would be cancelled. That title can only be defeated as provided for by Section 28 of the Registered Land Act.

vii) Is the Plaintiff entitled to the prayers sought?

The Plaintiff herein has sought for various declarations. The Court has found that the 1st Defendant’s registration as the proprietor of the suit property was tainted with irregularities, given that the Plaintiff’s title had not been defeated. Having found that the 1st Defendant’s Certificate of title was obtained irregularly, unprocedurally and illegally, then the said title is null and void. The said Certificate cannot be held to be a clean title. This Court will rely on the decision of the Privy Council in the case of ***Macfy...Vs...United Africa Co. Ltd 1961 3All ER 1169***, where it was held that:-

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of Court to set it aside. It is automatically null and void without more ado; though it is sometimes convenient to have the Court declare it to be so”.

Equally, in this case, the act of registering the 1st Defendant as a proprietor of the suit property before the Plaintiff’s title had been revoked and while the same was in existence, was an exercise in futility and therefore null and void. Having found that the exercise that brought about the 1st Defendant’s Certificate of title was null and void, then the resultant title is also a nullity. Further close home, in the case of ***Elijah Makeri Nyagw’ra...Vs...Stephen Mungai Njuguna & Another, (2013) eKLR***, the Court held that:-

“It needs to be appreciated that for Section 26(1)(b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are, the title was obtained illegally, unprocedurally or through corrupt scheme. The heavy import of Section 26(1)(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through corrupt scheme. The title holder need not to have contributed to these vitiating factors. The purpose of Section 26(1)(b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

The above scenario is very similar to this case. The 1st Defendant is a title holder claiming that he is an innocent purchaser for value. However, the transaction that brought about his Certificate of title was ***unprocedural or irregular*** as the Plaintiff herein was still a title holder by the time the 1st Defendant purchased the suit property. Therefore it does not matter that 1st Defendant was not a party to the vitiating factors. His title is still impeachable as it was obtained illegally, unprocedurally or irregularly. As the Court stated, there was no evidence of any transfer document having been signed by ***Mr. & Mrs. Esono*** as the transfer document is what indeed confer titles and not the sale agreement.

This Court also noted that there was no evidence of payment of stamp duty. The Court is therefore satisfied that the provisions of ***Section 26(1)(b) of the Land Registration Act, have been met and the 1st Defendant’s Certificate of title is liable for cancellation.*** The Court would therefore ***proceed to cancel the Certificate of title held by the 1st Defendant and his registration as the proprietor of the suit property.*** The ***Plaintiff’s Certificate of Title is the valid one*** and she should ***remain as the proprietor of the suit property*** herein.

Therefore, the **1st Defendant's Certificate of title** issued on **8th April 1997**, is **null and void** and the Court finds that it has no option but to **Cancel and revoke the same as it was irregularly issued on 8th April 1997**.

The said Certificate of title was issued under Cap 300 (now repealed). Section 143 (i) of the said Act provides:-

“subject to subsection (2), the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”

The above provision of law has been replicated in Section 80(1) of the Land Registration Act which provides that:-

“Subject to Section 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.”

The Court has found that the **1st Defendant's** registration over the suit property was done irregularly or by mistake since the Plaintiff's title was still valid and had not been defeated. The Court has further **cancelled and/or revoked** the **1st Defendant's** Certificate of title that was issued on **8th April 1997**.

Having now found that the **1st Defendant did not obtain a valid or good title**, the Court finds that the **Plaintiff is entitled to the prayers sought in her Complaint**. The Court therefore directs that the Register herein be rectified by cancellation of the Certificate of title issued to the **1st Defendant on 8th April 1997**.

In conclusion, the Court finds that the **Plaintiff** herein **is accordingly entitled to the prayers sought in the Complaint**.

viii) Who is to bear costs of the suit?

The Court has come to a conclusion that the Plaintiff herein is entitled to the prayers sought in the Complaint. The Plaintiff is therefore the successful litigant. The Court finds that the award of costs is discretionary as provided by Section 27 of the Civil Procedure Act. However, **costs normally follow the event**. The Plaintiff being the **successful litigant** is **entitled to costs**. Therefore the Court finds that the **Defendants herein will bear costs** of this suit **both jointly and severally**.

Having now carefully considered the available evidence, the Court finds that the **Plaintiff** herein **has proved her case on the required standard of balance of probabilities**. Consequently, the **Court enters judgement for the Plaintiff against the Defendants, jointly and severally** as prayed in the Complaint in **terms of prayers No.(a), (b), (c), (d) plus costs and interest thereon at the Court's rate**.

It is so ordered.

Dated, Signed and Delivered at NAIROBI this **31st day August 2017**

L. GACHERU

JUDGE

31/8/2017

In the presence of

M/S Ndirangu for Plaintiff

Mr. Mageto holding brief for Mr. Oyugi for 1st Defendant

No appearance for 2nd Defendant

Catherine - Court clerk.

L. GACHERU

JUDGE

31/8/2017