



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. NO. 2834 OF 1995

KENYA POST OFFICE SAVINGS BANK LTD..... PLAINTIFF

-VERSUS-

SIMIYU ABIUD WASIKE..... DEFENDANT

JUDGEMENT

By a *Plaint* filed in Court on **12th September 1995**, the Plaintiff herein, **Kenya Post Office Savings Bank Limited** brought a claim against the Defendant, **Simiyu Abiud Wasike**, and sought for various orders against him.

The orders sought are:-

- i. Vacant Possession and delivery up of the suit land and premises known as LR.No.209/11908, Nairobi House No.HG 34 Mara Road, Upper Hill.***
- ii. Damages or Mesne Profits at the rate of Kshs.50,000/= per month from **1st September 1995** until possession is delivered up.***
- iii. Costs and interest.***
- iv. Any further or other relief as this Honourable Court may deem just and fit to grant.***

The Plaintiff in its claim had alleged that at all material times, it was the registered owner and entitled to possession of land and the premises situated at and known as **LR.No.209/11908, Nairobi House No.HG 34, Mara Road**, (hereinafter the suit premises). The Plaintiff alleged that it got **registered** as the **owner** of the suit premises **by virtue of a vesting order** issued by the Court on **4th July 1994**. It was further alleged that the **vesting order was registered** on **27th July 1994**, at the **Central Lands Registry, Nairobi**. Further, that the Plaintiff issued a **Written Notice** to the Defendant on **26th July 1995**, to give immediate vacant possession, but the Defendant ignored the same.

The Plaintiff also averred that even with repeated requests by the Plaintiff to vacate the suit premises, the Defendant has wrongfully continued and continues to remain in wrongful occupation of the said suit premises. It further alleged that unless the Defendant is ordered by the Court to vacate, he will remain in wrongful occupation. The Plaintiff further alleged that it has given the Defendant the relevant **Demand**

and *Notice of Intention to Sue* and it therefore urged the Court to allow its claim.

The Defendant *opposed* the claim and *filed his Defence*, on *17th July 1996*. The Defendant denied all the allegations contained in the Plaintiff and further stated that any vesting order issued by the Court on *4th July 1994*, was a *fraud* as the Defendant was in occupation of the suit premises *LR. No.209/11908*, also known as *HG 34, Mara Road*. He further alleged that there was breach of the law prior to the issue of the vesting order. Further that the Defendant had an equitable interest in the suit premises which could not be disposed off without Notice to him.

It was the Defendant's contention that he was not in wrongful occupation of the suit premises as alleged by the Plaintiff. He further contended that his occupation is lawful and he cannot voluntarily or forcibly vacate the same. Therefore the Defendant urged the Court to dismiss the Plaintiff's suit with costs.

This matter protracted for a long time in Court with various interlocutory applications which were determined at various stages. Eventually, the matter *commenced for hearing on 20th September 2005*, before *Osiemo J.* At the *viva voce* evidence, the Plaintiff called a total of four witnesses.

Plaintiff's Case

PW1 – Isaiah Kiplangat, told the Court that he was a *retired Public Servant* but he worked *previously* as the *Managing Director of Post Office Savings Bank Limited* between *August 1999 – August 2009*. It was his evidence that *Kenya Post Office Savings Bank* had *deposits* with *Thabiti Savings Bank*. The deposits were about *Kshs.15,435,411/35*. That when they recalled the money, *Thabiti Bank could not pay* the same. That forced *Kenya Post Office Savings Bank* to go to Court and it *obtained Judgement* against the said *Thabiti Bank* for the stated *amount with interest*. After the Judgement, *Thabiti Finance Bank offered* one of its *property to cover the said amount*. It was his evidence that the property offered was *LR.No.209/11908*, which was *valued at kshs.26,000,000/=*. As the Plaintiff herein had obtained a prohibitory order after they had obtained the Judgement against *Thabiti Bank*, the said *property was transferred* to the Plaintiff on *27th July 1994*. According to the Certificate of title, *Thabiti Finance Company Limited*, had been registered as a proprietor on *11th June 1993*. He also stated that after the suit property was transferred to *Kenya Post Office Savings Bank*, it *sought to take possession* of the suit property but the Defendant who was in occupation *refused to vacate*. The Bank served him with a *Notice to Vacate* on *6th July 1995*, but he still failed to vacate. Thereafter, the Plaintiff filed this suit and *sought for an eviction order*. It was his further evidence that even if the Plaintiff is the registered owner of the suit property and the Defendant the occupant, he has never paid rent to the Plaintiff. Therefore, the Plaintiff is claiming for *vacant possession* of the suit property as well as *Mesne Profits*.

He also stated that though the Defendant alleged that he was *allocated* the suit property by the *former President, Daniel Arap Moi*, when the Plaintiff got title to the suit premises in *the year 1994*, it was not aware of that fact. Further, that the Defendant placed *caveat* on the suit property on *15th August 1994*, after the Bank had obtained the title to the suit land through the vesting order of the Court. Further that the Plaintiff had registered *prohibitory order* on the suit property on *31st March 1994*. It was his further evidence that the Defendant never approached the Bank to have this matter resolved but he denied the Plaintiff entry into the suit premises. The witness urged the Court to allow the Plaintiff's claim as prayed in the Plaintiff.

In cross-examination, the witness stated that he was not aware if the Defendant was served with the prohibitory order. Further that he was aware that the *suit property used to be a Government House*. He also admitted that the Defendant was claiming the suit property from *Thabiti Finance Bank*, by the time the Plaintiff got registered as a proprietor. He denied that the Plaintiff connived with *Thabiti Finance Company Limited* to defeat the Defendant's claim. He also stated that the *owner of Thabiti Finance Company Limited* was *Hon. Dalmas Otieno*, who had offered the suit property to cover the amount the Bank owed to the Plaintiff. He further stated that the *Plaintiff has never obtained vacant possession to date*.

In further cross-examination, the witness stated that when the Plaintiff obtained the property, it did not carry an official search to confirm the availability of the title and the ownership of the same. He also admitted that the suit property was **transferred to Thabiti Finance Company Limited in 1993**, when case **No.HCCC No.2567/93**, was on-going in Court. He also confirmed that it was not necessary to inform the Defendant of the prohibitory order registered in **HCCC No.2567/1993**, as he was not the owner of the property. PW1 also confirmed that the Plaintiff has ownership of the suit property but not possession.

In re-examination, the witness stated that when the Plaintiff obtained the title of the suit property, there was no entry in favour of the Defendant thereon. However, the property was in the name of **Thabiti Finance Company Limited**, which Company owed the Plaintiff some money. He also reiterated that **Thabiti Finance Company Limited**, gave the Plaintiff the suit property to settle the debt it owed the Plaintiff. He also stated that at that time, the Plaintiff was not aware that the Defendant was in possession of the suit property.

PW2 – Lily L.K. Kithinji, stated that she is a **registered Valuer** working with **Dayton Valuers Limited**, and that on **21st September 2005**, **Dayton Valuers Limited** was instructed by the **Managing Director of Post Bank Limited** to value **LR.No.209/11908 IR No.59328**. She further stated that **Dayton Valuers** was to give the market rental rates for the said property. It was her evidence that they visited the property which was a single storey erected on about **0.4104 Hectares**. They relied on other comparable areas with similar structures and came up with the rental rates of **Kshs.60,000/= per month**. The company thereafter prepared a **report** which was produced as **exhibit no.2**.

In cross-examination, she stated that she did not know who the Defendant was. She also did not know that there was a suit in Court over the property when they were given the instructions to value the property. She could also not tell the value of the property in the **year 1995**.

PW3 – Henry Wanyama Khaemba, told the Court that he is a **Practicing Valuer** at **City Valuer Limited**. He also stated that he valued the property **LR.No.209/11908**, having received instructions from **Wambugu & Company Advocates**. He prepared a **Valuation Report** dated **21st July 1994**. His instruction was to find out the market value of the vacant land. He told the Court that the **property is located at Upper Hill along Mara Road**. The property was developed with the **main house** and **two servant quarters**. It was his evidence that he compared similar properties within the locality but he did not go into the rental aspects of the property. However, he was later instructed to assess the rental aspect of the property and he prepared a report dated **28th February 2008**. He recommended a rental value of **Kshs.75,000/= per month**. In cross-examination, he stated that he valued the suit property as a vacant plot. He also testified that he was not aware of another valuation that put the report at **Kshs.26,000,000/=**. It was his testimony that at the time of preparing the report, he was not aware that there was a case in Court. It was his further testimony that at the time of valuation, there was a tenant in the suit property and he did not know who he was nor ask him how much he paid as rent. He also stated that he did not know that the house was occupied by a **Senior Civil Servant**, but he thought it was for **Thabiti Finance Company Limited** and not **Kenya Post Office Savings Bank Limited**.

PW4 – Mercy Njeri Kagiri Mbijiwe, told the Court that she is the **Company Secretary** for the Plaintiff. She was aware of the suit property **LR.No.209/11908**, owned by the Plaintiff and also **HCCC No.2567/93**. She testified that the Plaintiff filed the above case against **Thabiti Finance Company Limited**. Further that the Plaintiff had **deposited money with Thabiti Finance** in the tune of about **Kshs.8 million** in a fixed deposit. However, when the amount became due, **Thabiti Finance Company Limited** was unable to pay up and the Plaintiff filed a claim against the said **Thabiti Finance Company Limited**, which was **HCCC No.2567/93**. Thereafter, the Plaintiff obtained Judgement against **Thabiti Finance, in the tune of Kshs.15,435,411/35** but the Plaintiff was unable to recover the said amount. The Plaintiff decided to execute against the said **Thabiti Finance Company Limited** and when the Plaintiff carried investigations to identify the properties of the Plaintiff, they noted that it owned **LR.No.209/11908**. After carrying out due diligence, the Plaintiff noted that there was no encumbrances on the suit property and so the Plaintiff placed a prohibitory order against that property. Further, that the Plaintiff and **Thabiti Finance Company Limited** reached a consent settlement and **Thabiti Finance offered the suit property to the Plaintiff**. A Vesting Order was therefore issued by the Court on **6th July 1994**, and the same was

registered on **27th July 1994**. It was her testimony that the suit property was offered by **Thabiti Finance Company Limited**, in settlement of the debt and the Plaintiff took over the property after it was transferred to it. She also stated that the Plaintiff did not get vacant possession as there was somebody in occupation. However, the said occupant did not have legal possession and therefore the Plaintiff filed this suit seeking eviction of the occupant. It was her testimony that the person in occupation of the suit property was the Defendant herein. She testified that the Plaintiff desires to have vacant possession of the suit property plus damages.

In cross-examination, she confirmed that the Plaintiff acquired the suit property while the same was still occupied by the Defendant but the Defendant refused to give vacant possession. She also admitted that Plaintiff acquired the suit property through a vesting order in **HCCC No.2567/93**, but the Defendant was not a party to that suit. She further stated that when they got the vesting order, they were aware that the Defendant who was a **Civil Servant** was residing in the suit property. However, they were not aware that the Defendant was a **Permanent Secretary in the Government of Kenya**. Further that they did not try to find out why the Defendant was adamant to vacate the suit premises. It was her further testimony that the Plaintiff was not aware that the **President had approved allocation** of this property to the Defendant. She also confirmed that the Defendant registered a caveat over the suit property but this was after the vesting order had been registered and the suit property transferred to the Plaintiff. It was her testimony that the property was registered to **Thabiti Finance Company Limited** on **11th June 1993**, but the said **Thabiti Finance** did not avail the **Letter of Allotment**, but had a title to the suit property.

Defendant's Case

DW1 – Simiyu Abiud Wasike, stated that he is a **retired Civil Servant**. He further stated that he lives in **LR.No.209/11908**, the suit property which was allocated to him as a **Civil Servant in the year 1983**. It was his testimony that he has never transacted with the Plaintiff herein. It was his further testimony that in the **year 1990**, the **Government** developed a policy of **selling its Government Houses** to the **residing Civil Servants**. He applied for allocation of this house in the **year 1993** and the **President of the Republic approved his allocation**. The then **Head of Civil Service, Prof. Philip Mbithi**, informed him that the President had approved the said allocation. Further, **Prof Mbithi** directed that the Defendant be given a **Letter of Allotment by the Commissioner of Lands**, but the same was not forthcoming. Defendant testified that he wrote several letters to the President, through the Permanent Secretary in the Office of the President, seeking his intervention but he did not receive any response. He had also testified that the **President had directed, a one Mr. Ibrahim Kiptanui**, the **Comptroller of State House** to follow up the matter.

However, Defendant later received a letter from **Hon. Dalmas Otieno** who was a **Minister for Public Works**. The said **Hon. Dalmas Otieno**, requested the Defendant to give vacant possession of the suit property as he claimed that he had been allocated the said House. Further **Thabiti Finance Company Limited**, asked him to vacate the suit property and thereafter the said **Thabiti Finance Company Limited** filed a case against him, being HCCC No.2290 of 1994. However, before he could solve that case with **Thabiti Finance Company Limited**, he also received a **Demand Notice from Kenya Post Office Savings Bank**, requesting him to vacate the suit property. Thereafter, the said **Kenya Post Office Savings Bank** filed this suit against the Defendant and the matter has been in Court **since 1995**.

It was his further testimony that **Hon. Dalmas Otieno** and **Mr. Hezekiel Oyugi**, owned **Thabiti Finance Company Limited**, and the Defendant used to **forward his letters** to the **President** through **Mr. Hezekiel Oyugi** who was the **Permanent Secretary, Office of the President**. It was also his testimony that, **Mr. Oyugi** came to know that the house was available for allocation while forwarding the letters to the **President**. He also stated that he was not aware of the Vesting Order being referred to by the Plaintiff as he was not made a party to the Vesting Order and neither was he consulted over the same. He also testified that he was never shown any Letter of Allotment of this House to **Hon. Dalmas Otieno** or **Thabiti Finance Company Limited**. He only received **Notice to Vacate** the suit property. He was therefore not a party to the consent entered between **Thabiti Finance Company Limited** and the Plaintiff herein.

In cross-examination, he confirmed that he did not receive any Letter of Allotment for the suit property, as the Commissioner of Lands declined to give it to him. He further stated **that Hon. Dalmas Otieno's** allocation of the suit property was withdrawn with the intervention of **Prof. Philip Mbithi**, the then **Head of Civil Service** vide a letter dated **19th July 1994**. It was his further testimony that he has never seen the title document for the suit property. He also confirmed that he registered a caveat over the suit land in the **year 1994**.

DW2 – Abraham Kiptanui, a retired Civil Servant, stated that he was a **former Comptroller of State House**. He also stated that the Defendant herein was a **Civil Servant in the early 1990s**. The Defendant also used to stay in the suit property which is along **Mara Road**, which was a **Government House**. Further the **Government allowed Senior Civil Servants to purchase** the houses that they lived in. Then the Defendant herein was entitled to purchase the suit property. DW2 also testified that the **President** of the Republic approved the allocation of the suit property to the Defendant. The said authorization was in writing and DW2 further testified that he was involved in the authorization as he took Defendant's application letter to the **President**. The said application letter was approved by the President and the matter went back to the **Head of Civil Service, Prof. Philip Mbithi**. It was his testimony that after the authorization by the **President**, his task ended. He also testified that no one house could be approved by the **President** for purchase by **two different people**(persons).

In cross-examination, he stated that he was not aware if the Defendant was given allotment letter over the suit property. It was his testimony that the allotment was to be issued by the Lands office. He also stated that only **Civil Servants were entitled** to be allocated the **houses they lived in but not Government Ministers**, which **Mr. Dalmas Otieno** was. Further, he stated that he was not aware if **Hon. Dalmas Otieno** was issued with any **Letter of Allotment** over the suit property. It was also his testimony that he was not aware whether by the time the Defendant applied to be allocated the suit property, the said House had already been allocated to **Mr. Dalmas Otieno**. However, he was certain that the suit property and house were allocated to the Defendant. He was not aware whether the same had been allocated to **Mr. Dalmas Otieno** before the Defendant (**Wasike**) applied for it.

After the **viva voce** evidence, the Court directed the parties herein to file their **Written Submissions**. By the time of reserving this matter for Judgement, only the Plaintiff had complied with the said directions. The Plaintiff filed their **Written Submissions on 10th May 2016**, and urged the Court to allow its claim. Plaintiff further submitted that it is the registered proprietor of the suit property **LR.No.209/11908, Upper Hill, Mara Road**, and therefore it is the absolute and indefeasible owner. The Plaintiff relied on various decided cases. It relied on the case of **Milan Kumar Shah & 2 Others...Vs...City Council of Nairobi**, where the Court held that:-

“We hold that registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accordance with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”

It further relied on the case **of Dr. Joseph N. K. Arap Ngok..Vs..Justice Moiyo Ole Keiwua & 4 Others, Civil Application No.NA160 of 1997 (unreported)**, where the Court held that:-

“Section 23(1) the Certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all Courts as conclusive evidence that the person named therein as proprietor of land is the absolute and indefeasible owner thereof subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon title of that proprietor shall not be subject to challenge except on the grounds of fraud or misinterpretation to which he is proved to be a party.”

Further, the Plaintiff relied on the case of **Edwin Wambaa Regeru & Another ...Vs....Joseph Kariuki Kibaara & 6 Others (2011) eKLR**, where the Court held that:-

“The most difficult issue for me is to decide if Section 52 of ITPA can take precedence over Section 23 of the Registration of Titles Act or vice versa. Whereas Section 52 of ITPA says that in contentious suits or proceedings in which any right to immovable property is directly in question, it cannot be transferred or otherwise dealt with by one party so as to affect the rights of the other party thereto.... except under the authority of the Court, and on such terms as it may impose, under Section 23 of the Registration of Titles Act, the Certificate of title once issued by the Registrar to a purchaser is to be taken by all Courts as conclusive evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner thereof and his title shall not be subject to challenge except on grounds of fraud or misrepresentation to which he is proved to be a party.”

This Court has now carefully considered the pleadings herein in general, the annexures thereto, the available evidence and exhibits produced in Court. The Court has also carefully read and considered the Written Submissions filed herein and the cited authorities and this Court will render itself as follows:-

There is no doubt that the Plaintiff herein is ***seeking for vacant possession*** and delivery of the suit property ***LR.No.20911908***, from the Defendant herein. There is also no doubt that the Defendant is in occupation of the suit property. From the available evidence, the Defendant has occupied suit property from the ***year 1983*** by virtue of being a ***Civil Servant***. The Defendant produced a letter dated ***5th March 1983***, from the ***Ministry of Works*** addressed to the ***Permanent Secretary, Ministry of Higher Education***, in which the Defendant herein was allocated ***House No.HG34, Mara Road***, which stands on the suit property. Further, the Defendant in his evidence confirmed that he has occupied the House from the ***year 1983***, when he was allocated the same by virtue of being a Civil Servant.

There is also no doubt that in the ***1990s***, the Government of Kenya devised a policy wherein it sold off some of its non-strategic Government Houses. Most of these Houses were sold to the occupants who were mostly Civil Servants or Government employees. It is also evident that the Defendant applied for allocation of the suit property to the ***President*** of the ***Republic of Kenya***. The Defendant in his evidence stated that he applied for allocation of this house in ***1991***, by writing a letter to the President. He applied again in ***1992*** and later in ***1993*** wherein the President approved the said allocation.

This Court has seen a letter dated ***16th March 1993***, addressed to the ***President***, seeking allocation of the suit property to the Defendant. The said application was approved by the ***President*** on ***11th May 1993***. Further, there is no doubt that the ***Head of Public Service then, Prof. Phillip M. Mbithi***, wrote to the ***Commissioner of Lands***, vide his letter dated ***21st May 1993***, and informed him that the ***President*** had approved allocation of the suit property where ***House No.HG34*** stood to the Defendant herein. The said Head of Public Service requested the Commissioner of Lands to commence the allocation process in favour of the Defendant. It is also not in doubt that as the Defendant was awaiting for the response from the ***President*** of the Republic of Kenya after applying for allocation of the suit property, he received a letter from the Ministry of Transport and Communications, which was a ***Notice to Vacate*** the suit property as it was alleged that the said House had been allocated to ***Hon. Dalmas Otieno Anyango***, who was the ***Minister of Transport and Communications***. This ***Notice to Vacate*** culminated in flurry of correspondences back and forth and on ***19th July 1994***, ***Prof Phillip Mbithi*** wrote a letter to ***Hon. Dalmas Otieno*** and informed him that the house was allocated to the Defendant (***Mr. Wasike***) and he informed ***Hon Dalmas Otieno*** that the Defendant was to retain the House in issue and further ***Hon. Otieno*** was to ensure that ***Mr. Wasike*** received no further harassment. Further, ***Hon. Dalmas Otieno*** was informed that his earlier allocation had been withdrawn and he was asked to approach the Government for reconsideration.

However, by the time ***Prof Mbithi*** wrote this letter dated ***19th July 1994***, the suit property had already been registered in the name of ***Thabiti Finance Company Limited***, which was alleged a Company owned by ***Hon. Dalmas Otieno*** and ***Mr. Hezekiel Oyugi***, who was a Permanent Secretary in the Office of the President. The Grant was registered on ***8th June 1993***, for a term of ***99 years***. It is also evident that as soon as ***Thabiti Finance Company Limited*** acquired the Certificate of title, it filed ***Civil Case No.2290 of 1994*** on ***24th June 1994***, against the Defendant herein, ***Simiyu Abiud Wasike*** and sought for various

orders. Among the **orders sought** were **delivery of possession** and **eviction** of the said Defendant from the suit premises **LR.No.209/11908**.

Further, the Plaintiff therein **Thabiti Finance Company Limited** filed an interlocutory application seeking to restrain the Defendant from remaining in the suit property. The said application was however dismissed by **Justice V.V. Patel** on **25th July 1994**.

It is also evident that **Kenya Post Office Savings Bank Limited** had **filed HCCC No.2567 of 1993**, against **Thabiti Finance Company Limited**, wherein a **Decree** for a sum of **Kshs.15,435,411/45** had been entered in favour of the Plaintiff therein. The said Plaintiff (**Kenya Post Office Savings Bank**) also registered a **Prohibitory Order** against **LR.No.209/11908**, owned by **Thabiti Finance Company Limited**, which is the suit property. The said Prohibitory Order is dated **23rd March 1994**. All this time, the Defendant was in occupation of the suit property and his application for allocation of the suit property had been approved by the President. It is also evident that on **6th July 1994**, in **HCCC No.2567 of 1993**, the Court issued a **Vesting Order** in favour of the Plaintiff (**Kenya Post Office Savings Bank**) after the parties entered into a Consent on **28th June 1994**. Even as the parties entered into a Consent, **Thabiti Finance Company Limited**, had filed a suit against **Mr. Simiyu Abiud Wasike**, who was in occupation of the suit property and he was not made a party to the said Consent. Therefore with the said Consent and the Vesting Order issued on **6th July 1994**, the suit property was vested to **Kenya Post Office Savings Bank**, the Plaintiff herein. The said Vesting Order was registered on the Certificate of title or Grant of the suit property on **27th July 1994**.

It is also evident that after the said Vesting Order was registered, the Defendant on his part registered a Caveat over the suit property claiming allottees interest. Thereafter, the Plaintiff herein demanded from the Defendant Vacant Possession of the suit land. When the Defendant failed to heed the said demand, the Plaintiff herein filed this suit against the Defendant **on 12th September 1995**.

There is no doubt therefore that the Plaintiff herein is registered as the proprietor of the suit property by virtue of the Vesting Order entered on the Certificate of title on **27th July 1994**. The above analysis being the undisputed facts, the Court finds that the issue for determination are:-

- 1. Who is the proper allottee of the suit property?**
- 2. Who is the registered owner of the suit property?**
- 3. Was the allocation of the suit property done procedurally?**
- 4. Was the Vesting Order issued on 6th July 1994 done fraudulently, and is it valid?**
- 5. Is the Defendant's occupation of the suit property unlawful or lawful?**
- 6. Is the Plaintiff entitled to the orders sought?**
- 7. Who is to bear costs of the suit?**

Before the Court embarks on the determination of the set out issues, the Court will point out that at the close of the Defence case, the Court directed parties to file their **Written Submissions**. However, only the Plaintiff's advocate complied with the above directive. The Defendant's advocate failed to file the Written Submissions and by the time of reserving the matter for Judgement, no Written Submissions were forthcoming from the Defendant and even by the time of writing this Judgement, the Defendant's Written Submissions had not been filed. The Court will therefore rely on the available evidence and the Written Submissions filed by the Plaintiff.

1) Who is the proper allottee of the suit property?

It is evident from the available evidence that the Defendant herein was in occupation of the suit property from the **year 1983**. The Defendant was allocated the house to occupy by the Government because he was a Civil Servant. It is also evident that the Government of Kenya in the **1990s** decided to sell its non-strategic Government Houses. It is also evident from several correspondences on record in this matter that the Defendant did apply to be

allocated the suit plot **HG34, Mara Road** by the **President** of the Republic of Kenya. The Court has seen applications dated **12th August 1991, 23rd October 1991, 10th January 1992, 21st February 1992** and finally the one **dated 16th March 1993**. It is also evident that the application dated **16th March 1993**, was approved by the **President on 11th May 1993**. It was also alleged that the suit property was also allocated to **Hon. Dalmas Otieno** by the **President**. However, this Court has not seen any application by the said **Hon. Dalmas Otieno** and approval by the **President**.

It is evident that the suit property was initially a Government land which was unalienated. The applicable law for alienation of such property was the ‘Government Lands Act, Cap 280, Laws of Kenya (now repealed). The applicable Section is Section 3(a) which states:-

“The President in addition to but without limiting any other right, power or authority vested in him vide this Act, may;

a. Subject to any other written law, make grants or disposition of any estates interests or right in or over unalienated Government land”.

From the above provisions of law, it is clear that only the **President** had authority to alienate any unalienated Government land. The Defendant has alleged that he is occupying the suit land by virtue of having his application for allocation of the suit property approved by the **President**. Therefore to him, that approval was as good as being allocated the suit property, and the Commissioner of Lands was just supposed to guide in the process of allocation. However, the Court has seen several correspondences from the Ministry of Transport and Communications, wherein **Hon. Dalmas Otieno** was the Minister. The said correspondences were to the effect that the suit property which was being occupied by the Defendant had been allocated to the said **Hon. Dalmas Otieno**. However, the Court has not seen any application by the said **Dalmas Otieno** to the **President** for the said allocation. There was also no approval from the **President**. Therefore, it is evident that even if the suit land was allocated to **Hon. Dalmas Otieno**, there is no evidence that the **President** had authorized such allocation.

In the case of **Henry Muthee Kathurima...Vs...Commissioner of Land & Another (2015) eKLR**, the Court of Appeal held that:-

“We have examined the evidence on record and there is nothing on record to show that the President had authorized the Commissioner of Lands to alienate the suit property. We have examined the provisions of Sections 3, 7, 9 and 12 of the Government Lands Act and we are satisfied that the Commissioner of Lands had no power and authority to alienate the suit property and issue Certificate of Lease.”

The Court herein finds that there is evidence that the **President** approved the allocation of the suit property to the Defendant. There is no evidence that the **President** authorized the allocation of the suit property to **Hon. Dalmas Otieno**. Therefore, the Defendant herein is the proper allottee of the suit property.

ii) Who is the registered owner of the suit property?

There is no doubt that the registration of the suit property was done on **8th June 1993**. The registration was in favour of **Thabiti Finance Company Limited**. This registration was done after the President had approved the allocation of the suit property to the Defendant herein. After the registration of the suit property to **Thabiti Finance Company Limited**, the said Company filed a suit against the Defendant,

being **HCC No.2290 of 1994**, and the Plaintiff herein who was owed money by **Thabiti Finance Company Limited** had filed a suit against the said Company which was **HCC No.2567 of 1993**. It is in this suit (**HCCC No.2567 of 1993**), that the parties entered into consent and vested the suit property to the Plaintiff herein. The Plaintiff is therefore the registered owner of the suit property. However, at its registration, there was a suit between the previous owner and the Defendant. The Defendant was in occupation of the suit property since 1983. In the case of **Kassim Ahmed Omar & Another..Vs..Ahwar Ahmed Abeid & Others, Malindi ELC No.18 of 2015**, the Court held that:-

“A Certificate of title is an end product of a process. If the process that was followed in issuing the title did not comply with the law, then such a title can be cancelled by the Court”

The process that followed the issuing of title must comply with the law. Therefore the Court comes to a conclusion that at present, the suit property is vested to the Plaintiff herein vide a **Vesting Order** issued on **6th July 1994**, and registered on **27th July 1994**. The question that will therefore have to be determined is whether the same was done procedurally and regularly.

iii) Was the allocation of the suit property done procedurally?

As the Court has found and held earlier, all unalienated Government land is allocated with the **authorization of the President**. In this case, the Court finds that there was no evidence that the **President** authorized the allocation of this suit property to **Hon. Dalmis Otieno**. The applicable law herein is Section 3(a) of the Government Lands Act, Cap 280 (now repealed). The Court therefore finds that the allocation of the suit property was not done procedurally and the resultant registration therefore can be challenged. In the case of **Funzi Island Development Limited & Others...Vs...County Council of Kwale, Civil Appeal No.252 of 2005 (Mombasa)**, the Court held that:-

“In the case of allocated land, even if the Section is applicable, a registered proprietor acquires absolute and indefeasible title if and only if the allocation was legal, proper and regular. A Court of law cannot on the basis of indefeasibility of title sanction an illegality or give seal of approval to an illegally or irregularly obtained title”.

Though the Plaintiff is in possession of Certificate of title, the Court finds that the initial allocation that brought about this title was not procedurally done.

vi) Was the Vesting Order issued on 6th July 1994 done fraudulently and/or is it valid?

It is evident that **Thabiti Finance Company Limited**, obtained registration of the title over the suit property while Defendant was in physical possession and occupation of the suit property. It is also evident that **Thabiti Finance Company Limited** got registered as the proprietor on **8th June 1993**. It is also evident that the Plaintiff herein had filed **HCCC No.2567 of 1993** against **Thabiti Finance Company Limited** on **26th May 1993** and on **12th October 1993**, Judgement was entered against **Thabiti Finance Company Limited** for a sum of **Kshs.15,435,411/35**. It is also evident that the Plaintiff herein registered a Prohibitory Order against the suit land on **23rd March 1994**. At this time, the Defendant was in occupation of the suit property and had a tussle over the suit land with **Hon. Dalmis Otieno**, who was one of the **Directors of Thabiti Finance Company Limited**. It is clear that the Prohibitory Order was not brought to the attention of the Defendant who was in occupation of the suit property and who had been allocated the said house by the **President** of the Republic of Kenya. Further, the Plaintiff and **Thabiti Finance Company Limited** entered into a **Consent to Vest** the suit property to the Plaintiff herein whereas, it was evident that **Thabiti Finance Company Limited** had sued the Defendant in **HCCC No.2290 of 1994**. However, the Defendant herein was not made aware of the **Vesting Order**, and therefore his input was not taken into account. By Vesting the suit property to the Plaintiff herein, the said **Thabiti Finance Company Limited** ignored the Defendant's claim over the suit property. The Defendant was therefore condemned unheard and that is against the rule of Natural Justice. This is against the doctrine of **'audi alteram partem'** which is a right of a party not to be condemned unheard. In the case of **Pashito Holdings & Another ..Vs...Ndungu & 2 Others, Civil Appeal No.138 of 1997**, the

court held that:-

“The rule of ‘audi alteram Partem’ which literally means ‘hear the other side’ is a rule of natural justice. It is a indispensable requirement of justice that the party who has to make a decision shall hear both sides giving each an opportunity of hearing what is argued against him.”

In the referred case of ***HCCC No.2567 of 1993***, even if the Defendant was not a party, the suit property that was vested to the Plaintiff herein was an issue in ***HCCC No.2290 of 1994***, wherein the Defendant was a party and was claiming a stake in the suit property ***LR.No.209/11908***. Therefore by the parties therein entering into a Consent affecting the suit property, then that was a breach of the rule of Natural Justice and an attempt to resolve ***HCCC No.2290 of 1994***, behind the Defendant’s back as he was absent from the proceedings. Though the Court finds that the Vesting Order was validly issued by the Court, the same was done while there was material non-disclosure. The Court believes that if all facts had been disclosed to Court, maybe the Court would not have registered the said Vesting Order.

v) Is the Defendant occupation of the suit property unlawful or lawful?

The gist of this suit is that the Plaintiff is the duly registered proprietor of the suit property. That after acquisition of the title, it sought for Vacant Possession from the Defendant but the Defendant declined to vacate and deliver Vacant Possession of the suit land to the Plaintiff. The Defendant has alleged in his Defence that he is rightfully in occupation of the suit property. He alleged that he first occupied the suit property in ***1983 as a Civil Servant*** and later the ***President*** approved his allocation and he is therefore the rightful allottee. It is evident that the Plaintiff acquired the suit property while the Defendant was in physical possession and occupation. It is rightfully stated by the Defendant that, he was allocated occupation of the house in ***1983*** by virtue of him being a Civil Servant. Therefore, the Defendant initial entry was lawful. Further, he got approval for allocation of the suit property from the President on ***11th May 1993***. It is not in doubt that by dint of Section 3(a) of the Government Lands Act, Cap 280 (now repealed), the ***President*** of the Republic had power to alienate all unalienated Government land to any party. For that reason, the President authorized allocation of this property to the Defendant herein.

The plaintiff acquired ownership while the Defendant and ***Thabiti Finance Company Limited*** were involved in a Court battle. The Plaintiff cannot claim to have acquired the suit property and obtained a clean title. Before the Plaintiff acquired the Certificate of Lease over the suit property, the Defendant was claiming his equitable interest over the suit property. Further Section 52 of the Transfer of Property Act 1882(now repealed) was very clear on the issue of suit pending in Court; which provides that:-

“During the active prosecution in any court having authority in British India by the Governor General in Council of a contentious suit or proceedings in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the Court or on such terms as it may impose”.

It is clear that the Defendant was in occupation and physical possession of the suit property by the time the Vesting Order was issued. The Plaintiff herein therefore did not acquire a clean title. In the case of ***Mwangi & Another...Vs...Mwangi (1986) KLR 328***, the Court held that:-

“The right of a person in possession or occupation of land is an equitable right which is binding on the land.”

Equally in this suit, the Defendant who is and was in possession and occupation from ***1983*** has an equitable right which is binding on the suit property and cannot be dislodged without being given an opportunity to be heard.

The Court therefore finds that the Defendant occupation of the suit property was lawful from the time of

entry and the Plaintiff should have ensured that the suit property was vacant before entering into a Consent with **Thabiti Finance Company Limited**.

vii) Is the Plaintiff entitled to the orders sought?

The Court has found that the Defendant was the rightful allottee of the suit property herein, his application having been approved by the President. However, it is evident that **Thabiti Finance Company Limited** which was a Company associated with **Hon. Dalmas Otieno** got registered as the proprietor of the suit property. Later it caused the suit property to be registered in the name of the Plaintiff herein. Though Section 26(1) of the Land Registration Act provides that Certificate of title issued by the Registrar to a proprietor is conclusive evidence of ownership and the proprietor of such land is the absolute and indefeasible owner, the Court finds that the said title can also **be challenged** if it was obtained through **fraud, misrepresentation** or if the Certificate was **acquired illegally, unprocedurally or through corrupt scheme**. It is not therefore sufficient to dangle a Certificate of title as the process of acquisition and history of the root of the title has to be proper. See the case of **Munyu Maina...Vs...Hiram Gathiho Maina, Civil Appeal No.233 of 2009**, where 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.”

Though the Court has found that the process of acquisition of the title issued to **Thabiti Finance Company Limited** was **irregular** and **unprocedural**, the Court finds that the Defendant has not filed any Counterclaim to challenge the legality of the Plaintiff's title.

The Court will therefore say no more of that. Consequently, the Court having found that the **Defendant's occupation** of the suit property was **lawful** and given that he got **approval from the President** of the Republic to have the suit property allocated to him, then before his equitable right can be established, this Court finds that it cannot find and hold that his occupation is unlawful. For the above reasons, the Court finds that the **Plaintiff herein is not entitled to the orders sought**.

vii) Who is to bear costs of the suit?

Ordinarily costs follow the event. Further, it is evident that according to Section 27 of the Civil Procedure Act, the award of costs is discretionary. Taking into account the circumstances of the case, the Court finds that each party herein should bear its/his own cost.

Having now carefully considered the available evidence, the Court finds that the **Plaintiff has not been able to prove its case on a balance of probabilities**. Consequently, the **Court dismisses the Plaintiff's suit filed on 12th September 1995 entirely** with an **Order** that **each party to bear its own costs**.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 7th day of September 2017.

L. GACHERU

JUDGE

7/9/2017

In the presence of

No appearance for Plaintiff (Advocate not traced for service)

M/S Guya holding brief for Mr. Mwenesi for Defendant

Philis - Court clerk.

L. GACHERU

JUDGE

7/9/2017