



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC.NO.222 OF 2010(OS)**

**IN THE MATTER OF DELIVERY OF VACANT POSSESSION OF TITLE NO.LR.NO.209/11924  
(WILSON AIRPORT)**

**BETWEEN**

**AFRICAN INLAND CHURCH – KENYA**

**(REGISTERED TRUSTEES).....PLAINTIFF/APPLICANT**

**-VERSUS-**

**CATHERINE NDUKU & 12 OTHERS.....DEFENDANTS/RESPONDENTS**

**JUDGEMENT**

By an *Amended Originating Summons* dated **18<sup>th</sup> March 2011**, the Plaintiff/Applicant sought for appearance to be entered by the Respondents herein and orders be issued against them in favour of the Plaintiff/Applicant. The orders sought are:

- 1. That the Plaintiff/Applicant is entitled to vacant possession and to enjoy all rights and interests appurtenant to Land Parcel Title No.LR No.209/11924 as the registered title holder.***
- 2. That the Defendants/Respondents singularly and severally by themselves, their employees/Servants and/or agents or any other occupants do forthwith deliver and give vacant possession of Title No.LR No.209/11924 to the Plaintiff/Applicant .***
- 3. That the Defendants/Respondents singularly and severally, their servants, agents of any other occupants be forcefully evicted from the subject premises should they fail to deliver vacant possession within fifteen (15) days from the date of the Order of this Honourable Court.***
- 4. That the Officer Commanding Police Station, Langata do assist towards a peaceful and effective eviction in compliance with the court's eviction order.***
- 5. That the Defendants/Respondents do bear the costs of this application.***

This *Amended Originating Summons* is premised on the grounds stated on the face thereof and the

**Supporting Affidavit of Rev. Peter Ngule, being the in-charge of African Inland Church. Langata District Church Council.**

These grounds are:

- a) That the Plaintiff/Applicant, A.I.C-Kenya Trustees Registered is the bona fide registered absolute owner of all that parcel of land referred to as Title No.LR No.209/11924, and was issued with a valid title on 1<sup>st</sup> July 1990. The same has not been expunged and or challenged.**
- b) That the Plaintiff/Applicant is in possession of the requisite documents over the subject property including original title, and partial actual possession of the premises.**
- c) That the Plaintiff/Applicant is desirous of developing and have already contracted contractors who were scheduled to move on site immediately on the 1<sup>st</sup> of April 2010 to begin construction of a modest church building, building plans have already been approved by the City Council of Nairobi and therefore urgently requires the property delivered up to him in vacant possession otherwise it will continue suffering inconvenience and loss of investment opportunities.**
- d) That the property is currently illegally occupied by the various Defendant/Respondents singularly and severally together with other illegal occupants associated with them purporting to carry business on the said property.**
- e) That several notices have been issued to the Defendants/Respondents to vacate the suit premises including an Enforcement Notice by the City Council of Nairobi. The Defendants/Respondents requested that Plaintiff/Applicant to give them more time to enable them transfer their businesses to another alternative site. However the Defendants/Respondents have not made any efforts to vacate the suit property.**
- f) That the Plaintiff/Applicant has never connived, acquiesced, waived its rights or allowed the Defendants/Respondents to occupy the suit premises but has severally threatened them to vacate and give vacant possession to no avail.**
- g) That the Defendants/Respondents have erected temporary mabati business structures, kiosks, tea rooms and garage therefore occasioning loss and damage to the title holder who urgently seeks to stop any further destruction and or damage of the suit premises.**
- h) That it is in the interest of justice that the Defendants/Respondents singularly and severally be evicted as soon as is reasonable to enable the Plaintiff/Applicant take possession of its property as the rightful owner.**

Therefore the Applicant has asked the Court for the following declarations.

- a) A declaration that the Applicant/Plaintiff is the legal proprietor of Land Parcel LR.No.209/11924.**
- b) A declaration that the Defendants/Respondents, their employees/servants and/or agents of any other occupants give vacant possession of the Plaintiff/Applicant Land Parcel LR No.209/11924 forthwith.**
- c) An order evicting the Defendants/Respondents from Land Parcel LR No.209/11924.**
- d) A permanent injunction restraining the Defendants/Respondents from forthwith occupying Land Parcel No.209/11924.**
- e) Mense profit for the period the Respondents have been in illegal occupation.**

**f) Damages for loss or user and inhibition of development thereof.**

**g) Interests in (e) and (f) above at the court's rate from the time of institution of this suit.**

**h) Costs of the suit.**

In his **Supporting Affidavit**, the deponent **Peter Ngule**, reiterated the contents of the grounds in support of the **Amended Originating Summons** and further averred that sometimes in **early 2005**, whilst the Plaintiff had not moved to occupation of the parcel **LR.No.209/11924 (Wilson Airport)** the Defendants/Respondents, illegally trespassed and unlawfully occupied the Plaintiff/Applicant property **LR NO.209/11924**, and erected or caused to be erected therein Kiosks, shanties and or similar structures for various purposes unknown to the Plaintiff/Applicant without permission of the Plaintiff.

Further that the Defendants/Respondents have illegally taken possession of the parcel of land and have refused to vacate the premises despite notices being issued to them to stop encroaching and or give vacant possession of the land to the registered proprietor as is evident from annexures **PN-3** which are copies of the said **letters** dated **16<sup>th</sup> September 2005, 19<sup>th</sup> September 2005** and **20<sup>th</sup> March 2010**. He also averred that the Defendants have and continue to build and maintain the kiosks, shanties and similar structures on the suit premises, occasioning untold loss and damage to the property and great loss to the church. It was his contention that despite being the registered absolute owner, the Defendants/Respondents have and continued to frustrate the Plaintiff/Applicant's rights to owning, possessing, occupying, developing, utilizing, dealing and employing the parcel of land to all and every purpose that pleases it. He further contended that unless eviction orders are issued, the Defendants/Respondents' actions will result to irreparable loss and injury to the Plaintiff/Applicant and their property for which no claim for damaged would be able to recover. He urged the Court to allow the Plaintiff's claim.

The **Originating Summons** herein is vehemently opposed by the Respondents herein. The 1<sup>st</sup> – 12<sup>th</sup> Defendants only filed a **Replying Affidavit** sworn by **Patrick Mugo** in opposition to the **Chamber Summons** dated **21<sup>st</sup> April 2010**, which was later **amended** on **18<sup>th</sup> March 2011**. They did not file a Response to the **Amended Originating Summons**. The said Defendants had also filed a **Preliminary Objection** to the **Originating Summons** and had averred that the **Originating Summons** was not properly before the Court because the action was not filed by the registered trustees or an agent bearing the Power of Attorney executed by the said trustees. Further that **Peter Ngule**, is not a registered trustee and cannot purport to file an action on behalf of the Plaintiff. It was also stated that the Certificate of Incorporation of the registered trustees had not been exhibited and therefore the substratum of filing the suit had not been established. However, the said 1<sup>st</sup>-12<sup>th</sup> Defendants did not file a response to the **Amended Originating Summons**.

The 13<sup>th</sup> Defendant opposed the **Amended Originating Summons** by first filing a **Replying Affidavit** sworn by **Joy Nyaga**, the **Acting Corporation Secretary/Chief Legal Officer** on **6<sup>th</sup> April 2011**. The deponent averred that the suit land is part of the land which had been declared Aerodrome land in **1962**, under Land Reference **No.4959**. That the suit land was measuring approximately **265.5 acres** as is evident from **GK 2**. It was also averred that **Wilson Aerodrome** was later **gazetted as an Airport** and became **Wilson Airport**. By coming into force of **Kenya Airports Authority Act Cap 395**, in **1991**, then **Wilson Airport** was placed under the control of **Kenya Airports Authority**. Therefore all the assets that were under the control of Aerodrome Department were transferred to **Kenya Airports Authority (KAA)** and **Wilson Airport** land demarcated in land survey **Map No.27245**, was one of such assets transferred to **Kenya Airports Authority**. It was also averred that **Kenya Airports Authority** commenced on the process of obtaining title to its land and the Authority was issued with certificate of title to land set aside as **Wilson Airport** on **1<sup>st</sup> August 1996**. The said land was reference **No.209/13080**, as evident from **GK5** which is a copy of the said title.

The deponent further deponed that the Authority has never excision nor consented to excision of any area of land within the land for alienation to a third party, including the Plaintiff/Applicant herein. Therefore the Plaintiff's claim of ownership of the said **LR.No.209/11924**, was nullity as the Commissioner of

Lands did not have power to alienate property that already belonged to the 13<sup>th</sup> Defendant by operation of law. She also deponed that the property claimed by the Plaintiff legally belongs to the authority and the Authority cannot trespass over its own property and therefore the Plaintiff has no case against the 13<sup>th</sup> Defendant. The 13<sup>th</sup> Defendant therefore prayed for dismissal of the Applicant's ***Amended Originating Summons***.

Further, the 13<sup>th</sup> Defendant urged the Court to cancel the certificate of title ***No.LR.No.209/11924***, as it was illegally acquired and it should revert back to the Authority.

***Rev. Peter Ngule***, filed a further ***Affidavit*** sworn on ***4<sup>th</sup> July 2014***, and reiterated that the Plaintiff got registered as the owner of the suit land ***LR.No.209/11924***, on ***1<sup>st</sup> July 1991***, and therefore it's the first owner of the said parcel of land. Further that title in respect of ***LR.No.209/11924***, and ***LR.No.209/3080***, refer to two different parcels of land and the Plaintiff's title was the first one in time.

The deponent further stated that according to the latest official search, the Plaintiff was the registered owner of ***LR.No.209/11924***, and therefore its ownership is absolute and indefeasible. It was further alleged that the 13<sup>th</sup> Defendant did not plead fraud on the part of the Applicant and therefore the subject property is private property and Plaintiff has the rights to own and deal with it as a proprietor of the suit property.

After the close of the pleadings, parties did take directions and agreed to dispose off the matter by way of ***viva voce*** evidence. The Plaintiff called one witness, the 1<sup>st</sup>-12<sup>th</sup> Defendants did not call any witness and 13<sup>th</sup> Defendant called two witnesses to support its case.

The ***hearing*** commenced on ***7<sup>th</sup> May 2013***, wherein ***Rev. Stanley Mulinge Mutangiri***, gave evidence for the Plaintiff. He testified that he is an ***ordained Minister with African Inland Church***, in charge of ***A.I.C, Plainsview Local Church***. It was his testimony that in ***1998***, he was the Property Officer, dealing with the church properties. He testified that the land in issue was allocated to the Church (Plaintiff) in ***1990*** and the title was issued on ***1<sup>st</sup> July 1990***. That in the year ***2005***, the church wanted to construct a permanent church on the land and it therefore asked the tenants who had hired out the land for business to move out. The Plaintiff stated that he gave the said tenants ***Notices to Vacate***. The tenants did not vacate but they requested for more time. Such Notices were dated ***16<sup>th</sup> September 2005***, and the tenants request for more time is dated ***26<sup>th</sup> September 2005***. The Plaintiff again asked the tenants to move out vide a letter dated ***19<sup>th</sup> October 2005***, but they still did not move out. He also testified that their building plans had been approved by the City Council of Nairobi and their approved plans were produced as ***exhibits no.5*** in Court.

When the tenants failed to vacate, then the Plaintiff filed the instant suit against them. However, ***Kenya Airports Authority*** also claimed ownership of the land. It was his testimony that their land does not border ***Kenya Airports Authority's*** land at all as they ***border Kenya Police*** and ***Prisons Mess***. However, the Plaintiff disputed the said allegations and informed ***Kenya Airports Authority*** that they were the ***bonafide owners*** of the suit property vide their letter dated ***4<sup>th</sup> October 2005***, ***exhibit no.6***. Further that the Plaintiff got a confirmation from the Ministry of Lands, that their title was genuine vide a letter dated ***1<sup>st</sup> March 2010*** ***exhibit no.7***, and also from the Commissioner of Lands vide a letter dated ***4<sup>th</sup> March 2010*** ***exhibit 8***. It was his testimony that their title deed is genuine and valid.

It was also testified that the Plaintiff's Surveyor, ***Hekima Lands Surveyors***, carried a survey of the land and marked the beacons on the land. It was also his testimony that nobody has ever challenged their title deed and that when they acquired the land it was empty. Further that vide a letter dated ***6<sup>th</sup> July 2001***, the Commissioner of Lands had confirmed that the land was registered in the names of the African Inland Church(A.I.C) as is evident from ***Exhibit No.8(a)***. He also testified that the Plaintiff were allocated the land vide a letter of allotment and they followed the due process. He disputed the claim that the land belongs to ***Kenya Airports Authority***, the 13<sup>th</sup> Defendant herein. He further stated that the 1<sup>st</sup>-12<sup>th</sup>

Defendants used to pay rent to the Plaintiff for using the land and therefore the 1<sup>st</sup>-12<sup>th</sup> Defendants were tenants of the Plaintiff and not Kenya Airports Authority.

He also stated that the title deed for **Kenya Airports Authority** was issued on **1<sup>st</sup> August 1996**, and the Plaintiff's title was issued in the **year 1990**. Therefore the Plaintiff is the rightful owner of the suit property as **Kenya Airports Authority**, has its own distinct land which is separate from that of the Plaintiff. Further that Kenya Airports Authority has not stated that the Plaintiff's land was fraudulently acquired and have not challenged the Plaintiff's title deed. He produced the title deed for **LR.No.209/11924**, as **exhibit no.9**. He urged the Court to allow the Plaintiff's claim.

The witness further stated that vide a letter dated **18<sup>th</sup> November 2011**, the Ministry of Lands stated that **LR.No.209/11924**, is registered in the name of the Plaintiff herein which was produced as **exhibit No.11**. The **Letter of Allotment** was produced as **exhibit no.12**.

### **13<sup>th</sup> Defendant's Case**

**DW1 – Margaret Munene, a Legal Counsel** for **Kenya Airports Authority**, gave evidence and stated that she has authority to represent the **13<sup>th</sup> Defendant as Joy Nyaga**, the deponent of the **Replying Affidavit** dated **6<sup>th</sup> April 2011**, left the employment of **Kenya Airports Authority**. She testified that the Plaintiff herein do not own the suit property **LR.No.209/11924**. It was her testimony that the parcel of land was reserved for public use and was not available to be allocated to anyone. She also testified that the Plaintiff could not have acquired title for the land that was reserved for public use and if the Plaintiff is occupying the land, that was illegal occupation. DW1 further testified that **Kenya Airports Authority** did not give **consent** for the acquisition of the land by the Plaintiff/Applicant.

**DW2 – Rashid Abdurahi**, told the Court that he works as a **Land's Surveyor** in the **Engineering Department** and he is a **qualified Land Surveyor**. He testified that he is familiar with this case. He further testified that the land **4959**, was reserved for development of Aerodrome way back in **1960s** and the land reserve was **265.5 acres**. That the 13<sup>th</sup> Defendant's land is **LR.No.209/13080** which is **163.67 acres**. Further that the Plaintiff's land is within the **Wilson Airport's Land**. That this land was illegally excised from the Airport's land which action was even condemned by the Parliamentary Report dated **December 2011**. It was his evidence that the Plaintiff's land is located within the road reserve of the Aerodrome and it was never available for allocation. He also testified that once the land was reserved for public use, it was never available for allocation. If such land was to be converted for any other use, then there was a process to be followed. In the case of the Plaintiff's land, that process of degazetment was never followed. Further if the Plaintiff is allowed to develop the land, it will affect the master plan. He urged the Court to order that the land revert back to the Airport to be used for the purpose it was reserved for.

After the close of viva voce evidence, parties were directed to file their Written Submissions. The **Law Firm of Letangule & Co. Advocates** for the Plaintiff filed their submissions on **26<sup>th</sup> May 2015**, and relied on various authorities to support its case. The Plaintiff submitted that it was issued with title deed on **1<sup>st</sup> July 1990**, and the 13<sup>th</sup> Respondent was issued with its title deed on **1<sup>st</sup> August 1996**, and the two parcels of land are different and there was no evidence produced to point out any irregularities on the part of the Plaintiff. Plaintiff relied on 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 Plaintiff/Applicant also submitted that as the first registered proprietor of the suit property, then that

was a conclusive prove of ownership and its title was absolute and indefeasible. The Plaintiff further relied on the case of **Dr. Joseph N. K. Arap Ngok..Vs..Justice Moijo Ole Keiuwa & Others, Nairobi Civil Application No.60 of 1997**, where it was held that:-

***“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title to such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all the alleged equitable right of title. Infact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in Jeopardy”.***

The Plaintiff further submitted that it acquired its property regularly and it is entitled to the protection afforded by **Article 40** of the **Constitution**. The Court was therefore urged to allow the Plaintiff/Applicant's **Amended Originating Summons dated 18<sup>th</sup> March 2011**.

On the part of the 13<sup>th</sup> Defendant, the **Law Firm of Nyiha Mukoma & Co. Advocates** filed their **Written Submissions** on **2<sup>nd</sup> October 2015** and urged the Court to dismiss the Plaintiff's claim as stated in the **Amended Originating Summons**. They relied on various decided authorities among them the case of **Republic..Vs..Registrar of Kilifi, Ex-parte Daniel Ricci (2013) eKLR**, where the Court held that:-

***“Where public land is allocated to a private person, the Court has an obligation not to recognize such a title because as it has been said, time and again, public interest in a property will always outweigh an individual right to own the same property”.***

Further, they relied on **Article 40(6) of the Constitution** which provides that:-

***“The right under this Article do not extend to any property that has been found to have been unlawfully acquired”.***

The 13<sup>th</sup> Defendant also quoted the case of **Chemera Investments Ltd..Vs..The Attorney General & Others, Nairobi Petition No.94 of 2005**, where the Court held that:-

***“The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing indefeasibility.***

***I therefore adopt the sentiments of the Court in the case of Milan Kumarn Shah & 2 Others..Vs.. City Council of Nairobi & Another, where the Court stated as follows:-***

***“We hold that the registration of title to land is absolute and indefeasible to the extent, firstly that the creation of such title is demonstrated to a degree higher than the balance of probability that such registration was procured through person, or body which claims and relied on itself been part of a cartel which schemed to disregard the applicable law and the public interest.***

Therefore the 13<sup>th</sup> Defendant urged the Court to dismiss the Plaintiff/Applicant's claim in totality with costs to the Respondents.

The Court has now carefully considered the instant **Amended Originating Summons** and the annexures thereto. The Court has also considered the **pleadings** in general, the **Written submissions, cited authorities** and the relevant provisions of law and the adduced evidence and the Court makes the following findings;

The Plaintiff/Applicant is the one who has alleged. Therefore it has the duty of proving its allegations on the required standard of balance of probabilities. It is trite that he who alleges must prove as is provided by **Section 107 of the Evidence Act** which states as follows:

**107(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

Before embarking on the issues for determination, the Court will point out a few issues that are not in dispute. There is no doubt that **LR. No.209/11924**, is registered in the name of **African Inland Church Mission (Kenya) Registered Trustees**, who were registered as such on **1st July 1990**. The **Deed Plan No.113952**, for this parcel of land was issued on **8<sup>th</sup> June 1993**. There is no doubt that **LR.No.209/13080**, is registered in favour of **Kenya Airport Authority**, and the said **Certificate of Title** was issued on **1<sup>st</sup> August 1996**. That was six years after **LR.No.209/11924**, had been issued to the Plaintiff herein. It is evident that **LR.No.209/13080**, is approximately **163.67** Hectares and **LR.No.209/11924**, is approximately **0.3399** Hectares. Therefore the two parcels of land have different registration number and different acreage. It is also not evident whether **LR.No.209/11924**, is part of **LR.No.209/13080** or whether it was excised from the land parcel that forms **LR.No.209/13080**. The Court makes that finding because no evidence was availed to link the two parcels of land.

There is also no doubt that the Plaintiff herein had leased out **LR.No.209/11924**, to the **1<sup>st</sup> - 12<sup>th</sup>** Defendants who were carrying out various businesses on their respective portions that they had leased from the Plaintiff. It is also evident from a letter dated **16<sup>th</sup> September 2005**, that the **Board of Trustees** for the Plaintiff issued **Notices to Vacate** the suit property **LR.No.209/11924**, to the **1<sup>st</sup> - 12<sup>th</sup>** Defendants. It is evident from a letter dated **28<sup>th</sup> September 2005**, that the **1<sup>st</sup>-12<sup>th</sup>** Defendants asked for more time to move out of the suit premises on humanitarian grounds. It is also evident that the **1<sup>st</sup>-12<sup>th</sup>** Defendants had not moved out of the suit premises as at **29<sup>th</sup> March 2010**, since the Plaintiff's advocate wrote a reminder to the said Defendants to vacate the suit premises.

There is also no doubt that vide a letter dated **18<sup>th</sup> November 2011**, from the Ministry of Lands and signed by the Chief Land Registrar, the said Ministry confirmed that **LR.No.209/11924**, was a genuine title and it was registered in favour of the Plaintiff herein. Further vide an Official Search carried on **24<sup>th</sup> June 2011**, the suit property was confirmed to be still registered in the name of the Plaintiff herein. There is no evidence that the said title has been cancelled or revoked. If that is the case, then on the face of it, the Plaintiff is the indefeasible and absolute proprietor of the suit land as provided by Section 26(1) of the Land Registration Act of 2012.

It is the evidence of the Plaintiff that the **1<sup>st</sup>-12<sup>th</sup>** Defendants have trespassed on its parcel of land **LR.No.209/11924**, and therefore it has come to Court to seek for orders stated in the **Amended Originating Summons** dated **18<sup>th</sup> March 2011**. However, the **1<sup>st</sup>-12<sup>th</sup>** Defendants alleged that the suit land belongs to the **13<sup>th</sup>** Defendant and that they are tenants of the **13<sup>th</sup>** Defendant and therefore the Plaintiff should not be granted the orders sought.

The Court on its motion as provided by **Order 1 Rule 10(2)** of **the Civil Procedure Rules**, directed that the **13<sup>th</sup>** Defendant be enjoined as a Defendant in the suit. Indeed after being enjoined, the **13<sup>th</sup>** Defendant filed its Replying Affidavit and averred that the Plaintiff's suit property was part of the **13<sup>th</sup>** Defendant's parcel of land and that the Plaintiff illegally acquired its Certificate of title. The **13<sup>th</sup>** Defendant urged the Court to declare the Plaintiff's title as having been illegally acquired and order that the suit land should revert to the **13<sup>th</sup>** Defendant.

Having now pointed out the undisputed facts, the Court finds that the issues for determination are as set out by the **13<sup>th</sup>** Defendant. These issues are:-

**i) Was the suit property LR.No.209/11924, available for allocation to the Plaintiff?**

*ii) Was there a question of double allocation and if so, what are the consequences?*

*iii) Further, is the Plaintiff entitled to the orders sought in the Amended Originating Summons?*

*iv) Who is to bear costs of the suit?*

**i). Was the suit property LR.No.209/11924 available for allocation to the Plaintiff**

The Plaintiff through its witness **Stanley Mulinge Murangiri** testified that the church (Plaintiff) was allocated the suit land in the **year 1990**, and a title deed was issued on **1<sup>st</sup> July 1990**. He testified that the suit land was allocated to the Plaintiff procedurally. However, the 13<sup>th</sup> Defendant testified that the suit land was not available for allocation because the said land belonged to the 13<sup>th</sup> Defendant. Therefore it was its evidence that the **Commissioner of Lands** had no power to allocate the 13<sup>th</sup> Defendant's land to anyone. It is evident that the 13<sup>th</sup> Defendant acquired title to its land **LR.No.209/13080**, in the **year 1996**. That was **6 years after** the Plaintiff had acquired title for its parcel of land **LR.No.209/11924**, on **1<sup>st</sup> July 1990**. There was evidence from the **Ministry of Lands** specifically the letter signed by the **Chief Land Registrar**, which confirmed that the Plaintiff/Applicant's title to **LR.No.209/11924**, was authentic and the certificate of title was genuine. The said letter is dated **18<sup>th</sup> November 2011**. However, there was no evidence called by the 13<sup>th</sup> Defendant from the relevant Ministry to confirm that indeed **LR.No.209/11924**, was carved from the land that belonged to the 13<sup>th</sup> Defendant and that by the time the said allocation was done to the Plaintiff, this land had already been allocated to 13<sup>th</sup> Defendant. There is no dispute that the 13<sup>th</sup> Defendant acquired all the assets that belonged to Aerodrome Department. However, no evidence was adduced to confirm and prove that this suit land was part of the Aerodrome land. The Parliamentary Report relied by the 13<sup>th</sup> Defendant also has no reference to the suit property herein. The Court finds and holds that by the time the suit land was allocated to the Plaintiff/Applicant, there was no evidence that it was a public land belonging to the 13<sup>th</sup> Defendant. The Court therefore comes to a conclusion that the suit property herein **LR.No.209/11924**, was available for allocation to the Plaintiff/Applicant and the Plaintiff was rightly allotted the suit property and it went ahead and obtained the title on **1<sup>st</sup> July 1990**.

**ii) Is the Title LR.No.209/11924 indefeasible?**

The Court has found that the suit land was available for allocation and was rightly allotted to the Plaintiff/applicant in **1990**. The 13<sup>th</sup> Defendant's title was registered on **1<sup>st</sup> August 1996**, and is different from the Plaintiff/Applicant's land in terms of the registration and acreage. The Plaintiff/Applicant's title was registered in **1990** under the **Registration of Titles Act** and **Section 23(1)** of the said Act gave an absolute and indefeasible title to the owner of the property. The title to such an owner could only be subject to challenge on the grounds of fraud or misrepresentation to which the owner was proved to be a party to. This Section has now been replaced by **Section 26** of the **Land Registration Act** which provides as follows:-

***“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.***

Though the 13<sup>th</sup> Defendant alleged that the Plaintiffs/Applicants title was acquired illegally, there was no

evidence of such illegality. The Ministry of Lands vide its letter dated **18<sup>th</sup> November 2011**, confirmed that the Plaintiff/Applicant's title was genuine and further the Commissioner of Lands vide its letter dated **4<sup>th</sup> March 2010**, had also confirmed the authenticity of the Plaintiff/Applicant's title. Therefore having found that the Plaintiff is a genuine registered owner of the suit property, then the Court finds that its title is indefeasible. The Court will rely on the case of **Dr. Joseph N. K. Arap Ngok..Vs..Justice Moijo Ole Keiuwa & Others (supra)**.

Further, it is evident that the Plaintiff/Applicant's title was registered on **1<sup>st</sup> July 1990**, whereas the 13<sup>th</sup> Defendant/Respondent's title was registered on **1<sup>st</sup> April 1996**, about **6 years after** the Plaintiff/Applicant's title. The Plaintiff/Applicant's title was first in time and the Court will rely on the Maximum of Equity which states that, **"when two equities are equal, the first in time shall prevail"**. See the case of **Gitwany Investment Ltd..Vs.. Tajmal Ltd & 3 Others (supra)**.

The court therefore finds that contrary to the submissions by the 13<sup>th</sup> Defendant/Respondent, the Plaintiff/Applicant's title is indefeasible. Since the Plaintiff/Applicant's title has never been cancelled or revoked it retains its sanctity.

**iii) Was there a question of double allocation?**

From the available evidence, the Plaintiff/Applicant was allocated the suit property **LR.No.209/11924**, in **1990**. There was no evidence that this suit land had also been allotted to the 13<sup>th</sup> Defendant or the same was curved from the land that had been allotted to the 13<sup>th</sup> Defendant. The Plaintiff/Applicant's title is very different in registration and acreage from that of the 13<sup>th</sup> Defendant which is **LR.No.209/13080**, approximately **164.37 acreage**. The Court finds that there is no evidence of any double allocation as submitted by the 13<sup>th</sup> Defendant. In any event even if there was double allocation, the Plaintiff/Applicant's land was the first to be registered and therefore as equity provides, the first in time prevails, see the **Gitwany Investment Ltd case (supra)**

**iv) Is the Plaintiff/Applicant entitled to the orders sought in the suit?**

This Court had found and held that the Plaintiff/Applicant's title is indefeasible. The Court has also held and found that there was no evidence that Plaintiff/Applicant's allocation and registration of the suit land was shrouded in fraud or misrepresentation.

Having found that Plaintiff/Applicant is the absolute and indefeasible owner of the suit property, then the Court finds that the Plaintiff/Applicant is entitled to enjoy the rights of an absolute owner of the property as provided by Section 24 and 25 of the Land Registration Act. **Section 24(a)** of the said Act provides as follows:-

Subject to this Act:-

***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 or appurtenant thereto:***

Further as an absolute proprietor, such right attaching to it can only be defeated by operation of the law as provided by **Section 25(1)** of the **Land Registration Act** which provides as follows:-

***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.**

Again, since the Court finds that the Plaintiff/Applicant acquired its allocation and registration regularly and without any evidence of fraud, then it is evident that the **Plaintiff/Applicant is entitled to protection of its property as provided by Article 40 of the Constitution**. There was no evidence availed by the 13<sup>th</sup> Defendant to prove that the Plaintiff/Applicant acquired the suit land illegally. However, the Plaintiff has proved on the required standard what it had alleged – that the suit land belongs to itself.

Further, it is evident that the 1<sup>st</sup>-12<sup>th</sup> Defendants are occupying the Plaintiff/Applicant's suit land. They were given **Notices to Vacate** way back in **2005**, and they sought for time to move out based on humanitarian grounds. The Plaintiff/Applicant vide a letter dated **19<sup>th</sup> October 2005**, allowed them time to move out. The said 1<sup>st</sup>-12<sup>th</sup> Defendants did not move out of the suit land and another **Reminder** was sent to them by the **Law Firm of Katwa & Kemboy Advocates** on **29<sup>th</sup> March 2010**. By the time of adducing evidence, the said Defendants had not vacated the suit property. The 1<sup>st</sup>-12<sup>th</sup> Defendants did not adduce evidence nor file **Replying Affidavits to the Amended Originating Summons** by the Plaintiff. Therefore, the Plaintiffs/Applicants evidence on trespass and encroachment by the said Defendants remain uncontroverted. The Court having now carefully considered the available evidence, finds that the Plaintiff has proved its case on the required standards of balance of probabilities and it is therefore **entitled to the prayers sought** in the **Amended Originating Summons**.

**v) Who is to bear costs of the suit?**

Ordinarily costs follow the event. The Plaintiff herein is the successful litigant. The 1<sup>st</sup>-12<sup>th</sup> Defendants knew they were tenants of the Plaintiff. They refused to move out when they were given **Notices to Vacate**. They should therefore bear costs of the suit. Therefore, the Court finds that apart from the 9<sup>th</sup> Defendant whose claim against him was withdrawn, then all the other **Defendants herein** should **bear costs** of this suit jointly and severally. The Court therefore directs that all Defendants to bear costs of the suit.

Having now carefully considered the available evidence and the Written Submissions, the Court finds that the Plaintiff herein has proved its case on a balance of probabilities, and consequently the Court finds for the Plaintiff against the Defendants as prayed in the **Amended Originating Summons** dated **18<sup>th</sup> March 2011**, in terms of prayers no.(a), (b) (d) and (h).

Further the Court directs that the **Defendants** do **give vacant possession** to the Plaintiff within a period of **45 days** from the date of this **Judgement, in default, the Plaintiff to apply for an eviction order**.

It is so ordered.

Dated, Signed and Delivered at NAIROBI, this 4<sup>th</sup> day of August 2017.

**L. GACHERU**

**JUDGE**

**4/8/2017**

In the presence of

No appearance for Plaintiff - though served with Judgement Notice.

No appearance for 1<sup>st</sup>-12<sup>th</sup> Defendants

No appearance for 13<sup>th</sup> Defendant – though served with Notice

Court clerk – Phylis

**COURT** – Judgement read in open court in the absence of the parties and their Advocates, though served with Judgement Notices as indicated by the Returned copies of the Notices.

**L. GACHERU**

**JUDGE**

**4/8/2017**