



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 39 OF 2013
(Formally Mombasa HCCC NO.222 OF 2012)

THERESA CONSTABIR.....PLAINTIFF

=VERSUS=

JEREMIAH M. MARORO.....1ST DEFENDANT

TIMESHARINGING LIMITED.....2ND DEFENDANT

NEWTON OMONDI KULLA.....3RD DEFENDANT

LAND REGISTRAR, MOMBASA.....4TH DEFENDANT

J U D G M E N T

Introduction

1. The Plaintiff moved this court by way of a Plaint dated 15th October 2012 and filed on the same day.
2. In the Plaint, the Plaintiff is seeking for various reliefs, the main one being an order of permanent injunction restraining the Defendants from dealing in any manner with land known as CR. 18142, subdivision number 848/III/MN; CR.18143, subdivision number 849/III/MN; CR 18144, subdivision number 850/III/MN; CR 18145, sub-division number 851/III/MN and CR 18146 sub division, number 852/III/MN (the suit properties).
3. The Plaintiff also seeks for the rectification by cancellation and deletion of entries number 3 and 4 made on 3rd July 2012 and 18th July 2012 in respect to the above parcels of land.
4. The 1st Defendant filed his Defence on 29th October 2012 while the 2nd and 3rd Defendants filed a joint defence through the firm of Nyachoti & Company advocates on 17th December 2012. However, the firm of Mulwa Nduya filed a separate Defence on behalf of the 3rd Defendant on 21st May 2013. The 4th Defendant filed his Defence on 25th April, 2013.

The Plaintiff's Case

5. The Plaintiff averred in her Plaint that she was the registered owner of L. R numbers 848/III/MN, 849/III/MN, 850/III/MN, 851/III/MN, 852/III/MN (the suit properties).
6. It was the Plaintiff's averment that Mr. Kultar Hanspal, now deceased, gave her a loan of Kshs.

- 800,000 to enable her pay off the balance of the purchase price in respect to the properties that she had purchased from Mr. Mavis Jean Buxton. The suit properties were amongst the properties that the Plaintiff purchased from Mr. Mavis Jean Buxton and she deposited the title documents with Mr. Hanspal as security for the repayment of the loan.
7. The Plaintiff further averred that she was unable to repay Mr. Kultar Hanspal the money she had borrowed. The Plaintiff stated in her Plaint that before the demise of Mr. Hanspal which occurred on 5th March 2012, she had had discussions with Mr. Hanspal where it was mutually agreed that she repays the loan with interest in three equal monthly installments effective April 2012 but the same did not materialize due to the demise of Mr. Hanspal.
 8. It is the Plaintiff's deposition that in September 2012, she learnt that fraudulent transactions by way of Transfer of the Titles that were held by Mr. Hanspal had been effected in favour of the 2nd Defendant's Company who in turn transferred one of the said properties, to wit CR. 18145 sub-division number 851/III/MN to the 3rd Defendant.
 9. The Plaintiff, PW1 appeared before me on 21st May 2013 and stated that she is the owner of plot numbers (CR) 18142, 18143, 18144, 18145 and 18146 which are the subject of the suit. The suit properties measure 25 acres.
 10. According to PW1, the suit properties, amongst others, were bought by her husband from Mr. Mavis Jean Buxton for Kshs.1,500,000 in 1988. The total acreage that was purchased from Mr. Mavis Jean Buxton was 75 acres and they were represented by the firm of Daly & Figgis in the transaction.
 11. It was the Plaintiff's testimony that the 75 acres that her husband purchased from Mr. Mavis Jean Buxton was transferred to her and they paid kshs.1,000,000 for the land leaving a balance 500,000. According to PW1, a friend introduced them to Mr. Hanspal who loaned them Kshs.800,000 to enable them clear the balance of the purchase price.
 12. The Plaintiff stated that the cheques of Kshs.500,000 and Kshs 300,000 by Mr. Hanspal's company, Alcon International, were done in favour of their advocates.
 13. It was PW1's evidence that she handed to Mr. Hanspal the Title documents in respect to the suit property as security for the money that he lent them. The Plaintiff and her husband were unable to repay the money due to the financial constraints they had.
 14. When the Plaintiff and her husband made contact with Mr. Hanspal, he had suffered a stroke and was very ill and could not talk. The witness could not recall when this first contact with Mr. Hanspal was made.
 15. The Plaintiff testified that in the year 2011, they met Mr. Hanspal again. He was with his wife, 2 DW1 and his mother-in-law. It was the Plaintiff's testimony that they discussed the issue of repaying the loan with interest. The Plaintiff and her husband suggested to Mr. Hanspal that they were willing to pay him Kshs. 10,000,000 to have the Titles released to them. He turned down the offer and instead asked for Kshs.18,000,000 but agreed to take Kshs.15,000,000. The Plaintiff and her husband agreed to pay the said Kshs.15,000,000 in three equal monthly installments with effect from April 2012 but before they could start repaying the loan, Mr. Hanspal died in March 2012, a month after their meeting.
 16. The Plaintiff informed the court that Mr. Hanspal's wife, 2 DW1 refused to pick their calls after her husband's death. On 24th April 2012, the Plaintiff checked with the Registrar of Titles, Mombasa who informed them that everything in respect to the suit properties was fine. The titles were still registered in the Plaintiff's name.
 17. The Plaintiff stated that later, she was informed that there were people on the suit properties who wanted to purchase them. It was at that moment that she went to the land registry in Mombasa and found the properties had been transferred to the 2nd Defendant. She collected the copies of the Transfer documents in respect to the suit properties from the Registrar of Titles.
 18. The Transfer documents that the Plaintiff was given were drawn by the 1st Defendant in favour of the 2nd Defendant. The Plaintiff stated that she did not know the 1st and 2nd Defendants and that she never had any dealings with the said company. The Plaintiff further stated that she had never appeared before the 1st Defendant as indicated in the transfer documents at pages 20 all through to page 39 of her bundle of documents.
 19. The Plaintiff denied that the signatures on the Transfer documents were hers. She could not explain how her photograph which was on the transfer documents was obtained.

20. The Plaintiff further stated that she discovered that the 1st Defendant was not an advocate in 1993 when it is indicated in the Transfer documents that the Plaintiff appeared before him and he witnessed her signature.
21. PW1 stated that she had never applied for the consent of the Land Control Board to transfer the suit property to anybody and that the transfers of the five parcels of land to the 2nd Defendant were unlawful and the titles should revert to her name.
22. The Plaintiff stated that she was ready to repay the Estate of the late Hanspal Kshs.15,000,000 being the agreed amount. The Plaintiff produced as exhibit numbers 1 to 43 the bundle of documents that she had filed in court on 15th October 2012.
23. PW1 finally stated that the documents filed in court by the 2nd Defendant indicated that the Transfer documents in respect to the suit properties had been drawn by one J.M. Njage and Co. Advocates and her signature witnessed by somebody she did not know.
24. The Plaintiff stated that the suit property is agricultural land situated in Vipingo, Kilifi and that she obtained the consent of the Board when she purchased them.
25. PW1 was cross examined by counsels for the 2nd, 3rd and 4th Defendants.
26. PW1 informed the court during cross-examination that the money she received from Mr. Hanspal was a loan and that the subdivisions indicated on the first document in her bundle are the plots she purchased from Mr. Buxton.
27. PW1 admitted that she met 2 DW1, the wife of Mr. Hanspal together with her late husband. Mr. Hanspal was on a wheelchair but was of sound mind and that she knew that 2 DW1 was in possession of the title documents.
28. It was PW1 evidence during cross-examination that although the wife of Mr. Hanspal, 2 DW1, registered the transfer documents in favour of the 2nd Defendant, she was not aware if 2 DW1 was a director in the said company. The witness admitted that she did not have an agreement to show that the money she was given by Mr. Hanspal was a loan and that the same was to be refunded with interest.
29. It was the Plaintiff's evidence in cross examination that Mr. Hanspal was unwell between the year 2002 and 2012 when he passed on. The Plaintiff stated that the suit properties are leasehold and that she has been paying the requisite rent to the government and the rates to Kilifi County Council. The witness informed the court that she did not have in court the consent that she obtained from the Land Control Board in respect to the transfer of the land from Mr. Mavis to her.
30. The Plaintiff finally stated that the documents in respect to the transfer of the suit properties were given to him by Mr. Kebasu, the Registrar of Titles, Mombasa and that Mr. Hanspal never introduced her to Timesharing Limited before his death.

1st Defendant's case

31. The 1st Defendant filed his Defence on 29th October 2012. In the Defence, the 1st Defendant denied that he ever dealt with the five suit properties as alleged in the Plaint. The 1st Defendant was categorical in his Defence that he does not know the Plaintiff and denied having drawn and attested the transfer documents in respect to the suit properties in favour of the 2nd Defendant.
32. The 1st Defendant finally stated in his Defence that as at the time of the alleged drawing and attestation of the transfers in favour of the 2nd Defendant, he was not only a student outside the country but was also professionally unqualified to execute any legal instruments.
33. The 1st Defendant averred that he was admitted to the Bar as an advocate on 12th March 1998. In a nutshell, the Defendant denied any knowledge of the transaction in respect to the five suit properties.
34. The 1st Defendant did not testify.

2nd Defendant's case

35. The 2nd Defendant filed its Defence on 17th December 2012 and averred that the transfer of the suit properties to it and then to the 3rd Defendant was legal.

36. The 2nd Defendant denied that Mr. Hanspal (deceased) advanced any loan facility to the Plaintiff as claimed by the Plaintiff and that the Plaintiff offered to sell the suit property to Mr. Hanspal at a consideration of Kshs. 800,000.
37. The 2nd Defendant further averred that it had been agreed that the titles in respect to the suit properties were to be processed in the name of the Plaintiff who would in turn hand them over to the deceased to facilitate the transfer of the properties to his name.
38. The 2nd Defendant finally averred that upon the registration of the land in the Plaintiff's name, the title documents were delivered to Mr. Hanspal for purposes of transfer; that Mr. Hanspal instructed the firm of J.M. Njage & Company Advocates to form a company in the name of the 2nd Defendant; that the said company was incorporated on 6th July 1993 and that the deceased instructed the firm of J. M. Njage to transfer the parcels of land to the 2nd Defendant.
39. According to the 2nd Defendant's Defence, the Plaintiff executed the transfer documents on 19th August 1993 and the same were attested by Mr. Vishnu Sharma Advocate on the same date.
40. The 2nd Defendant's director, 2 DW1, informed the court that the 1st Defendant was not known to her and that she married Mr. Hanspal in the year 1998. She stated that most of the things in respect to the suit properties happened before she got married to Mr. Hanspal. She showed to the court the letters of administration in respect to the deceased Estate. The Letters of Administration was issued to her on 5th October 2012.
41. It was the testimony of 2 DW 1 that a Mr. Palli Naul introduced her husband, Mr. Hanspal, to the Plaintiff's husband who intended to sell the suit properties.
42. According to 2 DW1, her late husband was a director of Alcon International Limited. Mr. Hanspal, through his company known as Alcon International Limited paid Kshs.500,000 to the Plaintiff's advocates, Dally & Figgis as part payment of the purchase price of the land. The balance of Kshs.300,000 was paid later to the same law firm.
43. According to 2 DW1, her husband paid kshs.800,000 for the suit properties purely on trust and in the believe that the transfer documents and titles would be passed to him. The witness stated that the titles were issued in the name of the Plaintiff in 1989. According to 2 DW 1, the Plaintiff forwarded the said title documents to her husband. In 1993, her late husband instructed the firm of J.M. Njage and company advocates to have the title documents transferred in the 2nd Defendant's name. The transfer documents were attested by Vishnu Advocate who has since died.
44. Although the transfers were to be effected in the year 1993, 2 DW1 informed the court that they were not transferred until the year 2012 after her husband passed on. It was 2 DW1 evidence that she paid the requisite penalties in respect to the late transfers.
45. According to 2 DW1, the transfer documents together with the titles in respect to the suit properties were just in the house and that in the year 2011, the Plaintiff's husband visited them with their friend, Mr. Palli Naul. By that time, 2 DW1 stated that they did not have the Plaintiff's photographs for purposes of lodging the transfer documents for registration.
46. 2 DW1 further stated that during the said meeting, the Plaintiff's husband requested her husband to transfer the property to him (the Plaintiff's husband) at a consideration of Kshs.400,000 per acre. However, upon inquiry, 2 DW1 was informed that the going price for the suit properties was Kshs.3.5 million per acre if it was to be sold as a whole and if the land was to be sub-divided into smaller portions, it would fetch Kshs.5 million per acre. The figure which had been proposed by the Plaintiff's husband was therefore turned down.
47. 2 DW1 informed the court that after her husband passed on in March 2012, he met Mr. Palli Naul in May 2012 who informed her that the Plaintiff's husband was still willing to buy the suit property. The said Mr. Palli Naul wanted 2 DW 1 to sign an indemnity after which she was to be paid Kshs.15,000,000 for the entire 25 acres. The amount was to be paid in installments. She declined to sign the indemnity.
48. It was at that moment that 2DW1 consulted Mr. Mulwa, the 3rd Defendant's Advocate who assisted her with some money which she used to effect the transfers in the name of the 2nd Defendant and then transferred one of the suit properties in the name of the 3rd Defendant.
49. 2 DW1 stated that she did not know about the Transfer documents that were drawn and witnessed by the 1st Defendant in favour of the 2nd Defendant. According to her, the Transfer documents that were signed by the Plaintiff transferring the suit properties to the 2nd Defendant were prepared by

- J. N. Njage and Company advocates and witnessed by Vishnu Sharma Advocate IN 1993.
50. In cross-examination, 2 DW1 stated that she met Mr. Hanspal, her late husband in 1998 and that the transactions herein took place in 1988. She acknowledged that she did not know what transpired prior to 1998 save for what she was informed. It was her evidence that the caretaker on the land was put there by the Plaintiff.
51. According to 2 DW 1, she borrowed Kshs.5,000,000 from the 3rd Defendant although the Transfer document in respect to one of the suit properties indicates that it is the 2nd Defendant who sold it to the 3rd Defendant for Kshs.1,000,000. It was 2 DW1 evidence that she was to use the money to finalise the other transactions.
52. 2 DW1 stated that she was related to Vishnu Sharma advocate, deceased. She could however not remember the year that the advocate died.
53. 2 DW1 admitted that her late husband never thought of transferring the land in dispute and that he never transferred the land to himself between 1988 to 2012.
54. The witness further stated that she is the one who effected the transfers to the 2nd Defendant as a director of Timesharing. She testified that she became a director of the 2nd Defendant in the year 2000 and that she was not aware that the land in question was agricultural land. She only obtained the consent of the Commissioner of Lands to transfer the land because it was a leasehold of 999 years.
55. 2 DW1 finally testified in cross examination that she sold one of the suit properties to the 3rd Defendant. She stated that although she was meant to transfer 5 acres to the 3rd Defendant, the 3rd Defendant was to re-transfer 3 acres to her.

3rd Defendant's case

56. The 3rd Defendant filed his defence on 21st May 2013.
57. In the Defence, the 3rd Defendant deponed that he lawfully purchased one of the suit properties, to wit L.R. NO. 851/III/MN from the 2nd Defendant who was the registered owner.
58. The 3rd Defendant further averred in his defence that he did not require the consent of the Land Control Board to transfer the property to his name; that the Plaintiff's recourse is to recover damages from the 2nd Defendant or the 4th Defendant and that the Plaintiff does not disclose any reasonable cause of action against him.
59. The 3rd Defendant did not testify.

The 4th Defendant's case

60. Mr. John Kebaso, 4DW1, testified on behalf of the 4th Defendant. The witness informed the court that he was the Registrar of Titles, Mombasa.
61. 4 DW 1 stated that the transfer documents transferring the suit properties from the Plaintiff to the 2nd Defendant that were presented to his office were drawn by the 1st Defendant's firm.
62. The transfer documents were presented to him for stamping and registration in their original form. Accompanying the transfer documents were the original titles in respect to the five suit properties, the consent by the Commissioner of Lands to transfer and the rates clearance certificates from the Kilifi County Council.
63. The witness produced in evidence the bundle of documents that were presented to him for purposes of effecting the transfer of titles from the Plaintiff to the 2nd Defendant and the 3rd Defendant.
64. Although the witness was aware that the suit properties were within Vipingo, which, according to him, is an agricultural area, he was not sure if the consent of the Land Control Board was required before the transfers could be effected. He was however sure that the consent of the Board was not one of the documents that was given to him.
65. 4 DW 1 was shown the 2nd Defendant's bundle of documents which showed that the transfer documents were drawn by the firm of J. N. Njage and Co. advocates and witnessed by Vishnu Sharma Advocate. The witness stated that he gave certified copies of the documents that were in

his possession to the Plaintiff's Advocate and the CID officers from Kilifi. Those are the same documents that he produced in court.

66. The witness finally stated that the suit properties are leaseholds; that he received the consent of the Commissioner of Lands to transfer the properties and that it is the representative of the Commissioner of Lands who determines whether the land in question is agricultural or not.

Plaintiff's submissions:

67. The Parties appeared before me on 30th August 2013 and made oral submissions.

68. Mr. Mogaka, counsel for the Plaintiff submitted that it is a principle of law that courts cannot sanction illegalities; that the transactions in respect to the suit properties are void for want of the consent of the Land Control Board. Counsel relied on the cases of **Kariuki Vs Kariuk (1983) KLR 225 and Harambe Co-operative Savings & Credit Society Vs Mukinye Enterprises Ltd (1983) KLR 611** to buttress his arguments on this point.

69. Consequently, counsel argued that in the absence of the consent of the Land Control Board, the argument by the 3rd Defendant that he was an innocent purchaser for value is irrelevant in these proceedings.

70. Counsel submitted that this court will be violating the law if it ignores the mandatory provisions of section 6 of the Land Control Act requiring the consent of the Board in all transactions pertaining to agricultural land.

71. The Plaintiff's counsel further submitted that the evidence before this court shows that the documents that were presented by the Defendants for registration were all drawn by the 1st Defendant who was not an advocate in 1993. Consequently, the said documents are a nullity. Counsel relied on the case of **National Bank of Kenya Limited Vs Wilson Ndolo Ayah, Civil Appeal No. 119 of 2002 (2009) e KLR.**

72. The Plaintiff's counsel finally submitted that the purported agreement of sale between the Plaintiff and Alcon International Ltd was not witnessed as required by the Law of Contract Act.

2nd Defendant's submissions:

73. Mr. Gekanana, counsel for the 2nd Defendant submitted that the title documents in respect to the suit property were registered under the Registration of Titles Act and consequently, the consent of the Land Control Board was not required during the transfer from the Plaintiff to the 2nd Defendant and the 3rd Defendant.

74. Counsel submitted that whether the person who drew the transfer documents was a qualified advocate or not was irrelevant; that her client never saw the said advocate and that she was not involved in the transaction.

75. Counsel finally submitted that the agreement which was produced by the Plaintiff shows that Kshs.500,000 was part of the purchase price in respect of the suit property; that the agreement was signed by Mr. Constabir and that the document does not show that the Kshs.500,000 was a loan to the Plaintiff.

76. Counsel urged the court to dismiss the suit with costs.

3rd Defendant's submissions

77. Mr. Mulwa, Counsel for the 3rd Defendant submitted that the 3rd Defendant was a purchaser of one of the suit properties for value without notice of any fraud and that his title is absolute and indefeasible.

78. According to counsel, the Registrar of Titles confirmed that he received all the requisite documents in respect to the suit property and that there was no proof that the 3rd Defendant was involved in any form of fraud. Counsel relied on the case of **Gladys Wanjiru Ngacha VS Teresia Chepsat & Others; (2008) e KLR.**

79. The 3rd Defendant's counsel further submitted that for a government lease, the only consent that is required is the Commissioner of Lands. The consent of the Land Control Board was not a

requisite for leaseholds.

80. According to counsel, there is no indication that the land in question is agricultural. It was submitted that it is only the Minister who can designate land "agricultural". It was submitted that no evidence was led by the Plaintiff to show that the Minister had designated the suit property as agricultural land.
81. The 3rd Defendant's counsel further submitted that even if the suit property was agricultural land, the same is exempted by the provisions of section 6(3) of the Land Control Act because the government was a party to the transaction; that the government had already given its consent and that the government cannot be restricted in dealing with its land.

Analysis

82. It is not in dispute that the Plaintiff was the registered owner of the five suit properties before 3rd July 2012 when they were all transferred to the 2nd Defendant.
83. It is also not in dispute that the title documents in respect to the suit properties were handed over to Mr. Hanspal, deceased, by the Plaintiff.
84. What is in dispute, however, is whether:

- (i) The Plaintiff sold to the 2nd Defendant or to Mr. Hanspal or at all the suit properties;**
- (ii) The Plaintiff signed the transfer documents in favour of the 2nd Defendant in 1993;**
- (iii) The consent of the Land Control Board was required and**
- (iv) The 3rd Defendant is an innocent purchaser for value.**

(i) The consent of the Land Control Board

85. The Plaintiff's counsel has argued that notwithstanding the fact that the suit properties are leaseholds of 999 years, the consent of the Land Control Board was required before any transaction could be undertaken in respect to the suit properties. According to counsel, the purported transfer of the suit properties to the 2nd and 3rd Defendants was void for want of the consent of the Board. Counsel relied on the provisions of section 6 of the Land Control Act, Cap 302.
86. Section 6 of the Act provides that transactions affecting agricultural land are void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect to that transaction.
87. The Defendant's counsels, on the other hand have argued that, in all transactions in which the Government is a lessor, such transactions are exempted under Section 6(3) of the same Act.
88. According to the provisions of section 6(3) of the Land Control Act, Cap 302, section 6 does not apply to a transactions to which the Government is a party.
89. The Defendant's Counsels did not give me any authority or legal writing in support of their arguments.
90. The original grant in respect to the suit properties herein was registered as CR.16636/1 and 10330/1. The said grant had special conditions which were not reproduced in the subsequent sub-divisions. That notwithstanding, the special conditions in the main Grant are and should be applicable to the sub divisions.
91. The five sub-divisions that were created from the main grant are CR.18142, CR.18143, CR.18144, CR.18145 and CR.18146. All the Certificates of Titles were registered under the Registration of Titles Act, Cap 281 for a term of 999 years.
92. From 28th April 1950, the annual rent payable was Kshs.430. The Grant was also issued subject to the special conditions. It is therefore clear that the dispute before me is in respect to a leasehold and not a freehold.
93. The procedural law governing the suit properties is the Registration of Titles Act while the substantive law is the Government Land Act because the lessor is the Government. The

- Government is therefore the ultimate owner of the suit property while the “registered proprietors” are lessees.
94. The Government Lands Act, Cap 280 (now repealed) replaced the 1915 Crown Lands Ordinance. The Act made provisions for regulating the leasing and other disposition of Government land and related issues.
 95. The phenomenon of the Government as an owner of land was introduced by the 1902 Crown Land Ordinance. In this particular Ordinance, the crown (government) only owned “unoccupied land”. This changed in 1915 when the Crown Land Ordinance was amended and the whole protectorate became crown land, that is both unoccupied land and the land that was occupied by the Kenyan tribes. The only land that was exempted was the ten (10) mile coastal strip.
 96. The Crown Land Ordinance was amended further in 1938. The Ordinance excised the “native reserves areas” thereby designating them as trust lands.
 97. The concept of granting individuals 999 years leases by the Government was introduced in the 1915 Ordinance. This concept was introduced because initially, the settlers were being given free hold titles which could not be regulated by the Government.
 98. With the introduction of the 999 leases, the Government was able to set the terms and conditions on how town plots and agricultural land was to be dealt with. This was the only way the government could regulate the use of the land in the absence of the laws incorporating the common law doctrine of “police power” over land by that time.
 99. The 1915 Ordinance also allowed the conversion of 99 years leases which had been granted pursuant to the 1902 Ordinance into 999 years leases. That conversion is captured under section 27 (2) of the Government Land Act, Cap 280.
 100. The calculation of the rent payable under the 999 years leases is governed by the provisions of section 27(2) (a) - (c) of the Government Land Act, Cap 280. The implied covenants for the 999 years leases are found in section 33 of the Act while the grant will always have the express covenants which are binding on the lessees.
 101. Section 34 of the Government Land Act provides that in every lease of land under the Act, there shall be implied by virtue of the Act a covenant by the lessee not to divide the land and assign or sublet any portion thereof except with the previous written consent of the Commissioner of Lands and in such manner and upon such conditions as he may prescribe.
 102. In view of the above provisions of the Government Land Act, and the express special conditions that are contained in every lease, the Government introduced the doctrine of *police powers* in regulating the use of its land leased to an individual for a defined period.
 103. Although proprietary rights in land confer a wide spectrum of rights to an individual, those rights are exercisable in societal context. *Police power* in land law refers to the power of the state to regulate private property in the public interest. Its earlier manifestation was to accept the right of the State to interfere with private property through the taxation of its citizens.
 104. *Police power* does not qualify property rights. It simply regulates the exercise of private rights for the purpose of giving effect to public rights perceived to be overriding through legislation. There are many instances of the exercise of this power in Kenya, one of them being the control of transactions in agricultural land under the provisions of the Land Control Act.
 105. The Land Control Act was enacted in 1967. It owes its origin to the Land Control Ordinance of 1944.
 106. The land tenure committee appointed in 1944 had recommended that any system of land tenure would be unsatisfactory if it permitted unrestricted transfer and unrestricted use and misuse of land. The land control boards were given powers to impose conditions as to the development of land and failure to comply with those conditions led to the forfeiture of one’s land.
 107. The history that I have enumerated above clearly shows that the land control boards were only required to *police* agricultural lands that were freehold and not Government Land.
 108. I say so because the Government, through the special conditions in all its leases and the implied conditions enumerated in the Government Land Act regulates the use and assignment of its land, whether town plots or agricultural land. In the event that the lessee does not comply with the said conditions, the Government Land Act provides that the government could repossess the said land and allocate it to somebody else.
 109. Indeed, the establishment of the 1959 Land Control (National Lands) Ordinance was informed by the recommendations of the Swynnerton and the East African Royal Commissions that a

- system was needed to control productivity of land that was being held by the Africans which was Trust Land.
110. The Land Control Act, which incorporated the provisions of the 1944 and 1959 Ordinances, in my view, does not apply to agricultural land which is Government Land. The only consent that is required, which consent can be denied if the special conditions in the Grant and the implied covenants in the Act have not been complied with by the lessee, is that of the Commissioner of Lands.
111. A lease of whatever period by the Government does not relinquish the rights of the government over the said land. Such a lease only creates, for a term of years, a leasehold relationship between the Government and the lessee. It is therefore right to argue that the Government, being the lessor, will always be a party to transactions contemplated under section 6 of the Land Control Act. When the Government is a party to such transactions, section 6 (3) provides that the consent of the Board is not required.
112. Consequently, the transfers in respect to the suit properties did not require the consent of the Land Control Board in view of the fact that the land in issue is "Government Land".
113. Having said that, and considering that the main Grant with the special conditions was not produced in court to show the use of the land, I will not address the issue as to whether the suit properties were actually agricultural lands or not. Even if the properties were to be used for agricultural purposes, the consent of the Board was not required.

(ii) Did the Plaintiff transfer the suit properties?

114. The Plaintiff denied ever selling or transferring the suit properties to the 2nd Defendant.
115. I have perused the first document in the Plaintiff's bundle of documents. The handwritten note is dated 15th March 1988 with the word "signed" underneath. There are two names on the document, that is, Grace Teresa and Petus Constabir. The document is an acknowledgement by M/s Alcon International Ltd of paying a sum of Kshs.500,000 "being part of purchase price toward L.R. MN/III/848, MN/III/849, MN/III/850, MN/III/851 AND MN/III/852 (previous numbers L.R. MN/III/546/1 to 546/5 inclusive)".
116. The document does not state who is purchasing the said parcels of land and from whom. It does not even state the purchase price of the said properties.
117. The Plaintiff's case was that the 500,000/- that is indicated in the note was money that Mr. Hanspal, through his company, Alcon International Ltd, was advancing to them so that they could pay the balance of the purchase price to the person who was selling to them the listed portions of land, which they did.
118. The 2nd document on the Plaintiff's bundle shows the acknowledgment receipt by the firm of Daly and Figgis of Kshs.300,000 from Alcon International Ltd. The receipt does not indicate the purpose of the money.
119. The Plaintiff also exhibited the letter from Daly and Figgis dated 29th September 1989 addressed to the Plaintiff. The letter was informing the Plaintiff that the advocates were holding titles in respect to the six-sub-divisions duly registered in her name.
120. According to the form for registration attached on the Plaintiff's bundle, the six subdivisions, to wit, CR. Nos.18114, 18134, 18144, 18145, 18146 and 18147 were presented for registration on 13th April 1989.
121. The above documents, in my view supports the Plaintiff's testimony that the money, that is Kshs.500,000 and Kshs.300,000, that was given to them by Mr. Hanspal through his company on 15th March 1988 and 2nd August 1988 respectively was meant to offset the balance of the purchase price for the six parcels of land listed in the note of 15th March 1988.
122. I say so because upon the receipt of the said money, the Plaintiff's advocates presented the transfer documents in respect to the six parcels of land for registration on 13th April 1989. All the six sub-divisions were duly registered in the name of the Plaintiff on 24th July 1989.
123. If Mr. Hanspal, or his company, Alcon International Limited, was buying the properties from the Plaintiff as argued, nothing would have been easier, than the firm of Daly and Figgis to prepare a valid sale agreement as provided by the Law of Contract Act for execution by all parties.
124. In any event, the said properties had not been registered in the name of the Plaintiff by 15th

- March 1988 when the 500,000 was paid to the Plaintiff and her husband. The Plaintiff or her husband could therefore not have possibly sold the parcels of land to Mr. Hanspal on the said date because the interests in the land had not passed to them.
125. I therefore agree with the Plaintiff's testimony that after the purchase of the six portions of land, and with a view of refunding the Kshs.800,000 to Mr. Hanspal, they gave Mr. Hanspal the original title documents in respect to the five portions to hold them as security.
126. It was the Plaintiff's position that she did not sign the transfer documents in favour of the 2nd Defendant as at the time she handed to Mr. Hanspal the original title documents or in 1993 when she is alleged to have signed them.
- 127.2 DW1 was not present when the alleged transfer documents were signed by the Plaintiff. 2 DW1 only came into the picture in 1998 when she got married to Mr. Hanspal who died in March 2012. The only person, who, according to 2 DW1, witnessed the signing of the Transfer documents by the Plaintiff, was Mr. Vishnu Sharma who is also dead.
128. The transfer documents in respect to the suit properties in the possession of the 2nd Defendant differ from the transfer documents that the Plaintiff says she recovered from the Ministry of Lands in two aspects.
129. The documents retrieved from the lands office and held by the Plaintiff and the Registrar of Titles, Mombasa, shows that they were drawn by the 1st Defendant on 19th August 1993. The 1st Defendant is said to have witnessed the Plaintiff's (Vendor) signature on the same day.
130. The Transfer documents produced by the Plaintiff are the same documents which the Registrar of Titles Mombasa produced in court. The Registrar informed the court that those were the transfer documents that were presented to him for registration and which he did register on 3rd July 2012.
131. The copies of the Transfer documents that were produced by the Plaintiff and the Registrar of Titles in court are the same in all respect to the ones that were produced the 2nd Defendant except that the first and last pages are different. The Transfer documents that were produced by the 2nd Defendant shows that they were drawn by J. M. Njage and Company advocates on 19th August 1993 and witnessed by Vishnu Sharma Advocate who is said to be dead.
132. The 1st Defendant denied ever drawing and witnessing the Transfer documents that were presented to the Registrar of Titles for registration. Those are the same documents in possession of the Plaintiff.
133. Indeed, the 1st Defendant admitted in his defence that in 1993, he was a student outside the country and was not qualified to be an advocate.
134. The 2nd and 3rd Defendants have themselves distanced themselves from the said Transfer documents. According to them, the Transfer documents that were presented for registration of the suit properties in favour of the 2nd Defendant were drawn by J. M. Njage and witnessed by Vishnu Sharma.
135. The Transfer documents produced by the Plaintiff and the 4th Defendant which were registered on 3rd July 2012 were drawn and signed by an unqualified person. It is trite law that any document prepared or filed by an unqualified person is invalid and of no legal effect. As was held in the case of **National Bank of Kenya Ltd Vs Wilson Ndolo Ayah (2009) e KLR**, public policy demands that the court should not aid in the perpetuation of illegalities. In the circumstances, I find that the Transfer documents purportedly drawn and attested by the 1st Defendant who was not a qualified advocate are null and void and of no legal effect.
136. In any event, the 1st Defendant has denied ever drawing the said Transfer documents. In the circumstances, they are a forgery and the people who participated in the drawing and uttering of the said Transfer documents should be investigated, arrested and prosecuted.
137. As I have stated above, the invalid Transfer documents in the Plaintiff's and 4th Defendant's bundle are the ones which were presented for registration and they were registered. The Registrar of Titles, Mombasa produced the certified copies of the said Transfer documents and informed the court that he was holding the original titles that were presented together with the said Transfer documents.
138. The set of documents produced by the 2nd Defendant are not certified by the Registrar of Titles. The Registrar of Titles denied having registered the Transfer documents drawn by J. M. Njage & Co. Advocates and witnessed by Vishnu Sharma, now deceased.

139. The 2nd Defendant did not call any advocate from the firm of J. M. Njage and co advocates to testify as to the authenticity of the said Transfer documents and to state that indeed these were the transfer documents that were signed by the Plaintiff in 1993 and presented for registration on 3rd July 2012.
140. The failure by the 2nd Defendant to call a representative from the firm which purported to draw the Transfer documents in its possession confirms the evidence by the Registrar of Titles, Mombasa that those documents were never presented for registration.
141. Having heard the testimony of 2 DW1, and observed the demeanor of the said witness, I am convinced that 2 DW1 who was in financial difficulties after her husband's death hatched the idea of fraudulently transferring the suit properties from the Plaintiff's name to the 2nd Defendant.
142. The basis of my observation and views is because 2 DW1 informed the court that although her late husband, Mr. Hanspal, was in possession of the original documents since 1993, he never thought of transferring them to his name. The witness further stated that when her husband died in March 2012, she was approached by Mr. Pilla Naul who informed her that the Plaintiff's husband wanted to buy back the suit property at Kshs.15,000,000, which offer she declined. She thereafter approached her advocate who lent her money which she used to effect the transfers.
143. It appears that it is at that point that 2 DW1 realised that she could sell the suit properties and get more than Kshs.15,000,000 that the Plaintiff and her husband were offering to have their titles back. That is when the Transfer documents drawn by an unqualified person were presented for registration by the 2nd Defendant.
144. Once the Transfer documents were registered on 3rd July 2012, it was easy for 2 DW1, passing on as the director of the 2nd Defendant, to sell the suit properties. She sold sub-division number 851 to the 3rd Defendant for a sum of Kshs.1,000,000 although she admitted of receiving Kshs.5,000,000 from the 3rd Defendant. The Transfer was registered in favour of the 3rd Defendant on 18th July 2012, the same month that the suit properties were transferred to the 2nd Defendant.
145. This matter was filed in court thereafter and 2 DW1 could not sell the remaining portions.
146. The 2nd Defendant later on realised that the issue of the competence of the 1st Defendant in drawing the Transfer documents would arise and quickly changed the first and last pages of the Transfers. However, the Registrar of Titles had in his possession the initial Transfer documents and the substitution of the first and last pages never happened.
147. It is incredible that the process of transferring the suit properties by the 2nd Defendant at the behest of the 2 DW1 was done even before 2 DW1 could obtain letters of administration for the Estate of her husband.
148. According to her documents, she obtained the Grant of Letters of Administration on 5th October 2012 by which time she had already transferred the suit property to the 2nd Defendant and sold one of the properties to the 3rd Defendant. No evidence was produced to show that she was a director of the 2nd defendant and that she had the authority of the other Directors to sell the suit property.

Conclusion

149. The above chronology of event shows sustained efforts, in quick succession, of 2 DW1 to fraudulently transfer the suit properties to the 2nd Defendant and then to the 3rd Defendant. I believed the Plaintiff's evidence that she never signed the Transfer documents in favour of the 2nd Defendant.
150. The 3rd Defendant did not testify. There was no evidence to prove that the 3rd Defendant undertook due diligence before buying one of the suit properties two weeks after the same was transferred to the 2nd Defendant.
151. It is not clear if the 3rd Defendant made inquiries as to the directorship of the 2nd Defendant and the circumstances under which the suit property was transferred from the Plaintiff to the 2nd Defendant. It is not even clear whether there was any sale agreement between the 2nd Defendant

- and the 3rd Defendant and what the purchase price for the suit property was.
152. The failure by the 3rd Defendant to testify and justify why he bought one of the suit property can only amount to an admission of the fraud that was perpetuated in this transaction. The 3rd Defendant is not an innocent purchaser for value.
153. Having held that the Transfer documents that were presented for registration in favour of the 2nd Defendant were a forgery, null and void, I find and hold that the transfer of the suit properties to the 2nd and 3rd Defendants were a nullity. Those transfers cannot be allowed to stand and should be cancelled forthwith from the register. The 2nd Defendant did not have any valid title to pass to the 3rd Defendant.
154. In the circumstances, and for the reasons I have given above, I allow the Plaintiff's Plaint dated 15th October 2012 as prayed. I shall however not make any order for general damages as prayed at paragraph (e) of the Plaint.

Dated and Delivered in Malindi this 25th day of **October**, 2013

O. A. Angote

Judge