



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 592 OF 2010

**GRACE WAIRIMU SORORA (SUING ON BEHALF OF THE
ESTATE OF SORORA OLOITIPTIP).....PLAINTIFF**

-VERSUS-

CHAKA LIMITED.....1ST DEFENDANT
**PAN AFRICA CREDIT & FINANCE LTD (THROUGH
THE DEPOSIT PROTECTION FUND BOARD).....2ND DEFENDANT**
**ASHFORD KANG'ETHE T/A TOI EDUCATIONAL
SERVICES.....3RD DEFENDANT**
**BRIDGING SAVINGS AND CREDIT
CO-OPERATIVE SOCIETY LIMITED.....4TH DEFENDANT**
THE PRINCIPAL REGISTRAR OF TITLES-NAIROBI....5TH DEFENDANT

AS CONSOLIDATED WITH

ELC. SUIT NO. 29 OF 2012

FRANCIS SORORA OLOITIPTIP.....PLAINTIFF

-VERSUS-

KIBUCHO LIMITED THROUGH THE OFFICIAL RECEIVER..DEFENDANT
**PAN AFRICA CREDIT & FINANCE LTD (IN-LIQUIDATION) THROUGH THE
DEPOSIT PROTECTION FUND BOARD).....INTERESTED PARTY**

AS CONSOLIDATED WITH:-

ELC. SUIT NO. 340 OF 2010

GRACE WAIRIMU SORORA

BEING THE ADMINISTRATRIX OF THE ESTATE OF

FRANCIS SORORA OLOITIPTIP (DECEASED)..... PLAINTIFF

-VERSUS-

CITY COUNCIL OF NAIROBI.....DEFENDANT

AND

ELC SUIT NO. 564 OF 2010

ASHFORD KANG'ETHE T/A

TOI EDUCATIONAL SERVICES.....PLAINTIFF

-VERSUS-

CHAKA LIMITED.....1ST DEFENDANT

HON. DAVID KIPRONO SUDI.....2ND DEFENDANT

EUNICE KABUE SUDI.....3RD DEFENDANT

GRACE WAIRIMU SORORA.....INTERESTED PARTY

JUDGMENT

THE BACKGROUND

This judgment is on four consolidated suits namely ELC 340 of 2010, ELC No. 564 of 2010, ELC 592 OF 2010 and ELC 29 of 2012. The suits were consolidated by consent of the parties on 16th November 2012 upon an application by way the Plaintiff in ELC 29 of 2012 dated 16th January 2012 . The parties in the said consent also agreed on the status quo to be maintained and to dispense with all other pending applications in the said suits and to expedite the hearing of the same. The court file for ELC 592 of 2012 was agreed to be the main file for the recording of proceedings.

All the consolidated suits involve the parcel of land known as L.R. Number 209/9749 Nairobi (hereinafter referred to as the suit property), and more specifically the claims by Grace Wairimu Sorora with respect to the said property. The said Grace Wairimu Sorora who is the administratrix of the estate of Francis Sorora Oloiptip is the Plaintiff in ELC 340 of 2010, ELC 592 of 2010 and ELC 29 of 2012. Ashford Kangethe T/A Toi Educational Services who was the Plaintiff in ELC 564 of 2010 did not attend court nor prosecute the said suit.

An overview of the pleadings in the suits that were prosecuted now follows, and provides an account of the events surrounding the various suits.

ELC Suit No 20 of 2012

Of the suits that were prosecuted, the first suit to be filed was ELC 29 of 2012 which was initially filed in the Civil Division of the High Court as HCCC 339 OF 2007 (O.S), and later transferred to the Commercial Division of the High Court at Nairobi and given a new case number of HCCC 723 of 2008 (O.S). The said suit was then subsequently transferred to the Environment and Land Court and given the current case number of ELC 29 of 2012. The suit was brought by Francis Sorora Oloiptip by way of an Originating Summons dated 19th July 2007 filed on the same date, in which he sued Kibucho Limited through the Official Receiver. Francis Sorora Oloiptip who is since deceased was the husband of Grace Wairimu Sorora, who was substituted in his place as Plaintiff on 19th July, 2012 .On 28th August, 2012

Chaka Limited was joined to the suit as an Interested Party.

The orders sought in the said originating summons were as follows:

- a. That Francis Sorora Oloiptip be declared to have become entitled by virtue of adverse possession of more than twelve (12) years to all that piece of land known as L.R. No. 209/9749 registered in the name of Kibucho Limited.
- b. That the name of Kibucho Limited be cancelled from the register at the Land Registry and in its place Francis Sorora Oloiptip be registered as the proprietor of the whole of that piece of land registered as L.R. No. 209/9749.
- c. That the court do declare that the entry in the register of a charge by Pan African Credit And Finance Limited over L.R. No. 209/9749 has become extinct in accordance with the provisions of the law of Limitation of Actions Act.
- d. That the Land Registrar do make an entry in the register to note that the said charge is wholly discharged and endorse on the grant a memorandum of the date on which the entry was made in the register.
- e. That the Land Registrar Nairobi be directed to issue a new certificate of title in favour of Francis Sorora Oloiptip.
- f. That costs of the action be provided.

The Originating Summons was grounded on the premise that Francis Sorora Oloiptip had been in continuous, open, exclusive and uninterrupted possession of the suit property for a period of over twelve years since 1981. Further, that he entered into the subject land without legal title and has extensively developed it, and that the registered owner was aware of it and has never complained or questioned in law his stay upon and possession of the subject land.

The Originating Summons was supported by an affidavit by Francis Sorora Oloiptip sworn on 19th July, 2007, wherein he averred that he was claiming land parcel No. L.R. No. 209/9749 situated along Kangethe Road, Nairobi which is registered in the name of Kibucho Ltd, having acquired the same by adverse possession. Further, that he entered upon the suit land in 1981 and started operating a bar and restaurant, a hair salon, butchery and car wash business, which are still in operation, and had also build structures thereon which he had let out for business purposes.

The said deponent further stated that on or about the month of July, 1999 he applied to the City Council of Nairobi for a permit to construct and connect a sewer line from the suit land to the main public sewer, and he annexed copies of the payment receipts, the application form and letter granting permission to break open the road. He also stated that the City Council of Nairobi by a letter dated 10th August, 1999 certified that the construction of the sewer was done satisfactorily.

It was further averred that Kibucho Ltd has been fully compensated by being allotted another plot, and had no interest whatsoever in the suit property. Further, that there is a charge registered against the said land by Pan Africa Credit and Finance Limited for Kshs.4,000,000/=, but that the said bank had not exercised its statutory power of sale over the suit property. It was further averred that no steps had been made to evict the deponent from the suit land since the time that Kibucho Ltd was placed under liquidation and Pan Africa Credit and Finance Limited under receivership. It was also the deponent's contention that the decree passed in favour of Pan Africa Credit and Finance Limited against Kibucho Ltd for recovery of the loan amount had lapsed due to efflux of time pursuant to the Limitation of Actions Act, and the charge upon the suit property has been rendered extinct.

The Attorney General filed a Memorandum of Appearance on behalf of the Official Receiver on 26th October, 2009. There appears to have been no Replying Affidavit to the Originating Summons that was filed on behalf of the Official Receiver. However, there is on the court record a replying affidavit filed on 26th October 2009 sworn on 23rd October 2009 by Mark Gakuru, a state counsel in the state Law office in response to an application by Pan Africa Credit & Finance Limited. It appears from the said Replying Affidavit that the Official Receiver was not personally served and disputed the suit against it.

This particular suit was heard and judgment entered in HCCC 723 of 2008 against Kibucho Ltd and a decree issued on 23rd June, 2009. The decree was subsequently registered against the title of the suit property on 2nd July, 2009. However, the said decree was set aside on 6th September, 2010, on the application by Pan Africa Credit & Finance Limited, for the reason that it had a charge over the property and ought to have been served with the Originating Summons. The Court also directed that the claim by Francis Sorora Oloitiptip in the said suit be heard afresh.

ELC Suit No 340 of 2010

The second suit before the Court is ELC 340 of 2010 which was filed by Grace Wairimu Sorora. The claim by Grace Wairimu Sorora in this regard is detailed in the Plaint she filed therein dated 14th July 2010 and filed on the same date. Grace Wairimu Sorora sued Nairobi City Council in the said suit, and states therein that on 24th February, 2010 she obtained limited grant of letters of administration of the estate of the deceased Francis Oloitiptip, and that she runs a business in the name and style of M/S Zam Zam Bar among others on behalf of the estate of the deceased on the suit property. Further, that before the deceased died, he had constructed temporary structures and a sewer on the suit property with the approval of the Nairobi City Council.

She further claimed that on 9th July, 2010, the Nairobi City Council issued and served enforcement notices dated 9th July, 2010 upon her under Section 30 of the Physical Planning Act, requiring her to remove and/or demolish illegal structures of the suit property within a period of seven days, and that the said notice was to take effect on the 9th July, 2010. Grace Wairimu Sorora averred that the businesses being carried out on the suit property were licensed by the Nairobi City Council, and that the temporary structures on the suit property were also constructed with the sanction and approval of the said Nairobi City Council. Therefore that the aforesaid enforcement notice dated 9th July, 2010 is illegal, and she gave the particulars of illegality.

She further averred that unless the Nairobi City Council is restrained by an order of injunction from enforcing the aforesaid enforcement notices dated 9th July, 2010, the estate of the deceased stands to suffer substantial loss and damages by losing the structures erected on the suit property and various businesses. She prayed for judgment against the Nairobi City Council for:-

- a. A permanent injunction restraining the Nairobi City Council from removing and/or demolishing the approved structures on the suit property.
- b. Costs of the suit.
- c. Any other relief that this Court may deem fit to grant.

Nairobi City Council on its part filed a Defence in ELC 340 of 2010 dated 7th June 2013 in response to the claim by Grace Wairimu Sorora. It denied that it sanctioned and approved the construction of the temporary structures on the suit property and averred that the enforcement notice dated 9th July 2010 was lawfully issued by it in accordance with section 38 of the Physical Planning Act and denied the particulars of illegality enumerated thereunder. The Nairobi City Council further averred that Grace Wairimu Sorora is not entitled to the order of injunction sought as her suit was premature and vexatious and she had not exhausted the remedies available to her under section 15 of the Physical Planning Act, and prayed that her suit against it be dismissed with costs.

ELC Suit No 592 of 2010

The last suit filed by Grace Wairimu Sorora was ELC 592 of 2010 by way of a Complaint dated 1st December 2010 and filed in court on 2nd December 2010. In the said suit she sued Chaka Ltd as the 1st Defendant; Pan Africa Credit and Finance Ltd which is in liquidation and is sued through the Deposit Protection Fund Board as the 2nd Defendant, Ashford Kangethe T/A Toi Educational Services as the 3rd Defendant; Bridging Savings and Credit Co-operative Society Limited as the 4th Defendant and the Principal Registrar of Titles in Nairobi as the 5th Defendant.

In ELC 592 of 2010, Grace Wairimu Sorora claims that prior to 16th July, 2009, Kibucho Limited (under receivership), was the registered proprietor of the suit property, and that by way of the originating summons dated 19th July, 2007, Francis Sorora Oloiptip since deceased, sought to be declared by the court that he had become entitled by virtue of adverse possession to the suit property; that the name of Kibucho Limited be cancelled at the Land Registry and the deceased be registered in its place as proprietor of the suit property; and that the entry in the register of a charge by Pan Africa Credit and Finance Limited over the suit property had become extinct in accordance with the provisions of the Limitation of Actions Act.

Further, that on 23rd June, 2009, the court entered judgment in favour of the deceased as prayed in the said Originating Summons, and the decree of the Court was registered at the Lands Registry against the title to the suit property on 2nd July, 2009. However, that in the month of July 2009 the Principal Registrar of Titles illegally cancelled the entry in the register relating to the aforesaid decree on the ground of forgery. Grace Wairimu Sorora gave the particulars of the illegalities on the part of the Principal Registrar of Titles as follows:

- a. Cancelling an entry in the grant relating to the registered decree on the ground of forgery when the decree was genuine and authentic.
- b. Deliberately failing to verify from the court the authenticity or otherwise of the decree.
- c. Failing to summon the person in whose favour the entry of the decree was entered for in the register.
- d. Failing to apply to the court for the deceased to show cause why the said entry should not be cancelled.
- e. Cancelling the said entry in the register without power to do so.
- f. Usurping the powers of the court by cancelling the entry of the decree in the register.
- g. Cancelling the said entry in the register upon which the purported cancellation of the entry of the decree was made.
- h. Cancelling the registration of the decree to the detriment of the deceased without any valid reason.
- i. Cancelling the registration of the decree to the detriment of the deceased without any valid reason.

Grace Wairimu Sorora further averred that the Principal Registrar of Titles cancelled the said registration of the decree of the court in collusion with the Chaka Ltd to allow registration of the transfer in favour of Chaka Ltd. Further, that on or about 16th July 2009 Ashford Kangethe T/A Toi Educational Services transferred the suit property to Chaka Ltd, and she contended that the said sale and transfer is fraudulent, wrongful and illegal and the same is null and void on the following grounds:

- a. Registering the transfer in the pretext that, the decree of the court that had been registered earlier

- in favour of the deceased was a forgery.
- b. Cancelling the entry in the register relating to the decree on the ground that the same was forgery to pave way for registration of the transfer in favour of Chaka Ltd while knowing very well that the said decree was genuine and authentic.
 - c. Purporting to transfer the suit property in exercise of a statutory power of sale when no such right had arisen and exercised over the suit property.
 - d. There was no legitimate auction of the suit property carried out by Pan Africa Credit and Finance Limited whereof the Chaka Ltd was declared the highest bidder to facilitate the transfer of the suit property to it .
 - e. The Pan Africa Credit and Finance Limited was not entitled to exercise its statutory power of sale because the charge had become extinct pursuant to the Limitation of Actions Act.
 - f. No valid notice requiring payment of the amount due had been served upon the Official Receiver.
 - g. Basing the transfer on an invalid sale of the suit property.
 - h. Registering the transfer in favour of the Chaka Ltd without executing and registering a discharge of charge.
 - i. Registering a transfer that had not been validly executed and attested as required by law.

Grace Wairimu Sorora averred that the purported transfer of the suit property to Chaka Ltd was made with intent to defraud the deceased. Further, that Chaka Ltd is in the process of transferring the suit property, and she is in possession of the same wherein she is carrying on various businesses including a bar, restaurant and salon that the estate of the deceased depends upon, and that there is eminent danger that Chaka Ltd may alienate the suit property unless it is prevented by an order of this court. She accordingly prayed for the following relief:-

- a. A declaration that the said transfer of the suit property by Pan Africa Credit and Finance Limited to the Chaka Ltd is null and void as it was done fraudulently and consequently Chaka Ltd acquired no title or interest to the suit property known as L.R. NO. 209/9749.
- b. A permanent injunction restraining Chaka Ltd and Pan Africa Credit and Finance Limited and either of them by themselves or through their servants, agents
- c. The Principal Registrar of Titles be ordered to cancel Chaka Ltd's name in the register at the land Registry and in its place, Grace Wairimu Sorora be registered as the proprietor of the whole of all that parcel of land known as L.R. No. 209/9749.
- d. Costs of this suit and interest therefrom.
- e. Such other and further relief as this Court may deem fit and just to grant.

Chaka Ltd filed a Defence and Counterclaim dated 19th June 2012 and filed on the same date in response to the Plaintiff in ELC 592 of 2010. It denied that Grace Wairimu Sorora has the *locus standi* to institute the suit, and that her claim is incompetent as it is inseparably linked with her claim against Pan Africa Credit and Finance Limited. Further, that her claim against the Principal Registrar of Titles is incompetent as it was not preceded with the requisite notice of intention to sue as is required by the Government Proceedings Act. It was also claimed that Grace Wairimu Sorora misled the court to grant judgment in her favour in HCCC 723 of 2008, in that the documents she tendered in evidence as emanating from the City Council of Nairobi were a forgery, the purported service through advertisement was improper as the Defendant in that suit was in liquidation, and that she did not bring to the attention of the court that the bank had exercised its statutory power of sale over the suit property. Consequently, that the said judgment was set aside upon an application for review.

Chaka Ltd denied the allegations of illegality, fraud and wrongful acts particularised in the Plaintiff and put Grace Wairimu Sorora to strict proof thereof. It stated that it is an innocent purchaser for value of the suit property without notice of her interests therein, which interests it expressly denied and contended cannot override Chaka Ltd's title.

The claim by Chaka Ltd in its Counterclaim is that it bought the suit property from the Deposit Protection Fund Board which was exercising its statutory power of sale pursuant to a charge registered in favour of Pan Africa Credit and Finance Limited then in liquidation. Further, that Grace Wairimu Sorora attempted to frustrate its registration as owner by obtaining orders *ex parte* in HCCC 723 of 2008 that were set

aside, and subsequently in HCCC 340 of 2010 by obtaining orders of occupation of the suit property on the strength of development plans which the Nairobi City Council, the alleged issuer has disowned as forgeries.

Chaka Ltd further claimed that Grace Wairimu Sorora and her agents are in illegal occupation of the suit property which occupation has hindered its development of the same, and has refused to vacate the same despite demands made to her to do so. It also claimed that it purchased the suit property through loan resources which it is servicing and for which it has been sued for non-payment. Chaka Ltd prayed that the suit by Grace Wairimu Sorora be dismissed and judgment be entered in its favour for:

- a. A mandatory injunction against Grace Wairimu Sorora requiring her and her agents to forthwith vacate the suit property pending the hearing and determination of the suit.
- b. Damages for loss of user from June 2009 upto the date the suit property is handed over to Chaka Ltd.
- c. General damages for trespass.
- d. Costs of this suit.
- e. Such other or further relief the Court may in the interest of justice deem necessary to grant.

Pan Africa Credit and Finance Limited through the Deposit Protection Fund Board on its part filed a Defence dated 28th January 2011 in response to the Plaintiff in ELC 592 of 2010. It averred that the proceedings against it were fatally defective and incompetent to the extent that while it is a company under liquidation, Grace Wairimu Sorora did not seek and obtain the Court's leave to sue it in terms of the mandatory requirements of section 228 of the Companies Act as read together with section 35 of the Banking Act.

Further and without prejudice to the foregoing, it averred the suit property was prior to 16th July 2009 charged to by way of a charge dated 14th June 1983 to secure an advance of Kshs 4,000,000/= and interest thereon. Further, that the decree issued in favour of the deceased Francis Sorora Oloitiptip in HCCC 723 of 2008 was set aside by an order of the court dated 6/09/2010, and that in the circumstances Grace Wairimu Sorora has no basis in law to maintain or agitate the claims to the suit property.

Pan Africa Credit and Finance Limited also stated that it was entitled as chargee to dispose of the suit property in exercise of its statutory power of sale so long as the monies secured under the charge remained unpaid, and to also dispose of the suit property by private treaty in exercise of the said power of sale. Lastly, it was averred that at all material times the suit property was occupied by not only the deceased but also at least 31 other persons who were squatting thereon and operating kiosks and open air garages purportedly with the permission and licence from the City Council of Nairobi to whom fees were paid.

The Principal Registrar of Titles filed a Statement of Defence to the suit dated and filed on 1st October 2013. He averred that the suit property was prior to 16th July 2009 charged to Pan Africa Credit and Finance Ltd and that Grace Wairimu Sorora had no legal claim to the same at the time of filing of the suit due to the setting aside of the judgment in HCCC 723 of 2008. Further, that the entry to the register of the suit property was cancelled due to suspicion of fraud, and that the said entry being an error on the face of the record and having been set aside at the time of filing of the suit was therefore non-existent, and that the particulars of illegalities on the part of the Registrar of Titles therefore do not hold. The Principal Registrar of Titles however did not file any documents and/or witness statements, or call any witness at the hearing of the suit.

This suit was not defended by Ashford Kang'ethe T/A Toi Educational Services and Bridging Savings & Credit Co-operative Society Limited who were sued as the 3rd and 4th Defendants respectively. The two Defendants did not file any Defences, documents, witness statements nor did they call any witnesses at the hearing.

THE EVIDENCE

The Case by Grace Wairimu Sorora

The hearings of the consolidated suits took place on diverse dates between 3rd October 2013 and 31st July 2014. The Plaintiffs in ELC 340 of 2010, ELC 592 of 2010 and ELC 29 of 2012 called Grace Wairimu Sorora (PW1) as their first witness and one expert witness, Mr. John Muinde (PW2). PW1 gave oral testimony and also adopted her witness statements filed in court that she signed on 16th January 2012, 22nd May 2013 and 3rd October 2013 as her evidence. She stated in the said statements that she is the Administrator of the Estate of the Francis Sorora Oloitipitip, her late husband, and that she and her deceased husband occupied and still continue to occupy the suit property which is situated along Joseph Kangethe Road, Nairobi. Further, that she runs a bar and restaurant on the property by the name Zam Zam.

PW1's testimony was that suit property was registered in the name of Kibucho Limited and charged to Pan Africa Credit and Finance Limited, and that on 19th July, 2007 her deceased husband filed a claim for adverse possession of the property and a declaration for extinction of the charge in favour of Pan Africa Credit and Finance Limited in **Civil Suit No. 339 of 2007 (O.S) - Francis Sorora Olitipitip -vs- Kibucho Limited through the Official Receiver**. Further, that the said suit was heard and judgment made in favour of her deceased husband on 23rd June, 2009 and a decree issued on 30th June, 2009. PW1 stated that the said decree was lodged for registration on 2nd July, 2009 and was registered on the register of the property as entry number 3 on 2nd July, 2009.

However, that on 19th August, 2009 Pan Africa Credit and Finance Limited applied to set aside the judgment and decree in Civil Suit No. 339 of 2007 (O.S), on the claim that it was an interested party who ought to have been served but was never served with the Originating Summons. The judgment and decree were subsequently set aside on 6th September, 2009. Further, that during the pendency of the said application it transpired that Pan Africa Credit and Finance Limited had through an unregistered instrument of transfer dated 11th June, 2008 transferred the suit property to Chaka Limited, and the transfer was registered on 16th July, 2009. PW1 also stated that she learnt that during the pendency of Civil Suit No. 339 of 2007 (O.S), that Pan African Credit and Finance Limited had sold the property to Ashford Kangethe on 6th June, 2008, who in turn sold the property to Chaka Limited on 14th July, 2009.

PW1 claimed that the transfer of the property by Pan Africa Credit and Finance Limited to Chaka Limited on 16th July, 2009 during the pendency Civil Suit No. 339 of 2007 (O.S) was fraudulent on the grounds set out in the Complaint dated 21st December, 2010 and for the following other reasons:-

- a. The charge over the property had been extinguished and there was no basis upon which the power of sale thereunder could have been exercised.
- b. The sale and transfer of the property could not be effected when Civil Suit No. 339 of 2007 (O.S) was pending.
- c. There was no agreement for sale that preceded the claimed transfer to Chaka Limited.
- d. Chaka Limited never paid any consideration for the claimed transfer for the property to it.
- e. The decree registered on the register of the property was cancelled on the false claim that the entry in respect thereof was obtained by forgery even before the decree was set aside, to enable the registration of the transfer.
- f. Her late husband and her were and are still in adverse possession and occupation of the property.

According to PW1 It is evident that both Chaka Limited and Ashford Kangethe fraudulently obtained the sale of the suit property, and that Chaka Limited fraudulently obtained the transfer of the property with the intention of defeating her interest in adverse possession, which had accrued at the time of filing of Civil Suit No. 339 of 2007 (O.S). PW1 also stated that on 18th September, 2009 Chaka Limited filed suit in the subordinate court seeking to evict her and her husband from the property, and has on several occasions attempted to take possession of the property from them without any order for vacant possession.

She further stated that one such an attempt has been the incitement of the City Council of Nairobi to demolish the structures she and her husband erected on the suit property, on the false claims that the same were erected without the approval of the City Council of Nairobi. It was her case that the various Defendants do not have any valid claim or entitlement to the suit property and the transfer thereof to Chaka Limited ought to be cancelled and her claim on account of adverse possession in Civil Suit No. 339 of 2007 (O.S) upheld.

With respect to her claim in ELC No. 340 of 2010, PW1 stated that the enforcement notice leading to the action complained of was issued by the City Council of Nairobi on 9th July, 2010. She stated that the structures on the suit property were erected pursuant to approvals given by the City Council of Nairobi on 21st July, 1997, 12th March, 1998 and 10th August, 1999 and that the receipts, letters and drawings in that regard were exhibited. Further, that she and her deceased husband had conducted business on the suit property way before 1999 and continued conducting business on the property with the approvals, permits and licences of the City Council of Nairobi.

It was PW1's testimony that in light of the said evidence the City Council of Nairobi does not have any justification whatsoever to demolish the structures erected on the suit property. However, that sometime in November, 2011, the City Council of Nairobi instructed Peter Kogi to demolish the structures on the property despite an order of injunction issued by the Court on 24th May, 2011. Further, that on 15th November, 2011, the City Council of Nairobi were advised by their then Advocates not to undertake the demolition, and that despite this advice on 18th November, 2011, officers from the office of the City Council of Nairobi raided the premises on the suit property and destroyed a substantial part thereof.

It was PW1's belief that the raid on the property on 18th November, 2011 was instigated by Eunice Kabule and David Sudi, who claimed to be directors of Chaka Limited, which claims to have bought the property. PW1 further stated that her belief is based on the fact that immediately after the said raid, the said Eunice Kabule and David Sudi caused her to be arrested and charged in Court for the alleged offence of being on the property illegally and refusing to allow them to take vacant possession, which criminal case is yet to be determined. She exhibited the charge sheets and statements in respect of the criminal case.

PW1 in her statement doubted that the transfer of the suit property to Chaka Limited was executed in the manner claimed by Pan Africa Credit & Finance Company Limited for the reasons that David Sudi and Eunice Kabule are not directors of Chaka Limited; the Central Bank of Kenya had refused to confirm whether the transfer of the property to Chaka Limited was executed by it; and there is doubt whether stamp duty was paid on the claimed transfer. Further, that a search conducted on the property confirms that the said transfer of the suit property to Chaka Limited was registered on 16th July 2009, before the setting aside of the Decree of 23rd June, 2009.

PW1 produced the Bundle of Documents dated 16th January, 2012, the Further List and Bundle of Documents dated 22nd May, 2013 and the Supplementary List and Bundle of Documents dated 3rd October, 2013 as her Exhibits 1A, 1B & 1C respectively.

Upon cross-examination by the counsel for Chaka Ltd, PW1 stated that she has occupied the suit property from 1981 to-date, a period of 32 years. Further, that when she first entered the land in 1981 there were kiosks built by City Council of Nairobi on part of the land, and that they were given the kiosks with others when they entered the land. Further, that these kiosks were demolished in 2011. She testified that she later left the kiosk and built her own structures on the land. She confirmed that the letter of allocation from the City Council of Nairobi given to her deceased husband was dated 22nd January 1981, and that at the time the suit property did not have a title. She however did not know if any payments were made pursuant to the letter of allotment, as all the payments were made by her deceased husband and she did not know where he had put some of the documents.

The witness reiterated that she wanted the court to give her title on account of adverse possession because she had stayed on the land since 1981. She also stated that she was aware that the decree of adverse

possession was set aside, and she stated that she did not appeal the decision because the judge said the case was to be heard afresh.

On the sale of the suit property to Ashford Kangethe, PW1 stated that the said purchaser was not a squatter on the suit property and did not have a kiosk on the land, and that she did not know when the property was sold. She also stated that she had seen the sale agreement between Pan Africa Credit and Finance Ltd and Ashford Kangethe and/or his nominees. PW1 further stated that she did not know if Chaka Ltd was a nominee of Ashford Kangethe. Further, that there was no advertisement for the sale of the land, and that she could also have bought it had it been advertised.

PW1 testified that the said sale agreement stated that the suit property was being sold with vacant possession, but that she was still on the land at the time. Further, that for the time being she was a squatter on the suit property whereon she has put up businesses, and that she is the one who invited the other squatters to stay on the suit property and that this was the reason why she did not join them in the case.

On cross-examination by the Counsel for Pan Africa Credit and Finance Ltd, PW1 admitted that at the time of bringing the suit for adverse possession the owner of the suit property was Kibucho Ltd, and that Pan Africa Credit and Finance Ltd had given a loan to Kibucho Ltd who gave the suit property as security. She also admitted that Kibucho Ltd failed to repay the loan and stated that she did not know if any notice was given to Kibucho Ltd to pay the loan. She stated that she did not see any advertisement for the sale of the land by Pan Africa Credit and Finance Ltd and did not know if it was sold by public action, or whether Chaka Ltd bought the land at the public auction. According to PW1 the wrong committed by Pan African Credit and Finance Ltd was in not advertising the sale of the land, and that it should have given her the first opportunity as the occupier to buy the land.

PW1 was cross-examined by the counsel for the Principal Registrar, and she stated that she operated a business of a bar and a restaurant on the suit property since 1981, and that she has all the licences from the City Council of Nairobi for the business but that they were not all filed in court. On the letter of allocation dated 22nd January 1981 allocating the suit property to her deceased husband, PW1 stated that she did not remember if any steps were taken to get the title, and that it was her deceased husband who was dealing with the issue. She stated that there are other people undertaking businesses on the suit property, and that her business does not occupy the entire parcel of land. She also stated that she had informed the other people on the suit property of this suit, and that they have no interest in joining the suit because she is the one who invited them to the land and that they are occupying the same on her behalf.

Upon cross-examination by the counsel for the City Council of Nairobi, PW1 stated that she had sued the City Council of Nairobi because they came to demolish the premises at the suit property where she undertakes her business. Further, that they did not give any reasons and that they came at night. She confirmed that she was given and read the enforcement notice dated 9th July 2010, and that it was stated therein that the City Council of Nairobi was demolishing the structures on the suit property because they were illegal structures. She reiterated that they were given approval to build on the land by Nairobi City Council, and that she had the drawings.

PW1 was referred to the receipts for payment to construct a sewer dated 9th and 13th July 1999 issued by the Nairobi City Council that were in her Exhibit 1B, and stated that they did not constitute an approval to build a bar, saloon or restaurant. She was also referred to a letter dated 12th March 1998 by Nairobi City Council to Francis Sorora, and stated that the building plans approved in the said letter were Plans No. DG-408. She confirmed that she did not have the said plans and that the plans she had produced were marked DV-48 which are different from those in the said letter. She stated that she was given approval to build structures in 1998, and that she demolished the old structures that had been built in 1981 and built new ones. She also stated that the other persons who are on the suit property had built structures thereon and did not have approved plans.

PW1 stated that she had the approved plans although she could not tell the date of approval. The Court at this juncture asked her counsel to produce the original approved plans in Court. Upon production of the original plan marked DV-48 by PW1, the Counsel for the Principal Registrar asked the Court to note that

the original approved plan was different from the copy produced in the Plaintiff's documents, and that the date of approval was not clear in both the said original and copy.

PW1 upon further cross-examination testified that she had not been paying rates for the suit property, and that she was not aware of any application made to the Nairobi City Council for the approval of the plans, nor did she have any receipts for any approvals that were given because all the documents were kept by her deceased husband. She also stated that the buildings currently on the suit property are different from the ones on the approved plans, and that the approved buildings were the ones demolished by the Nairobi City Council. She reiterated that she sued the Nairobi City Council because they had demolished the structures on the suit property when she had approval to build them, and that they did not give the other occupiers notice of the demolition.

Upon re-examination PW1 stated that the original of the plan no DV-48 was dated 15th February 2005 and reiterated that she entered the suit premises in 1981 and that the title given to Kibucho Ltd was issued on 23rd March 1983 after she had entered the land and after her deceased husband had been given a letter of allotment dated 22nd January 1981. She also stated that the site plan she produced in evidence referenced PDS MD/20/99 and approved on 27th July 1999 for the proposed extension of sewer to serve the suit property was the same one referred to in a letters of approval to her deceased husband from the Nairobi City Council dated 21st July 1999 and 10th August 1999. Further, that even though the plan marked DV-48 was approved by the Nairobi City Council on 15th February 2005, it showed that it was prepared by the Architect on 19th July 1999, and that at the time of the issue of the enforcement notice dated 9th July 2010 the plan had already been approved.

The second witness called to testify on behalf of Grace Wairimu Sorora was Police Superintendent John Muinde (PW2) who stated that he is based at the Criminal Investigations Department (CID) headquarters, and holds a Bachelor degree in Food Science and Technology from Moi University. He stated that he has undergone professional training in forensic document examination at the United States Secret Service, National Ribat University, Institute of Forensic Evidence in Khartoum, Forster and Freeman Ltd in the United Kingdom and Interpol headquarters in Lyons, France. Further, that he has been practicing forensic document investigation since 2002 and was the head of the forensic examination department at the Criminal Investigations Department(CID) headquarters.

PW2 testified that on 2nd May 2014, he received a letter written to the Director of CID from Havi and Company Advocates, requesting for forensic examination of certain documents. He stated that the documents received were firstly, the signatures in dispute in the drawings marked "A" and "B" being original approved drawings registered as DV-48., and secondly the undisputed signatures marked "C" and "D" which are the signatures of John Ojwang.

PW2 testified that he examined the documents at the CID forensic laboratory and employed the examination methods stated in his report namely, physical examination, infra-red spectroscopy and stereomicroscopy. He explained that physical examination by the naked eye only employs ones skills, but that infra-red spectroscopy enlarges and reads minute characteristics in documents. Further, that stereo microscopy uses the normal light.

PW2 averred that he examined the disputed signature with the undisputed signature and made the opinion that the signatures were made by the same person, due to the fact that there were peculiar characteristics and similarities in the two sets of signatures as indicated in his report, and as shown by the images attached to the report. He stated that the natural variations are as a result of many factors such as age. PW2 testified that he signed his report dated 6/5/2014 and produced the original report as the Plaintiff's Exhibit 2.

Upon cross examination by the counsel for the City Council of Nairobi, PW2 testified that the documents refer to as 'A' and 'B' were the photographs generated after examination, and that he did not have the copies of the said document with him nor did he attach the said documents to his report. He explained that he generated 4 images of the documents because there are 2 undisputed and 2 disputed signatures. He

stated that the documents “A” and “B” that he examined were two different documents and he could not comment on the impression or shapes across the image of the documents in his report. He testified that he examined what was brought before him and it was adequate to form a conclusion.

Upon cross-examination by the counsel for the Principal Registrar of Titles, PW2 explained that he had acquired a state of art machine a month before, which was better than the one he used in his examination. He confirmed that the machine cannot give an opinion or probability range and that it only gives a graphic image. He reiterated that the two signature he examined are the same. According to PW2, the letter ‘S’ in the signatures looked similar and the loop in the letter ‘J’s are the same, the only difference is the natural variation. He also stated that there was a variation in the lower ‘g’ and stated that the signatures cannot exactly be the same and that there are other factors such as pen pressure that makes signatures similar and dissimilar. PW2 was shown the plan marked DV – 48 and confirmed that it was the one he used as document “B” in his report. He admitted that there was no date of 15th February 2005 on the said plan as stated in his report.

Upon re-examination PW2 explained that he got the date of 15th February 2005 from the letter from Havi and Company Advocates dated 2nd May 2014 , and confirmed that he received the originals of the two plans produced in evidence by Grace Wairimu Sorora, and that is where he got the disputed signatures. Further, that document “C” was from the original statement of John Ojwang signed on 20th March 2014 and document “D” from the one he signed on 14th March 2014. He stated that those were the four documents he relied upon for his examination.

The Case by Chaka Ltd

Eunice Kibule Sudi (DW1) testified on behalf of Chaka Limited. It was her testimony that she is a Director of Chaka Ltd together with her husband, David Kiprono Sudi. Further, that they registered Chaka Ltd on 17th May 2005, and have the Memorandum of Articles of Associations and a copy of a search to confirm their directorship, as well as a copy of certificate of incorporation. She also stated that they had been filing returns and that Chaka Ltd is a legal entity.

DW1 testified that they got information that Ashford Kangethe T/A as Toi Educational Company had made an offer to purchase the suit property from their former advocates – Cheptumo and Advocates. Further, that they found out that the then registered owners of the suit property were Kibucho Ltd, and that at the time the property had a legal charge to Pan Africa Credit and Finance Co. Ltd for a loan of Kshs.4 million and interest, and that the loan amount had not been paid.

DW1 further testified that they contacted Ashford Kangethe and met severally. Further, that they also found out that he had written to the liquidating agent of Pan Africa Credit and Finance Co. Ltd on 6th May 2008 offering to purchase the suit property. DW1 stated that the liquidating agent was Doris Mugambi who was working for the Deposit Protection Fund Board, who then wrote a letter to Ashford Kangethe offering to sell the property. DW1 stated that Ashford Kangethe wrote a letter dated 3rd June 2008 accepting the offer.

According to DW1 an agreement was then entered into on 6th June 2008 between Ashford Kangethe and Pan Africa Credit and Finance Ltd, and that Chaka Ltd are the ones who paid the purchase price for the suit property as nominees of Ashford Kangethe. She testified that the first payment was by way of a bankers cheque dated 3rd October 2008 of Kshs 11,000,000/= payable to Pan Africa Credit and Finance Ltd. Further, that they made a subsequent payment on 2nd December 2008 by way of a bankers cheque of Kshs.6.5 million in favour of Pan Africa Credit and Finance Ltd and that the total amount paid was Kshs 17.5 million. She stated that at the time of making the payments the property was still charged to Pan AfricanCredit and Finance Ltd.

DW1 explained that Cheptumo and Company Advocates then wrote to Pan Africa Credit and Finance Ltd on 4th December 2008 forwarding a certificate of incorporation of Chaka Ltd as a nominee of Ashford

Kangethe. Further, that there was a response on 18th December 2008 from the liquidating agent of Pan Africa Credit and Finance Ltd who forwarded an executed transfer and original title to the suit property. However, that they were not able to transfer the property as there were arrears of land rent and rates that required to be cleared before the transfer could be effected, and they learnt that the suit property had been advertised for auction by Garam Investment Auctioneers in the *Daily Nation* newspaper on 1st December 2008, on instruction from Nairobi City Council for non-payment of rates.

DW1 testified that Pan Africa Credit & Finance Ltd through the Deposit Protection Fund Board then moved to court in High Court Civil Case 589 of 2008 to stop the City Council of Nairobi from auctioning the suit property, and that a consent was recorded in court on 1st April 2009 whereby Pan Africa Credit and Finance Ltd agreed to pay the rate arrears which then stood at Kshs. 874,380/= together with Advocates fees of Kshs. 480,000/=, and which they paid to E.N. Omotii and Company Advocates on the 27th June 2009.

It was DW1's evidence that Chaka Ltd was then granted a rates clearance certificate paving way for the payment of stamp duty which they paid on the 11th June, 2009 amounting to Kshs. 640,000/- as evidenced by the Stamp Duty declaration assessment form serial No. 0460939 dated the same day. Further, that after satisfying all the formalities and fully paying the purchase price, the suit property was transferred to Chaka Ltd on 16th July 2009 for a consideration of Kshs. 16,000,000/= freed and discharged from all encumbrances. DW1 further testified that on 27th July 2009, Chaka Ltd made an application to the City Council of Nairobi for change of user from single dwelling to multi dwelling units. It was her evidence that by the time they were making the payments, the suit property was vacant and on visiting the property later, they found that Grace Wairimu Sorora had trespassed into the suit property and erected a kiosk.

DW1 referred to the plans for a parameter wall and drawings for flats on the suit property that they produced in their bundle of documents, and testified that they have not managed to put up the flats on the suit property. Further, that when they attempted to survey the property, they found that Grace Wairimu Sorora had occupied part of the land and build structures thereon, and that vigilantes also scared them away.

DW1 testified that they reported the matter to the City Council of Nairobi and were told that Grace Wairimu Sorora was a squatter and an enforcement notice had been issued to her by the City Council. She confirmed that Chaka Ltd has never occupied the suit property, that it is currently occupied by Grace Wairimu Sorora and other squatters, and that there are structures on the property namely, a bar, salon and kiosks. Further, that Grace Wairimu Sorora has filed numerous cases to frustrate them from occupying the land and invited more squatters and vigilantes who have not completely occupied the land.

DW1 stated that she had not seen any ownership documents to the suit property produced by Grace Wairimu Sorora or any of the other claimants, neither have they produce any receipts for rent or rates paid for the suit property, yet they remain in occupation. She testified that according to the records of City Council of Nairobi the rateable owner of the suit property is Chaka Ltd and rate demands come in the name of Chaka Ltd, and she referred the court to the latest rate demand in their bundle of documents. She also referred the court to the evidence of their payment of rates for 2014 of Kshs.120,360/= and land rent of 130,944/=.

DWI explained that other than the court case Chaka Ltd filed, they have also reported the occupation of the suit property by Grace Wairimu Sorora to the Criminal Investigation Department who found that she had no ownership documents and was occupying the land by force. Further, that PW1 was arrested and charged in a criminal case in the Magistrates Court Case no. 252 of 2010 for forcible detainer, which is still ongoing.

DW1 gave evidence as to the loss she has suffered and stated that Chaka Ltd has spent Kshs.32 million on the suit property over the last six years, and that part of the payment for the property was from a loan they borrowed from Trans National Bank which accrued a lot of interest. Further, that as a result her home was

auctioned and two vehicles sold because they could not repay the loan and that her family now lives in a rental house. DW1 also testified that her children who had joined two universities in the United Kingdom have dropped out and are at home because she could not pay their fees as they did not get rental income from the suit property.

In support of her case DW1 produced a bundle of documents filed on 12th March 2013 which she produced as Exhibit 1 for Chaka Ltd, and also produced the originals of the title to the suit property, payments receipts, bankers cheques copies for Kshs. 11 million and 6.5 million, rates clearance certificate, stamp duty receipts, consent from the Land Control Board and the original transfer by charge duly executed by the directors of Chaka Ltd and Governor of Central Bank Professor Njuguna Ndungu in his capacity as the secretary to the Deposit Protection Fund Board. She also relied on her witness statements filed on 19th June 2012 and on 12th March 2014.

Upon cross examination by counsel for the Grace Wairimu Sorora, DW1 reiterated that she and her husband are the directors of Chaka Ltd which was incorporated on 17th May 2005, and stated that she had seen the letters dated 29th May 2013 and 20th November 2012 from the Registrar of Companies stating that there are other companies bearing the names of Chaka Ltd which were registered on 6th June 2004 and 6th September 2004. It was DW1's evidence that it was for the said Registrar to rectify the position, as it was not her fault that there are two companies both bearing the name Chaka Ltd that have been registered. When referred to the title to the suit property and the different dates of the grant and deed plan, DW1 stated that she could not explain the differences and that it was for the lands department to do so.

She testified that after they were introduced to Ashford Kangethe he took them to the suit property and that there were some kiosks along the road next to the property, but that she did not find anyone on the property which was open and vacant. Further, that the kiosks were along the road and were not on the property. DW1 testified that it was later on that some people moved in and started constructing on the suit property, and that she came to know later that it was Grace Wairimu Sorora who was undertaking the construction

DW1 was referred to a letter dated 15th May 2008 from Pan Africa Credit & Finance Ltd to Toi Educational Service stating that the suit was being sold on an "as is" basis with the squatters. She was also referred to clause 4 of the sale agreement dated 6th June 2008 between Pan Africa Credit and Finance Ltd and Ashford Kangethe Trading as Toi Educational Services as to the presence of squatters on the suit property. She reiterated that the squatters were near the property and that when Chaka Ltd bought the suit property it was vacant, and they were told that the kiosks that had been there were burnt down.

DW1 was again referred to clause 1 of the sale agreement between Pan Africa Credit and Finance Ltd and Ashford Kangethe Trading as Toi Educational Services and stated that the purchase price therein was Kshs 17,500,000/=. DW1 was then referred to clause 2.2 of the sale agreement dated 14th July 2009 between Ashford Kangethe Trading as Toi Educational Services and Chaka Ltd wherein the purchase price was stated to be Kshs 32,000,000/=:, and she testified that they paid Kshs 32,000,000/= for the suit property. She also testified and referred the court to evidence of payments of Kshs 17,500,000/- of this amount to Pan Africa Credit and Finance Ltd, and that they had arranged with Mr. Ashford Kangethe on how to pay him the balance.

DW1 further testified that it was provided in the agreement Chaka Ltd entered into with Ashford Kangethe that they would get vacant possession of the suit property, but that this did not happen because people started encroaching on the property after they bought it. She admitted that there were letters produced in evidence written by the Commissioner of Lands and Kibicho Ltd dated 8th May 1991 and 27th May 1997 respectively showing that there were kiosks on the suit property that prevented Kibicho Ltd from taking occupation.

DW1 was taken through the entries made against the title to the suit property and on entry number 3 which was the transfer to Chaka Ltd on 16/7/2009, and she stated that she could not answer if there was a

discharge of charge before that entry. Further, she stated that she was not the one who procured the cancellation of the entry of registration of the suit property in Grace Wairimu Sorora's name which was stated to be cancelled on account of forgery. She also stated that she testified in the criminal case in which Grace Wairimu Sorora was charged and also recorded a statement therein.

DWI was also cross-examined on the forged document she had stated in her witness statement dated 12th March 2014 were used by Grace Wairimu Sorora in the cases she filed in court. She stated in this regard that she was referring to the building plan dated 15th February 2005 which was stated to be a forgery in an internal memorandum dated 3rd July 2012 by John K. Tanui, the Director of Information and Information Analysis at the City Council of Nairobi, and in a forensic report dated 28th June 2012 made by Emmanuel K. Kenga from the Department of Criminal Investigation Department that were among the documents Chaka Ltd filed in Court. She confirmed that the said report was prepared upon a complaint made by her husband.

Upon cross-examination by counsel for Pan Africa Credit and Finance Ltd, DW1 referred to letter dated 1st December 2008 written by the lawyer for Ashford Kangethe and addressed to the lawyer for Pan Africa Credit and Finance Ltd in which it was stated that Chaka Ltd were the nominees of Ashford Kangethe. She also reiterated that Chaka Ltd paid Kshs 17,500,000/= to Pan Africa Credit and Finance Ltd, and that Mr. Ashford Kangethe prepared the necessary transfers to Chaka Ltd.

DW1 also stated that Pan Africa Credit and Finance Ltd is the one that moved the court to remove the entry registering Francis Oloiptip Sorora as owner of the suit property and referred to the order dated 23/06/2009 made in HCCC 723 of 2008, in which the applicant was Pan Africa Credit and Finance Ltd which resulted in the cancelled entry by the principal registrar of title. She explained that Pan Africa Credit and Finance Ltd moved to court to remove the impediment to the title after being informed of the same by Chaka Ltd.

DW1 further stated that Pan Africa Credit and Finance Ltd was not party to the agreement between Chaka Ltd and Ashford Kangethe. Further, that the suit property was described as having been sold on an "as is" basis in the offer made by Pan Africa Credit and Finance Ltd to Toi Educational Serviced dated 15th May 2008, and in clause 5 of the agreement between Pan Africa Credit and Finance Ltd and Ashford Kangethe trading as Toi Educational Services dated 6th June 2008.

The Case by Pan Africa Credit & Finance Limited

Doris Mugambi (DW2) testified on behalf of Pan Africa Credit & Finance Limited. She stated that she is a liquidation agent with the Deposit Protection Fund Board, and was the liquidation agent of Pan Africa Credit and Finance from 2007 until 2013, and relied on the witness statement she signed, dated and filed in court on 28th January 2011. DW2 explained that Pan Africa Credit and Finance Ltd held the title to the suit property as security for a loan given to Kibucho Ltd, and referred the Court to the charge entered into between Pan Africa Credit and Finance Ltd as the lender and Kibucho Ltd as the chargor dated 14th June 1983, and registered against the title to the suit property on 28th July 1983, which was produced as part of the documents relied upon by Pan Africa Credit & Finance Limited.

Further, that the charge was securing a loan of Kshs. 4,000,000/=, and that to the best of her knowledge, there has been no challenge as to the validity of the charge. DW2 testified that the money lent to Kibucho Ltd was never repaid, and that after the initial demand and failure to make payments, Pan Africa Credit and Finance Ltd sought to sell the property in 1984. DW2 referred the Court to letters by various auctioneer firms dated 16th November 1984 and 3rd June 1985 which explained that the sale did not take place at the time as the reserve price was not attained, and stated that there was no reference to third parties on the suit property in the said letters. She also stated that they were not aware of any squatters on the suit property until they received the letters dated 6th February, 2002 and 18th March 2002 from Forefront agencies who had attempted to sell the suit property. Further, that they received a letter dated 27th January 1995 informing them of an injunction restraining the sale of the property.

DW2 stated that Pan Africa Credit and Finance Ltd sought to evict the squatters on the property through a suit it filed in ELC 2167 of 2007 on 17th September 2007 and that the 1st defendant in that suit was Francis Sorora Oloiptip. DW2 referred the court to the pleadings filed in that suit, and testified that Francis Sorora Oloiptip in his defence was claiming entitlement to the suit property by way of adverse possession and that he had filed a suit to this effect in HCCC 339 of 2007. DW2 stated that Pan Africa Credit and Finance Ltd was not a party in HCCC 339 of 2007, even though at the date the said suit was filed on 19th July 2007 it had a charge over the suit property, and Francis Sorora Oloiptip was aware of this fact as shown by the title to the suit property he attached to the supporting affidavit he swore in the case on 19th July 2007 that showed a charge registered against the title.

DW2 explained that Pan Africa Credit and Finance Ltd did not proceed with the suit in ELC 2167 of 2007 because it got a buyer to purchase the suit property. DW2 referred the Court to the letter of offer dated 10th May 2008 addressed to Toi Educational Services to purchase the suit property on an “as is” basis for the purchase price of 16 million and collection costs of 1.5 million. She also referred the Court to the letter of acceptance by Toi Educational Services dated 3rd June 2008. She testified that the acceptance was reduced into an agreement dated 6th June 2008 between Pan Africa Credit and Finance Ltd and Ashford Kangethe trading as Toi Educational services and/or his nominees.

DW2 stated that the lawyers for Ashford Kangethe are the ones who introduced the clause on nominees in their letter dated 7th October 2008, and that in a letter dated 1st December 2008 the said lawyers identified the nominee as Chaka Ltd and P. O. Box 75827 – 00200 Nairobi, and asked Pan Africa Credit and Finance Ltd to prepare the transfer in the said nominee’s name. DW2 confirmed that the entire purchase for the suit property was paid by Toi Educational Service and was acknowledged by Pan Africa Credit and Finance Ltd, and she took the court through the evidence of payment.

DW2 further testified that Pan Africa Credit and Finance Ltd then executed a transfer in favour of Chaka Ltd that was drawn by the advocate for Ashford Kangethe, and sought to explain the anomaly of the said transfer having been dated 11th June 2008 which was before the execution of the sale agreement between Pan Africa Credit and Finance Ltd and Ashford Kangethe which was executed on 14th October 2008. She in this regard referred to a letter dated 23rd October 2012 to the advocate for Ashford Kangethe to confirm the dates of the transfer, and the response by the said Advocate namely Leah Manyarkiy who swore an affidavit on 7th November 2012 and deponed that the agreement was executed before the transfer, and was erroneously dated 11th June 2008 instead of 11th June 2009.

According to DW2 the payment for the suit property came much later after the sale agreement because it was found that the suit property was also being offered for sale by the Nairobi City Council to recover outstanding rates, and she referred the Court to an advertisement of the said sale published in the *Daily Nation* newspaper of 1st December 2008 stating that the suit property was to be auctioned on 16th December 2008. She explained that Pan Africa Credit and Finance Ltd got injunction orders on 16th December 2008 stopping the said sale in a suit it filed against the City Council of Nairobi in HCCC No. 589 of 2008, paid the outstanding rates and was subsequently availed with a clearance certificate on 3rd July 2009. Further that Nairobi City Council as a result did not sell the property, and that this was the time that the transfer was executed.

DW2 gave evidence that the advocate for Ashford Kangethe was however unable to register the transfer as she found that a decree issued in HCCC 723 of 2008 on 30th June 2009 had been registered against the title to the suit property. She referred to letter by the said advocate to the advocate for Pan Africa Credit and Finance Ltd dated 8th July 2009, and the letter to herself by the advocate of Pan Africa Credit and Finance Ltd dated 9th July 2009 seeking instructions in this respect. DW2 expounded that Pan Africa Credit and Finance Ltd as an interested party then filed a Notice of Motion dated 19th August 2008 in HCCC 723 of 2008 and got orders setting aside the decree in favour of Francis Sorora Oloiptip.

Further, that the entry of the decree against the title of the suit property was subsequently cancelled by the

Registrar of Titles and the transfer to Chaka Ltd was thereafter registered. DW2 stated that Pan Africa Credit and Finance Ltd sold and transferred the property to Chaka Ltd because it was the chargee, and that transfer to Chaka Ltd was above board. Further, that the said transfer discharged its charge and it has no further interest in the suit property. However, that the sale agreement did not satisfy the entire debt of Kibuchi Ltd which is still outstanding.

Upon cross-examination by the advocate for Chaka Ltd, DW2 testified that as a liquidation agent she was to sell the assets of Pan Africa Credit and Finance Ltd and pay debts, and that she sold the suit property because of a debt of Kshs.4 million and interest given to Kibucho Ltd by Pan Africa Credit and Finance Ltd. DW2 reiterated that the suit property was sold and transferred to Chaka Ltd as nominee of Ashford Kangethe, and stated that she was never approached by Grace Wairimu Sorora to purchase the property. According to DW2, Chaka Ltd is the owner of the suit property.

Upon cross-examination by the Advocate for Grace Wairimu Sorora, DW2 stated that she became seized of the account of Kibucho Ltd in 2007 when she was appointed as liquidation agent of Pan Africa Credit and Finance Ltd. She stated that she has never personally been to the suit property, and that the secured sum in the charge between Pan Africa Credit and Finance Ltd and Kibucho Ltd was due for repayment on 14th July 1983. She reiterated the various attempts to sell the suit property to recover the secured sum as between 1984 and 2007 when the sale to Chaka Ltd took place, and stated that she was not aware if there is a time limit within which a security on land should be realised. She also stated that there was no attempt to sell the property between 2002 and 2007 because there were subsisting suits in court.

DW2 explained that Kibucho Ltd was placed under liquidation because after acquiring judgment in its favour, Pan Africa Credit and Finance Ltd could not execute the decree as it was found not to have any other assets. DW2 was referred to the pleadings filed in HCCC 644 of 1986 in which Pan Africa Credit and Finance Ltd sued Kibucho Ltd for the outstanding sum of Kshs.2,875,889/=. She was also referred to the decree issued by consent in the said case on 28th January 1990 where the total amount decreed as payable was Kshs 3,019,647/=. She confirmed that the amount decreed was not paid, and that between the date of the decree in 1990 and the sale of the suit property to Chaka Ltd in 2007, 17 years had passed. She was of the view that a decree need to be executed within 12 years, however that the decree was executed by way of winding –up proceedings of Kibucho Ltd commenced in Nairobi H.C Winding Up Cause No 44 of 1994. Further, that the creditor in the cause was Pan Africa Credit and Finance Ltd.

DW2 confirmed that she did not personally know Francis Sorara Oloiptip and was not aware for how long he had been in occupation of the suit property. She admitted that as at 16th October, 2007 at the time of filing of the Defence by Francis Sorara Oloiptip in ELC 2167 of 2007, Pan Africa Credit and Finance Ltd was aware of his claim to the suit property, however that at the time of the letter of offer made to Ashford Kangethe dated 6th May 2008, the said claim had not been brought to her attention. She was also referred to the clause in the agreement for sale dated 6th June 2008 between Pan Africa Credit and Ashford Kangethe t/a Toi Educational Services as regards the substituting suits, and admitted that one of the said suit was the one by Francis Sorora for adverse possession.

DW2 was further cross-examined on the dates on the said sale agreement and of the transfer between Pan Africa Credit and Finance Ltd and Chaka Ltd and reiterated that there was an error on the date of the transfer which was dated June 2008, yet it was done in 2009. She denied that the transfer was executed in 2008 and that all the agreements were drawn to justify a fraud. When questioned on the purchase price for the suit property, DW2 testified that Pan Africa Credit and Finance Ltd was not party to the agreement between Chaka Ltd and Ashford Kangethe in which the purchase price of the suit property was Kshs.32,000,000/=. and stated that Pan Africa Credit and Finance Ltd sold the property to Ashford Kangethe for Kshs.17.5 million inclusive of costs of collection.

Lastly, on the entry in the title of the suit property of the registration of the transfer to Chaka Ltd, DW2 stated on cross-examination that she was not in charge of the process transferring the suit property, and could not explain how the said transfer was registered on 16th July, 2009, before the order setting aside the decree in favour of Francis Sorara Oloiptip was issued on 22nd September 2010.

Upon re-examination, DW2 clarified that Pan Africa Credit and Finance Ltd sold the property to Ashford Kangethe and his nominee as chargee, and not in execution of a decree. Further, that the judgment setting aside the decree issued to Francis Sorora Oloiptip was delivered on 23rd June 2009, before the transfer in favour of Chaka Ltd was registered, and that the entry of the transfer in the title of the suit property on 16th July, 2009 was effected after the judgment.

The Case by the City Council of Nairobi

John Ojwang (DW3) and Assistant Police Commissioner Emanuel Kenga (DW4) testified on behalf of the City Council of Nairobi. DW3 stated that he is currently the Assistant Acting Director for Development Control at the Nairobi City County and formerly worked with the Nairobi City Council. Further, that part of his job description entails scrutinizing building plans and forwarding them to the technical committee for approval, and that until June 2014 he also used to approve plans. He confirmed that he filed a statement in court on 21st March 2014 which he dated and signed on 20th March 2014.

DW3 testified that he was aware that this suit involves plans with respect to property on Joseph Kangethe Road at Woodley which were purportedly signed by him. He confirmed that he had visited the said property, and that there were temporary structures built thereon comprising a bar and kiosks.

DW3 was referred to the enforcement notice dated 9th July 2010 that was addressed to Ms Zam Zam bar on plot 209/9749 on Joseph Kangethe Road. He explained that it was issued by the Nairobi City Council because there were illegal structures within the suit property, and it was meant to notify the illegal occupants to remove the structures. Further, that the structures were considered illegal because there was no record to show that the structures had been approved.

The processes of approval was explained to the Court by DW3, who stated that a person applies for permission to erect a structure and attaches the necessary documents such as the plans and documents of ownership. Upon payment of the statutory fees, the plans are then forwarded to a technical committee comprising various stakeholders who consider them, approve them where necessary and release them to the developer. Upon being referred to the letters dated 21st July, 1997 and 10th August 1999 in Grace Wairimu Sorora's Exhibit 1A on the approval of the design and construction of a sewer line on the suit property given to Francis Sorora Oloiptip, DW3 was emphatic that the same were not approvals of a plan. DW3 was also shown the plan marked DV – 48 produced by Grace Wairimu Sorora, and he testified that it resembled an approved plan, but was not approved by City Council of Nairobi because the signature on the plan on behalf of Nairobi City Council was not his signature and is a forgery.

DW3 stated that there were no records at the Nairobi City County of the processes of approving the said plan, and reiterated that he had been involved in approving plans since March 2007 when he got the authority to do so. It was DW3's view that the plan was a forgery for the reasons that the stamp of approval that was used was not the type used on the date of approval namely 15th February 2005; he was not an authorised signatory at the time. and the signature that was appended was not his.

DW3 confirmed that the enforcement notice dated 9th July 2010 was issued legally and explained that according to the Physical Planning Act, there was a liaison committee to which the appeal indicated at the bottom of the enforcement notice was to be made. He stated that he was not aware whether Grace Wairimu Sorora made an appeal.

Upon cross-examination by the advocate for Pan Africa Credit and Finance Ltd, DW3 testified that documents of ownership were required before approval of a plan could be given, which would be a copy of the title and any other document of ownership registered at lands office. In the case of certificates of ownership from land buying companies, he explained that a sworn affidavit from the owner of the land is required. DW3 clarified that if these documents are not presented approval will not be granted. Further, that the same will also happen a title is presented with another person name there will be no approval.

DW3 testified that if the plan DV-48 was approved then the developers shown on the plan being Francis

Sorora Oloiptip needed to have presented his documents of ownership, and that the plan could not have been approved without a title in his name.

Upon cross-examination by the Advocate for Grace Wairimu Sorora, DW3 stated that he has been in the Development Control Section of the City Council of Nairobi for 24 years, and that in 2005 he was in the section. He further stated that he was transferred to the Forward Planning Section for about 9 months from 2005 – 2006 and then went back to Development Control section in 2006.

DW3 reiterated that the signature on plan DV-48 was not his signature and that the stamp that was used thereon was not being used then although it was similar. He further stated that he knew the impressions of the stamps they used, and that at the time a Mr. Wachira was the one signing plans, and that while he himself was a Development officer he was not signing plans at the time. He however admitted that he had not made any complaint to the police about his signature.

DW3 further testified that he did not know for how long Grace Wairimu Sorora had carried out the business of a bar on the suit property, and came to know of the business and of the enforcement notice dated 9th July 2010 in 2013 when an inquiry was conducted by the investigation department, and it was alleged that he had signed some plans. He stated that he was told to give sample signatures when it was found that he had not signed the said plan.

DW3 was shown the contents of an internal memo on the forged plan by the City Council of Nairobi dated 3rd July 2012, and the report of the examining officer made on 28th June 2012, and he stated that the same were made before the facts of the forged plan came to his attention. Further, that he gave his statement in 2014 and did not make any statement in 2012. He also stated that he first saw the plan DV-48 in 2013 and had only seen a copy not the original plan.

DW3 was also shown the site plan for the proposed sewer extension by Francis Oloiptip Sorora dated 27/7/99 referenced PDS ND/20/99 in Exhibit 1B produced by Grace Wairimu Sorora, and the letter dated 21st July 1997 approving the said design. He stated that he could not verify if the letter originated from the City Council of Nairobi as it did not emanate from his department namely the City Planning Department, but from the Water and Sewerage Department, and that he was not competent to comment on them. When shown the copies of the applications and receipts produced by Grace Wairimu Sorora in the said Exhibit 1B, DW3 stated that they appeared to emanate from the Nairobi City Council.

DW3 clarified upon re-examination that that he could not guarantee the authenticity the applications and receipts produced in evidence by Grace Wairimu Sorora, and stated that they cannot however amount to approval of a building plan. Further, that when approving plans the Nairobi City Council/County requires the applicant to submit a clear copy which remains in its records, and the paper prints are approved which are the ones given back to the developers. However, because the approval is now made online, they ask for paper prints which are scanned and remain on record.

DW4 in his evidence stated that he is an Assistant Commissioner of Police and a forensic document examiner of more than 24 years' experience. He stated that he trained as a document examiner at the laboratories at the Criminal Investigation Department and later on proceeded for further training at Jerusalem in Israel, Lyons in France at the Interpol headquarters, and at Moshi in Tanzania.

DW4 testified that on 27th June 2012 he received a request from the Director, Investigation and Information Department at the Nairobi City Council to compare questioned signatures indicated in the attachment to his report marked "AI" with the standard signatures on the exhibits attached to his report marked "BI – B6" and the known signature attached as "EI". He stated that he did the examination and could not find any agreement between the signatures. DW4 further testified that he also examined the stamp impressions in the attached exhibit marked 'AI' with the stamp impressions on the attached exhibits marked "DI" and "D2", "CI – C5" and "EI". He stated that that he could not find any agreement with the stamp impression and that they were made by a different instrument.

DW4 relied on the methodology indicated in his report dated and signed on 28/6/2012 which he produced

as an exhibit in this court. He explained that the attachment marked “Exhibit A1” is a plan having two areas of dispute – the signature and stamp impression, and that he got a copy of the plan from the Director of Investigations at the Nairobi City Hall. Further, that the attachment marked exhibits “B1 – B6” were specimen signatures brought together with exhibit “A1” to compare with the signature on the plan. He also stated that exhibits “CI – C5” were also specimen signatures, while exhibits “D1 – D2” were specimen signatures and specimen stamp impressions. Lastly, that annexure “E1” bears the known signatures of one Ojwang. DW4 also asked that his signed statement filed in Court and dated 7th October 2013 be adopted as his evidence.

Upon cross-examination by the advocate for Grace Wairimu Sorora, DW4 stated that he is currently the Criminal Investigations Department Commander at Vihiga County, since June 2013. Further, that before June 2013 he was seconded to the City Council of Nairobi since June 2011 by the Criminal Investigations Department Headquarters. DW4 confirmed that the forensic laboratory for the Criminal Investigations Department is based at the Criminal Investigations Department Headquarters, and that there is no forensic laboratory at City Council of Nairobi.

DW4 testified that he was requested to make his report by the Director of Investigation at the City Council of Nairobi known as Benard Mate, and that his instructions which were given on 27th June 2012 were to compare signature and stamp impressions. He believed that there was a complaint made to the Director of Investigation, but that he never met the complainant and was forwarded the documents by way of a memo and did as requested.

DW4 stated that the sample signatures in exhibit “D2” were provided by the investigation officer and he believes that they were Mr. Ojwang’s. He however did not know to whom the signature that he was to compare them with on Exhibit “A1” belonged to. Further, that the signature at B1 – B6 were identified in the memo as belonging to Mr. Ojwang. DW4 testified that he has not seen Mr. Ojwang sign a document, and that none of the specimen signatures or stamp impressions were made in his presence. He however stated that it was not his mandate to get a statement from the person who gave the specimen signature. Further, that this was the mandate of the investigating officer.

DW4 also stated that he received a copy of exhibit “A1”, and that he has never seen the original document. However that photocopies can still be used provided they are clear and legible, and that exhibit “1A” was clear and suitable for the examination process. He confirmed that he used machines for the enlargement of the signatures and stamp impressions and did his observations during the enlargement and made his report.

Upon re-examination DW4 clarified that the basis of his report was a complaint from the Director of Investigation at the Nairobi City Council, and that he was given the questioned documents and specimen signatures and impressions. He was shown the plan DV – 48 and the signature and stamp impression thereon and he testified that they appeared the same as those in exhibit “A1”. DW4 confirmed that he did not have any problem or encounter any limitations with regards to the documents and specimen he examined. Further, that it is not a requirement to meet the author of the document and specimen being examined, or obtain their impression. He concluded his testimony by stating that the techniques he applied were proper and he did the examination to the best of his experience and understanding.

THE ISSUES AND DETERMINATION

The undisputed facts in the consolidated cases herein are that Chaka Ltd is currently the registered owner of the suit property, and that Grace Wairimu Sorora is in possession of the same. Pan Africa Credit and Finance Company Ltd has also raised a preliminary issue as to whether there is a valid suit against it in the absence of leave to institute the said suit. After a determination of this preliminary issue, the Court will then proceed to determine the substantive issues in dispute which are firstly, whether the sale of the suit property to Chaka Ltd was illegal and/or fraudulent; secondly whether Grace Wairimu Sorora has acquired ownership of the suit property by adverse possession; thirdly whether Grace Wairimu Sorora had approvals to construct structures on the suit property; and fourthly whether the parties herein are entitled to the reliefs sought.

Whether there is a valid suit as against Pan Africa Credit and Finance Limited (In Liquidation).

The Advocate for Grace Wairimu Sorora submitted that the preliminary issue of leave to bring the suit against Pan Africa Credit and Finance Ltd was resolved by the order given on 12th June, 2007 in Misc. Application No. 54 of 2007, which order was sought and granted on the ground that the registered owner of the suit property, Kibucho Limited, and the mortgagee, Pan African Credit & Finance Limited, were both in liquidation. That it was therefore not expected that another application needed be made in ELC No. 592 of 2010.

Further, that the order for consolidation made on 12th November, 2012 is deemed to relate back to the time of filing of all the four consolidated suits, thereby remedying any claimed defect of want of leave. It was argued that in any event, the claimed failure to obtain leave has not occasioned any prejudice to any party because Pan African Credit & Finance Limited has ably defended the claim and it would go against the principle enshrined in Article 159(2)(b) of the Constitution to uphold any such objection to the detriment of the substantive justice required to be administered in these four consolidated suits.

The Advocate for Pan Africa Credit & Finance Limited on his part invited the Court's attention to section 228 of the Companies Act, and submitted that it is quite clear that the leave of this Court was required prior to the commencement of these proceedings as against Pan Africa Credit & Finance Limited. Further, that in the two consolidated suits as against Pan Africa Credit & Finance Limited (In Liquidation), namely Environment & Land Case No. 592 of 2010 and Environment & Land Case No. 29 of 2012, no such leave was sought or obtained.

It was further submitted by the said Advocate that the proceedings in High Court Miscellaneous Application No. 54 of 2007 only sought leave to institute suit as against Kibucho Limited (In Liquidation). There was no prayer sought in those proceedings requesting leave to commence an action against Pan Africa Credit & Finance Limited (In Liquidation) nor was an order in that respect granted. Further, Pan Africa Credit & Finance Limited (In Liquidation) was not made a party to Environment & Land Case No. 29 of 2012 (formerly High Court Civil Case No. 723 of 2008 (O.S.)) until 6th September 2010 which is three years after the leave of 12th June 2007 was granted.

Pan Africa Credit and Finance Ltd's position is that the provisions of section 228 of the Companies Act as to the requirement for leave of Court prior to the commencement of proceedings against a company in liquidation are couched in mandatory terms. Therefore, any proceedings commenced against such a company in the absence of the requisite leave would be null and void, and reliance was placed on various judicial decisions to this effect including **Sammy Kimwele Mwangangi & 10 others v Thabiti Finance Company Ltd & 2 Others [2012] eKLR**, **Ruth Wanjiku Kagiri v Reliance Bank Limited (In Liquidation) & 2 Others,[2012] eKLR**, **Welcome Properties vs. Jackson Kamau Karuga & 2 Others, 2001 [KLR] 402** and **John Gachoki Ndenge v Kiambu Dandora Farmers Company Limited & Another, [2008] eKLR**.

It is not contested that the Pan Africa Credit & Finance Limited is under liquidation and/or that the Deposit Protection Fund Board is its liquidator appointed by the Central Bank of Kenya. Section 228 of the Companies Act provides as follows with respect to action brought against a company under liquidation: -

“When a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose.”

This Court notes that the leave sought in Misc. Application No. 54 of 2007 was to commence proceedings against Kibucho Ltd, and this is clearly stated in the resultant order made on 12th June, 2007 and issued on 13th June 2007 that was in Exhibit 1C that was produced by Grace Wairimu Sorora. Pan Africa Credit and Finance Ltd was not a party in the subsequent suit that was filed on 19th July 2007 against Kibucho Ltd on namely HCCC 339 OF 2007 (O.S), which is now ELC No. 29 of 2012. The

action against Pan African Credit & Finance Limited in ELC 592 of 2010 was commenced by way of a plaint dated 1st December 2010 and filed on 2nd December 2010. There was no evidence brought of any prior application brought by Grace Wairimu Sorora for leave to commence proceedings against Pan African Credit & Finance Limited, and the said suit was brought long after the approval relied upon by Grace Wairimu Sorora that was given on 12th June 2001. It is thus evident that no leave was granted by the Court for the proceedings brought against Pan African Credit and Finance Ltd, which was sued through the Deposit Protection Fund Board.

In addition the main purpose of consolidation is to combine two or more suits involving the same parties or issues into a single suit for purposes of having them heard together for reasons of expediency. It cannot therefore be as urged by Grace Wairimu Sorora that consolidation remedies any defects that may exist in any of the suits, which must still be heard and determined in the normal manner and according to the applicable law.

The effect of the failure by Grace Wairimu Sorora to obtain leave to commence proceedings as against Pan Africa Credit & Finance Limited (In Liquidation) is that the said suit is incompetently before this Court as held in **Sammy Kimwele Mwangangi & 10 others v Thabiti Finance Company Ltd & 2 Others, [2012] eKLR** and **Welcome Properties vs. Jackson Kamau Karuga & 2 Others, 2001 [KLR] 402**. In the circumstances, the suit by Grace Wairimu Sorora as against Pan Africa Credit & Finance Limited (In Liquidation) is a nullity at law and is hereby struck out.

This finding also effectively disposes of the arguments made and prayers sought by Grace Wairimu Sorora as regards the fraudulent sale of the suit property by Pan Africa Credit and Finance Ltd. The specific arguments in this regard were that the charge registered against the title of the property on 28th July, 1983 was extinguished on expiry of twelve years from the said date, and no power of sale could be exercised on the basis thereof. Further, that the loan pursuant to which the charge was registered was sued upon in H.C.C.C. No. 644 of 1986, a consent Decree made on 23rd April, 1999 and the Decree enforced through the winding up proceedings in Winding Up Cause No. 44 of 1991. Therefore, that no power of sale could be exercised where the remedy of recovery of the loan had been pursued, and Pan Africa Credit & Finance Limited had obtained a decree in foreclosure which was not executed within twelve years.

It must however be emphasised that it is only the suit against Pan Africa Credit and Finance Ltd that has been struck out. The evidence adduced by Pan Africa Credit and Finance Ltd still remains on the court record as no plea was made to have it expunged, and will be referred to and relied upon by this Court if and when necessary.

Whether the sale of the suit property to Chaka Ltd was illegal and/or fraudulent

The outstanding arguments by Grace Wairimu Sorora on this issue were that the sale and transfer of the suit property to Chaka Ltd was undertaken when ELC No. 29 of 2012 (Formerly H.C.C.C. No. 723 of 2008 (O.S)) was pending, and was null and void, the same having been made *pendente lite*. Further, that Chaka Limited claimed to have purchased and obtained transfer of the property despite the fact that the same was in occupation by Grace Wairimu Sorora, and the secrecy of the transfer whilst the property was in occupation by Grace Wairimu Sorora rendered the transfer fraudulent.

The Advocate for Grace Wairimu Sorora relied on the definition of fraud in section 2 of the repealed Registration of Title Acts, where it was provided as follows:-

“fraud” shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration.”

He also relied on **Kerr on the Law of Fraud and Mistake, 7th Edition**, on what he termed the badges of a fraudulent transfer and submitted that the actions by Pan African Credit & Finance Limited and

Chaka Limited fall within all the four corners of these badges which included secrecy of a transaction and that it was made *pendente lite*.

It was the Advocate's submissions in this regard that Chaka Limited knew of the occupation of the property by Grace Wairimu Sorora. Further, that it also knew of the existence of ELC No. 29 of 2012 (Formerly H.C.C.C. No. 723 of 2008 (O.S)), and that the fact of possession and of existence of the litigation on the property are acknowledged in the agreements for sale dated 14th July, 2009 between Ashford Kang'ethe and Chaka Limited.

It was further submitted that the repealed Transfer of Property Act at section 52 prohibited the sale and transfer in view of the pending litigation on the property, and that this has been reiterated by the Court in several cases including **Mawji –vs– US International University & Another, (1976 – 80) I KLR 229** and **Clement Kuguru –vs– Kamau Njuguna & 2 Others, (2007) eKLR** where a transfer effected during the pendency of a suit was cancelled.

Lastly, the Advocate for Grace Wairimu Sorora argued that the sale and transfer of the property to Chaka Limited was fraudulent as the same was intended to defeat the interest acquired by Grace Wairimu Sorora on account of adverse possession. It was urged in this regard that the Principal Registrar of Titles who was well aware of the proceedings in ELC No. 29 of 2012 (Formerly No. 592 of 2008 (O.S)), the same having been minuted on the register of the property on 2nd July, 2009, proceeded without any legal justification to remove the entry on the allegations of forgery. Further, that he then registered the transfer to Chaka Ltd on 16th July, 2009 when there was no application before the Court or an order for the removal of the entry protecting Grace Wairimu Sorora's interest in adverse possession.

Chaka Ltd in response relied on the indefeasibility of its title conferred by section 26 (1) of the Land Registration Act of 2012, and submitted that it is the registered owner of the suit property as evidenced by the title issued by the Registrar of Titles in accordance with the Registration of Titles Act, and that there is no evidence of fraud or unlawful acquisition on its part. Further, Chaka Ltd relied on the right to acquire and own property enshrined in Article 40 (1) of the Constitution, and submitted that it acquired the suit property from Pan Africa Credit and Finance Limited through the Deposit Protection Fund after exercising due diligence by conducting a historical search of the premises and establishing the sanctity of the title before purchasing the same. The decision in **Dr. Joseph N. K. Arap Ng'ok v. Justice Moijo Ole Keiwua and OtherS, Nairobi Civil Application No. NAI. 60 of 1997** was cited in support of this position.

It was also argued that at all material times before acquisition by Chaka Ltd, the title to the suit property was registered in the name Kibucho Ltd who having taken a loan from Pan African Credit and Finance Limited which consequently registered a charge on the title back in 1983, and having failed to satisfy the loan facility, then it was lawful for the chargee to exercise its statutory power of sale.

Therefore that the title issued to Chaka Ltd cannot be impugned and/or impeached even if there were any irregularities in the manner in which the title was issued, as the suit property was acquired within the existing legal framework and no fraud was committed by Chaka Ltd in the process of acquisition. Chaka Ltd relied on the decision in **Dinshaw Byramjee and Sons Limited v. Attorney General of Kenya [1966] EA 198** where the Court of Appeal held that whatever irregularities may have occurred in the registration of earlier instruments, the charge created by the registered proprietors of the land became on registration a valid and effectual instrument.

Lastly, it was submitted by Chaka Ltd on this issue that Grace Wairimu Sorora had not provided any evidence to prove that Chaka Ltd was involved in any fraud during the acquisition of the property. Further, that she had not provided proof that Pan African Credit and Finance Ltd engaged in fraud when transferring the property to Chaka Ltd.

The counsel for the Principal Registrar of Titles submitted that Chaka Ltd had brought evidence to show how they purchased the suit property and its compliance with the entire requirements as to the sale of the said property. Further, that all documents leading to the transfer of the suit property were produced in

support of its claim, and having been registered as the owner of the said property, Chaka Ltd has a better claim than Grace Wairimu Sorora. Therefore, that Chaka Ltd should be declared the owner of the suit property and an order be directed toward Grace Wairimu Sorora to vacate the suit property immediately and to remove the illegal structures.

This Court has considered the arguments made and notes that section 52 of the repealed Indian Transfer of Property Act provided as follows:-

“During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding 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 proceeding 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 and on such terms as may impose.”

The material requirement in the said section was that it prohibited the dealing of property that was subject of a suit by any party to the suit or proceedings. Therefore, the limitation as to transfer or dealings with property forming the subject matter of a suit created by section 52 of the repealed Act is only applicable to parties to that suit. In the present case, the transfer of the suit property, effected under statutory power of sale by the Pan Africa Credit and Finance Ltd to Chaka Ltd took place on 16th July 2009. As at that date, the only suit of the consolidated suits herein that had been instituted was ELC Suit No. 29 of 2012 (formerly High Court Civil Case No. 723 of 2008 (O.S.)) and the parties thereto were Grace Wairimu Sorora and Kibucho Limited (In Liquidation). Chaka Limited and Pan Africa Credit & Finance Limited (In Liquidation) were not parties to the suit at the time.

To that extent, the limitation as to transfer or dealings with suit property by virtue of section 52 of the repealed Transfer of Property Act, only applied and/or affected Grace Wairimu Sorora and Kibucho Limited (In Liquidation). It did not in any way affect Chaka Limited and Pan Africa Credit & Finance Limited (In Liquidation) who were not parties to the suit and cannot therefore invalidate the sale of the suit property.

It was also argued by Grace Wairimu Sorora that the anomaly in the dates of sale and transfer of the suit property to Chaka Ltd was further evidence of fraud, with the allegation that the transfer was effected before the sale and all subsequent documents were prepared to justify the transfer. The sequence of events from the evidence produced in Court was as follows: on 6th May 2008 an offer was made by Ashford Kangethe trading as Toy Education Services to purchase the suit property from the liquidation agent of Pan African Credit & Finance Ltd, which offer was accepted by the said liquidation agent on 10th May 2008. A sale agreement between the two parties is entered into on 6th June 2008, and another sale agreement between Ashford Kangethe trading as Toi Educational Services and Chaka Ltd entered into on 14th July 2009. The transfer by Pan African Credit to Chaka Ltd is dated 11th June 2008.

On the dating of the transfer which is in contention, Leah Manyarkiy, who was the advocate for Ashford Kangethe trading as Toi Educational services swore an affidavit dated 7th November 2012 which was produced in evidence, and stated therein that she was the one who prepared the transfer and the same was executed on 11th June 2009 but erroneously dated 11th June 2008. Other evidence that corroborated her statement was the fact the said transfer on its face was shown as having been presented at the Central Registry of the Department of Lands on 16th July 2009, and stamp duty as having been paid on 23rd June 2009. The application for registration of the transfer shows that it was also made on 16th July 2009. Lastly, the transfer to Chaka Ltd was also registered on the title of the suit property on 16th July 2009. It is the finding of the Court that sufficient evidence was adduced by Chaka Ltd and Pan-African Credit and Finance Ltd to explain the anomaly of the date of transfer being shown to be before the date of sale of the suit property.

Further submissions made on the alleged fraudulent sale of the suit property to Chaka Ltd were on the

cancellation of the entry against the title of the suit property of the order of adverse possession in favour of Grace Wairimu Sorora dated 2nd July 2009, and the entry of registration in favour of Chaka Ltd on 16th July 2009, and that these were all done before the delivery of the ruling by Khaminwa J. setting aside the said orders on 6th September 2010. It would certainly have been helpful to the Court to hear evidence from the Registrar of Titles in this regard as to the forgery that caused the cancellation of the entry of 2nd July 2009, as was noted in the register of the suit property.

However, it must be remembered that the burden of proof to show that this action was fraudulent still rested with Grace Wairimu Sorora, and other than the fact of the cancellation of the entry being before the ruling to set aside the order, no other evidence was brought of fraud as against the Principal Registrar of Titles. The Court notes in this regard that the cancellation of the said entry is not based on any court order, but on account of it being a forgery, and therefore the fact that the ruling setting aside the orders was delivered afterwards is immaterial.

In addition, even if the effect of the said cancellation was to pave way for the registration of the transfer in favour of Chaka Ltd, no evidence was brought to show the participation of Chaka Ltd in the said cancellation. Chaka Ltd on the other hand brought evidence to show the processes leading to the registration of the transfer in its favour on 16th July 2009. In any event, the Court did subsequently set aside the order for adverse possession in favour of Grace Wairimu Sorora, and therefore there is no prejudice that has been caused by the entry in the register cancelling the said order.

It is therefore my finding on this issue that the allegations of fraud as against Chaka Ltd have not been proved by Grace Wairimu Sorora to the satisfaction of the Court.

Whether Grace Wairimu Sorora has acquired ownership of the suit property by adverse possession

It was submitted by Grace Wairimu Sorora that she and her late husband were in occupation of the property as early as 1981, having lawfully entered the property on the basis of the letter of allocation dated 22nd January, 1981, and that she is still in occupation to date. Further, that her occupation of the property has been continuous, open, exclusive and without interruption from 1981 to date, a period of over 33 years. Reliance was placed by her Advocate on section 38 of the Limitation of Actions Act, and excerpts from the **Law of Real Property by Megarry & Wade, 8th Edition**, for the circumstances under which title may be acquired on account of adverse possession.

It was further submitted that since adverse possession had been established, Chaka Limited cannot claim or purport to establish entitlement to the suit property on account of purchase and transfer. Further, that the accrual of Grace Wairimu Sorora's right over the suit property on account of adverse possession could not be defeated by the claimed change of ownership to the registered owner upon issuance of the title to it on 23rd March, 1983 and transfer to Chaka Limited on 16th July, 2009. It was submitted that all these events occurred whilst the suit property was in occupation by Grace Wairimu Sorora, and the later event when she had already acquired entitled on account of adverse possession.

The Advocate for Grace Wairimu Sorora cited various judicial decisions in support of these arguments including **Jandu –vs– Kirpal and Another (1975) E.A 225**, **Githu –vs- Ndeete (1984) KLR 776**, **Francis Gicharu –vs- Peter Njoroge Maina (2005) eKLR** and **Gerald Muriithi Kamonde –vs- Wamugunda Muriuki & Another (2010) eKLR**.

The Advocate for Chaka Ltd on his part submitted that Pan Africa Credit and Finance Ltd having exercised their statutory power sale within the law, and Chaka Ltd being an innocent purchaser for value without notice, its title and interest in the suit property is indefeasible. Further, that Grace Wairimu Sorora is not denying the fact that the law was followed during disposal of the property. Chaka Ltd argued that the auction was fully advertised, and if Grace Wairimu Sorora was interested in the property she was free to also place a bid.

It was also argued that the occupation of the suit property by Grace Wairimu Sorora does not meet the

threshold for adverse possession, as the suit properly has been subject to litigation since 1986 and she therefore has not had quiet possession. Further, that her claim for adverse possession cannot stand for reasons that the adverse possession decree the Plaintiff had obtained in HCCC NO. 723 of 2008 on the 23rd June 2009 which was issued on the 30th June, 2009 was reviewed and set aside on grounds of misrepresentation and concealment of material facts. Furthermore, that her occupation was not peaceful as it was being interrupted time and again both by the City Council of Nairobi, Kibucho Limited and Pan Africa Credit and Finance Limited.

Lastly, it was submitted by Chaka Ltd that the official receiver of the government is entrusted with the task of carrying out winding up proceedings of companies and individuals who have become bankrupt and cannot pay off their debts, and that in ELC No. 29 of 2012 (formerly HCCC NO. 723 of 2008), Francis Sorora Oloitipitip purported to sue the official receiver for recovery of the suit property via adverse possession. It was submitted that the suit was a mistake from the very beginning since the subject property had an encumbrance of a legal charge to Pan Africa Credit and Finance Limited, and was therefore not available for distribution by the official receiver. Further, that a claim for adverse possession cannot supersede the right of a legal chargee over property.

The counsel for the Principal Registrar of Titles on his part submitted that Grace Wairimu Sorora admitted that there are other persons on the suit property and she could not confirm the size of land she occupies in relation to the whole suit land. Further, if she stakes a claim for adverse possession when she did not occupy the whole suit land, then it is difficult for the court to determine the extent of her claim.

It was also submitted by the counsel relying on section 17 of the Limitation of Actions Act that the action by Grace Wairimu Sorora to claim adverse possession as against Chaka Limited could only start running from the date Chaka Limited became the registered owner, that is to say from 16th July, 2009. Hence, that the period of twelve years had not lapsed. Further, that the interest of Pan Africa Credit and Finance Ltd over the suit property could not be limited by any operation of the law by virtue of the charge interest, and reliance was placed on the decision in **Jaber Mohsen Ali and Another vs Prisca Boit and Another, Eldoret ELC No. 200 of 2012** in this regard.

This Court in reaching a determination on this issue relies on the definition of adverse possession found in **Black's Law Dictionary, Ninth Edition** at page 62, where the same is defined as *“the enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, hostile, open and notorious.* Section 7 of the Limitation of Actions Act sets a statutory threshold of 12 years possession for such enjoyment and/or occupation by a claimant of land to give rise to adverse possession. The said section provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Grace Wairimu Sorora also relied on section 38(1) of the Limitation of Actions Act for her claim to adverse possession, which states as follows:

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

A claimant seeking ownership of land by way of adverse possession must take possession of the land, either by dispossessing the owner, or by entering on the land after the owner has discontinued his own possession. There are two elements that are required to exist to prove adverse possession. The first is that of factual possession in that the alleged possessor must show that he has been dealing with the land in

question as an occupying owner might be expected to deal with it. Secondly, he or she must also show the intention to possess, which is the intention to exclude everyone else, including the owner with the paper title from possession of the land.

The Court of Appeal in **Wambugu v Njuguna (1983) KLR 172** in this regard held that adverse possession contemplates two concepts: dispossession and discontinuance of possession. The Court of Appeal further held that the proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed of, or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that that he or she has been in possession for the requisite number of years.

In the present case, Grace Wairimu Sorora maintained that she has been in continuous occupation of the suit property without any interruption from 1981 to date. The evidence Grace Wairimu Sorora brought of her occupation since 1981 was the letter of allotment given to her deceased husband, Francis Oloiptip Sorora dated 2nd January 1981, and various letters by Kibicho Ltd and the Commissioner of Lands alluding to occupation of the suit premises by illegal squatters. No evidence of the shops and businesses that were established thereon in 1981 as claimed was provided, in light of the requirement that what needs to be proved in adverse possession is the actual possession of land, not a right to possession.

I also noted that the letters relied upon do not specifically refer to the occupation of the suit property by Grace Wairimu Sorora or her late husband, and indeed in one of the letters, namely the letter dated 27th May 1997 it is stated by Kibicho Ltd that it is Nairobi City Council that constructed kiosks on, and was in occupation of the suit property, and had rented it out to various businesses. This allegation was also reiterated by the Commissioner of Lands in his letter dated 9th May 2000 to the Provincial Commissioner, Nairobi.

The only evidence of the actual occupation of the suit premises during the period alleged by either the late Francis Sorora Oloiptip and/or Grace Wairimu Sorora was in a letter dated 26th August 1985 from the Nairobi City Commission to Francis Sorora Oloiptip which was in the Exhibit 1C produced by Grace Wairimu Sorora. The said letter read as follows:

“20th August, 1985

Francis Sorora Oloiptip

P. O. Box 34501,

NAIROBI.

Dear Mr. Oloiptip,

RE: JOSEPH KANG’ETHE ROAD SITE

I refer to your application dated 26th August, 1985 and write to inform you that your application have been considered and you have been allocated the site along Joseph Kang’ethe Road where you are carrying your business on.

Please contact the Valuation Section for further details regarding the site.

S. J. GETONGA

SECRETARY/TOWN CLERK”

Although the said letter does not specifically refer to the suit property, it refers to the location of the same, and since it is not disputed that this is the location that is occupied by Grace Wairimu Sorora, I am willing

to accord her the benefit of doubt. The Court also noted in this regard that all the other evidence pointing to actual possession adduced by Grace Wairimu Sorora including the applications for approvals to construct a sewer line on the suit property and the payments for licenses point to her occupation of the suit property from around 1995, but the Court will accept the evidence of occupation as shown in the letter reproduced hereinabove dated 20th August 1985. I therefore find that from the evidence adduced, Grace Wairimu Sorora was only able to prove her actual occupation and possession of the suit property as from 1985 and not from 1981 as claimed. Time for purposes of adverse possession and limitation of actions therefore started to run from 1985.

For the said occupation to amount to adverse possession Grace Wairimu Sorora must in addition prove that the essential requirements for adverse possession existed. In the Kenyan situation, these requirements have been set out in various judicial decisions. In **Mbira v. Gachuhi (2002) 1 EALR 137**, this court held thus:

“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption”

Likewise, in **Jandu v Kirplal and Another (1975) EA 225** it was held as follows:

“.....to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed. The Possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual visible, exclusive, open and notorious. “

The qualities for the possession by a claimant to amount to adverse possession are also described in the **Elements of Land Law, 5th Edition** by Kevin Gary and Susan Francis Gray at paragraphs 9.1.44 to 9.1.52. These are that there must be a complete and exclusive physical control over the land in dispute over the statutory period, the possession should be open meaning not secret, it must be peaceful and not by force, and lastly it must adverse and not be by consent of the true owner.

It has been argued by Chaka Ltd in this regard that the possession of the suit property by Grace Wairimu Sorora was not peaceful and was subject to various challenges by way of suits instituted to remove her from the suit property. In **Githu –vs- Ndeete (1984) KLR 776** it was held that time ceases to run under the Limitation of Action Act either when the owner takes or asserts his right or when his right is admitted by adverse possession. Further, that assertion occurs when the owner takes legal proceedings or makes an effective entry into the land.

A dispossessed proprietor of registered land is therefore entitled to bring proceedings for the recovery of the land at any time before he loses his statutory right to claim the land, irrespective of the duration of the adverse possession. In this instance the time runs against the person claiming to recover land, that is, a title owner, and not the person who is claiming title by way of adverse possession. This was the holding in the case of **Nguyai – Vs – Ngunayu (1985) KLR 606** that under the Limitation of Actions Act the time of limitation will run against the person seeking to recover land from the date of accrual of the cause of action, and that the person who is in possession is not barred by limitation.

Evidence was brought in the consolidated suits herein to show that the initial registered owner of the suit property was Kibucho Ltd which was registered as owner on 25th March 1983. Subsequently a charge was registered in favour of Pan African Credit and Finance Ltd on 28th July 1983. The earliest suit concerning the suit property that was shown to have been instituted was that by Pan Africa Credit and Finance Ltd against Kibucho Ltd in HCCC No. 644 of 1986, seeking recovery of the loan pursuant to the charge instrument, and a decree was given therein on 18th January 1990. This suit was clearly not seeking recovery of possession of the suit property, and cannot therefore be found to be an assertion of rights by either Pan Africa Credit and Finance Ltd and/or Kibucho Ltd as regards the said property.

Pan Africa Credit and Finance Ltd in addition brought evidence of letters to show it conducted public auctions to sell the suit property pursuant to its statutory power of sale. These attempts were from 1984 and are shown in the letter dated 16th November 1984 from Rusi Enterprises Co Ltd to Rustam Hira Ltd informing that an auction sale of the suit property did not materialise due to the fact that the reserve price of Kshs 800,000/= was not attained. A similar letter was also produced in evidence dated 3rd June 1985 from CB Mistri. The rights of Pan Africa Credit and Finance Ltd over the suit property were in this respect provided for by law, and particularly by the repealed Indian Transfer of Property Act.

The legal effect of a charge such as the one in favour of Pan Africa Credit and Finance Ltd which was registered under the Registration of Titles Act was stated in section 100A of repealed Indian Transfer of Property Act as follows:

“(1) A chargee under a charge executed in accordance with the provisions of section 46 of the Registration of Titles Act and duly registered under that Act shall have the same rights, powers and remedies (including the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rent and profits, or any of them) as if the charge were an English mortgage to which section 69 of this Act applies.

(2) All the provisions of this Act with respect to the rights, powers or remedies, or the duties, liabilities or obligations, of mortgagors, or mortgagees, shall, except in so far as the contrary intention is expressed or implied, apply not only to mortgagors, or mortgagees, under the forms of mortgage specified in section 58 of this Act but also to mortgagors, or mortgagees, or, as the case may be, chargors, or chargees, under -

(a) charges executed in accordance with the provisions of section 46 of the Registration of Titles Act, attested and certified in accordance with the provisions of subsection (4) of section 69 of this Act and duly registered under the said Act; and

(b) equitable mortgages by deposit of documents of title, duly protected by registration of a memorandum thereof under the Crown Lands Ordinance or the Land Titles Act; and (c) charges by deposit of documents of title, duly protected by registration of a memorandum thereof under the Registration of Titles Act,

and references in any such provision to a mortgage, mortgage-deed or mortgage instrument, or to mortgaged property, or to mortgage-money or a mortgage debt, or otherwise in relation to mortgages, shall be construed accordingly.”

Of particular relevance in this respect were the provisions relating to the rights of mortgagees in sections 67 to of the repealed act which included the statutory power of sale under section 69A. Similar rights for a charge to take possession and exercise the statutory power of sale with respect to charged land are now provided for in sections 94 to 96 of the Land Act of 2010, Therefore any person claiming to be in adverse possession of property that is subject to a charge is also subject to the rights and powers given to the chargee under the law. Reference is also made in this respect to the **Law of Real Property by Megarry & Wade, 8th Edition** paragraphs 35-056 at page 1488 where it is stated that a squatter holds his or her estate subject to third party rights, including those of a mortgage created before adverse possession attaches.

The question then that needs to be answered is whether the attempts by Pan Africa Credit and Finance Ltd to sell the suit property in exercise of its statutory power of sale qualified to be legal proceedings for the recovery of the suit property. A legal proceeding is defined in **Black’s Law Dictionary, Ninth Edition** at page 979 as follows:

“Any proceeding authorised by law and instituted in a court or tribunal to acquire a right or enforce a remedy”

In the light of the above definition this Court finds that the exercise of a statutory power of sale that is

made without court intervention even though authorised by law, does not qualify as a legal proceeding for purposes of adverse possession.

This is also for the reason that the exercise of a statutory power of sale does not necessarily entail recovery of possession, and the two are mutually exclusive. Therefore a charge exercising a statutory power of sale with respect to land that is in possession of a person or persons other than the charger, must in addition bring legal proceedings for recovery of possession of the same in the event that he or she requires such possession. In addition, in the context of adverse possession, the assertion of rights and recovery of the property must be made against those in possession of the property, who may not be the same persons as the chargor. In the present case the assertion of rights by Pan Africa Credit and Finance Ltd in its attempts to sell the suit property was not made against Grace Wairimu Sorora, but as against Kibucho Ltd as the chargor, and were not legal proceedings to recover possession for the reasons given in the foregoing.

This finding brings me to the suit by Kibucho Ltd filed in HCCC N0. 3178 of 1995. The Plaintiff in that suit was dated 26th October 1995 as amended on 1st August 1996. The Defendant was Nairobi City Council which filed a Defence dated 25th August 1997. What is of relevance to the issue before the Court are the orders sought by Kibucho Ltd in the said suit. Initially Kibucho Ltd sought orders directing the Defendant to evict the illegal squatters on plot number 209/9749 and give it vacant possession of the same. After the amendment of the Plaintiff, the prayer sought was a mandatory injunction to issue against the Defendant therein requiring it to remove the kiosks from LR. Number 209/9749 and to restrain it from occupying the land by its servants, agents and/or licencees.

Grace Wairimu Sorora admitted to have entered the suit property upon permission from the Nairobi City Council, when she testified that there were kiosks built thereon by Nairobi City Council on part of the land, and that she and others were given the said kiosks when they entered the land. There was also evidence of such permission being given in the letter dated 26th August 1985 from the Nairobi City Commission to Francis Sorora Oloitiptip that is reproduced in the foregoing

The suit in HCCC N0. 3178 of 1995 was filed ten years into the commencement of occupation of the suit property by Grace Wairimu Sorora, which this Court has found to have been in 1985, and was therefore within the limitation period of 12 years. Therefore the time for purposes of adverse possession effectively ceased to run for Grace Wairimu Sorora on or about 26th October 1995 when the claim in HCCC N0. 3178 of 1995 was made. This Court therefore finds that the required threshold of 12 years uninterrupted possession for adverse possession to attach was not met by Grace Wairimu Sorora. Further, that the registered owner of the suit property, being Kibucho Ltd did take legal proceedings to recover the said property in HCCC N0. 3178 of 1995 within the statutory limitation period of 12 years from the date of the accrual of the cause of action, as required by section 7 of the Limitation of Actions Act.

Whether Grace Wairimu Sorora had approvals to construct structures on the suit property

Grace Wairimu Sorora submitted that she produced several documents from the City Council of Nairobi to prove that the developments she undertook on the suit property were authorised. Amongst the documents was a letter dated 21st July, 1997 from Nairobi City Council to Francis Sorora Oloitiptip approving the construction of structures on the property and approved drawings PDS MD/20/99 dated 27th July, 1999 for the sewerage system, as well as approved drawings marked DV-48 dated 15th February, 2005. It was also submitted that several licences and permits issued for the business carried on the property by Grace Wairimu Sorora and her late husband were not disputed on substantial grounds or credible evidence.

Grace Wairimu Sorora contended that it was only until after the transfer of the suit property to Chaka Limited that the City Council of Nairobi noticed the illegality of the developments when the same had been in place since 1981, and it had all though the years issued licences for the business conducted on the property by Grace Wairimu Sorora and her late husband. It was her submission that the actions of the City Council of Nairobi were fuelled and instigated by Chaka Limited in its attempt to take possession of the

suit property from Grace Wairimu Sorora.

It was also submitted that there had been no complaint made by John Ojwang (DW3) on his disputed signature on the approved drawings marked DV-48 dated 15th February, 2005, and that the investigations and a report alleging that the signature was a forgery were conducted and concluded a year before the issue was brought to his attention. Further, that DW4 did not base his report on any laboratory analysis of the original document containing the disputed signature, as opposed to the report and testimony of PW2, who based his report on a laboratory analysis of the original documents containing the disputed and known signatures of John Ojwang. It was Grace Wairimu Sorora's submission that DW3's and DW4's testimonies were not credible to support the allegations of forgery, and that no charges have been proffered on that claim.

The advocate for Grace Wairimu Sorora relied on the decisions in **Re: Manibhai Kishabhai Patel alias Manibhai Kisabhai Patel, (2001) eKLR**, and **Samson Tela Akute –vs– Republic, (2006) eKLR**, for the position that cautioned should be exercised against the use of photocopies in ascertaining the authenticity of a handwriting, and that ***it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. The Court was urged to consider the contradictory evidence of the two experts against any other evidence, and evaluate it in light of all the other factors that lean towards the stronger inference that the plan marked DV-48 originated from the City Council of Nairobi and was indeed signed by John Ojwang.***

The Nairobi City Council/County on its part submitted that Grace Wairimu Sorora did not challenge its jurisdiction and/or authority in respect of controlling of developments in the city of Nairobi, and instead, challenged its decision to issue enforcement notices on the 9th July 2010. Reliance was placed on Part V of the Physical Planning Act particularly sections 29-40 thereof that make provision for control of development by local authorities, and obligate every person wishing to carry out any development in any land within the precincts Nairobi City County to first seek and obtain the requisite approval before commencing any development.

It was further submitted that it is evident that by dint of section 38 of the Physical Planning Act, the Nairobi City Council/County can order the demolition and/or removal of any structure that is put up in contravention of the Physical Planning Act. Further, that the matter complained of by Grace Wairimu Sorora are matters suited to be determined by way of an appeal before the relevant physical planning liaison committee established under the Physical Planning Act and as such, this Court lacks the jurisdiction to entertain the suit against Nairobi City Council by Grace Wairimu Sorora.

The Nairobi County Government also submitted that the enforcement notice dated 9th July 2010 specified the illegal structures on the suit property and required Grace Wairimu Sorora to remove and/or demolish the said illegal structures, failure to which the council would demolish them within 7 days. Further, that Grace Wairimu Sorora was advised of her right to appeal to the Liaison Committee, a provision she decided not to invoke.

It was contended that the notice given to Grace Wairimu Sorora was a reasonable notice that afforded her time to take any steps she deemed appropriate, including filing an appeal to the relevant liaison committee, and that Grace Wairimu Sorora has not exhausted the remedies available to her under the Physical Planning Act. Reliance was in this respect placed on the decisions in **Diasta Investments Ltd vs. Nilesh Devan Kara Shah & 5 others** Elc Civil Suit No. 340 of 2011, **Speaker of National Assembly V Njenga Karume [2008] 1 KLR 425**, **Sanjay Solanki & 8 Others V Hirji Kanji Patel & 5 others [2013] eKLR** and in **International Centre for Policy and Conflict & 5 Others V The Hon. Attorney-General & 4 Others [2013] eKLR**.

The Nairobi County Government analysed the evidence tendered by the witnesses in respect of the purported approved drawings relied upon by Grace Wairimu Sorora marked DV-48, which it submitted led credence to its case that the purported approved drawings never emanated from it and that they are mere forgeries. Further, that the issue of the period or date when DW3 became aware of the forged approvals *vis-a-vis* the date of the investigations that were carried out by its Director Investigation &

Information Analysis is immaterial as at no time did the Nairobi County Government claim that DW3 is in charge of investigations nor did DW4 claim to have been instructed to undertake the forensic examination of the disputed document by DW3.

It was also submitted that the forensic document examiner's report dated 28th June 2012 remains uncontroverted as the report by Mr. John Muinde fails to establish its basis and must be disregarded. Further, that even if this Court had jurisdiction to entertain this suit as filed, Grace Wairimu Sorora has not shown evidence that she or her late husband did in fact seek and obtain approval of the disputed building plan before constructing the illegal structures on the suit land. In addition, that she had not tendered any proof of payment of approval fees to the Nairobi City Council before the purported approvals were issued or any minutes by the Nairobi City Council approving her building plans.

On this issue I find that the claim by Grace Wairimu Sorora against Nairobi City Council is properly before this Court in light of the consolidation of the suits filed herein, for the reason that the liaison committees provided for under the Physical Planning Act would not have had jurisdiction to grant the reliefs she sought in the consolidated suits. The jurisdiction of the Nairobi County Government to issue the enforcement notice and demolish unapproved structures as provided in the Physical Planning Act was also not contested. The only question therefore that remains to be answered by this Court is whether Grace Wairimu Sorora had approved plans to construct structures on the suit property.

The plans relied upon by Grace Wairimu Sorora marked DV-48 dated 15th February 2005 have been highly contested, and the person who is alleged to have approved them, namely DW3 gave evidence and denied that he approved or signed the purported building plan marked DV-48. It was also his testimony that he started approving building plans in the year 2007 yet the said plan was allegedly signed by him in the year 2005. DW3 also disputed the stamp used in the purported drawing as not being the one used by the Nairobi City Council at the time.

The Court also observed that different versions of the said plan were produced in evidence, with the original copy that was produced in Court showing marked differences from the certified copy that was filed in court particularly as to the positioning of the disputed stamp and signature.. In addition, there was conflicting expert opinion given on the authenticity of the signature of DW3 on the said plan.

The Court notes in this regard that PW2 who was one of the expert witnesses, in his report and testimony made reference to documents marked "A" and "B" being 2 sets of the original drawings drawn on 19th July 1999, approved and registered as DV-48 on 15th February 2005 by the Director of City Planning and Architecture that contained the disputed signatures. However he did not attach the said documents to his report and this Court cannot therefore in the circumstances find that the documents that he examined was the disputed plan marked DV-48. This Court cannot therefore rely on the finding in the said report that found DW3's signature to be genuine. In addition it cannot find that the plans marked DV-48 dated 15th February 2005 were approved by Nairobi City Council in the light of the evidence of DW3 that he did not sign or approve them and conflicting evidence as to its authenticity.

Whether the parties herein are entitled to the reliefs sought.

The sum total of the findings in the foregoing is that Grace Wairimu Sorora has not proved her cases in the consolidated suits filed herein to the required standard of a balance of probabilities. Likewise, since Ashford Kangethe trading as Toi Educational Services did not bring any evidence in support of his claims in ELC Suit No. 564 of 2010, he cannot be granted the reliefs he claims therein.

Chaka Ltd had also filed a Counterclaim against Grace Wairimu Sorora and brought evidence of the processes it undertook to buy and be registered as proprietor of the suit property, and of the payments it made in this regard. Its title to the suit property has not been impugned. In the circumstances Chaka Ltd is entitled to the prayers for mandatory injunction sought in its Counterclaim, which require Grace Wairimu Sorora and her agents to forthwith vacate the suit property. This is for the reason that as registered owner, Chaka Ltd is entitled to possession of the suit property.

This Court is in this respect guided by the decision of the Court of Appeal in **Moya Drift Farm Ltd vs Theuri (1973) EA 114**, wherein it was held that an absolute and indefeasible owner of land is entitled to take proceedings in trespass. Further, that where an Act gives a registered proprietor title upon registration, unless there is any other person lawfully in possession such as a tenant, that title carries with it legal possession. It is also for the same reasons that Chaka Ltd is entitled to damages for trespass, and since Grace Wairimu Sorora did not succeed in her claim for ownership of the suit property by way of adverse possession, she has essentially been trespassing on the suit property.

There was also a prayer sought in Chaka Ltd's Counterclaim for damages for loss of user from June 2009 up to the date the suit property is handed over to Chaka Ltd. This Court notes in this regard that no evidence was brought by Chaka Ltd to guide the Court as to the measure of damages to award for such loss of user. The measure of damages in this instance as stated in **McGregor on Damages, Eighteenth Edition** at paragraph 34-044 at page 1280 is the market rental value of the occupied property for the period of wrongful occupation or user. It must also be noted that damages for loss of user are essentially a claim for mesne profits, and as stated by the Court of Appeal in **Hahn -vs- Singh , (1985) KLR 716** being special damages, such damages must not only be pleaded but must also be strictly proved. No evidence was brought by Chaka Ltd of the market rental value of the suit property for the period it has not been in occupation thereof.

Lastly, it is worth noting that it is also arguable that Chaka Ltd did not lose this amount of damages because evidence was brought to show that it bought the suit property on an "as is" basis, which basis was that the suit property was bought by Chaka Ltd with squatters thereon, and it would not therefore have been able to let out or use the suit property at the time it bought the same, until or unless it had taken steps to recover possession.

It is also for this reason that each party shall bear their own costs of the consolidated suits as there has evidently been some element of fault on the part of all the parties for the state of affairs that gave rise to the said suits. This is particularly so in terms of the delays by all the parties involved in taking recovery of, and/or asserting their rights over the suit property.

Lastly I would like to express my appreciation to the counsel for all the parties for their diligence, effort and cooperation in the filing of the pleadings and submissions herein that have been of great assistance to the Court, and for the timely and expeditious hearing of the consolidated suits herein

I accordingly enter judgment for the Chaka Ltd as against Grace Wairimu Sorora only to the extent of the following orders:

1. That Grace Wairimu Sorora and/or her agents and servants shall within 30 days of the date of this judgment vacate the parcel of land known as L.R. No. 209/9749 and shall remove all structures constructed thereon within the said 30 days. Upon default the Nairobi County Government and Chaka Ltd shall be at liberty to evict Grace Wairimu Sorora and/or her agents and servants, and to demolish the said structures, and eviction orders to issue.
2. That Grace Wairimu Sorora shall pay Chaka Ltd the sum of Kshs 100,000/= as nominal damages for trespass together with interest at court rates from the date of this judgment until payment in full.
3. That the prayers by Grace Wairimu Sorora in the Originating Summons and various Plaints filed in ELC 340 of 2010, ELC 592 of 2010, and ELC 29 of 2012 are denied.
4. That the prayers by Ashford Kangethe trading as Toi Educational Services in the Plaintiff filed in ELC 564 of 2010 are denied.
5. Each party shall bear their own costs of the consolidated suits.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____2nd____ day of March, 2015.

P. NYAMWEYA

JUDGE