IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO 82 OF 2018

BETWEEN

CAROGET INVESTMENT LIMITED.....APPELLANT

AND

ASTER HOLDINGS LIMITED.....1ST RESPONDENT

THE CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

THE REGISTRAR OF TITLES.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

(An appeal from the judgment of the Environment and Land Court

at Nairobi (Obaga, J.) dated 31st October, 2017

in

ELC No.175 of 2015)

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JUDGMENT OF THE COURT

The dispute culminating in this appeal involves a parcel of land known as L.R No. 1870/V/6 (the suit property), which was originally adjacent to L.R No.1870/V/3/1 before the two were amalgamated. According to the 1st respondent, it purchased both parcels from Nairobi Housing Development Limited for Kshs. 6,500,000 and Kshs. 4,500,000, respectively; that it applied for and was granted change of user from residential to residential hotel and apartment; and that it was granted permission to amalgamate the two parcels, after which a new title, being LR No. 1870/V/247 was issued in its name in 1999. The 1st respondent further explained that the initial lease period of 50 years was converted to one of 99 years with effect from 1st July, 2001.

It was the case for the 1st respondent that in August 2007 the appellant forcefully invaded the suit property, which was already at this point in time part of the amalgamated property. The invasion was reported to the police, who offered no help. Feeling helpless, the 1st respondent opted to institute the action giving rise to this appeal.

By an amended plaint the 1st respondent applied for;

a) declaration that it was the sole and lawfully registered proprietor of the suit property,

b) a declaration that the allotment of the suit property to the appellant on 11th April, 2007 by the 3rd respondent (the Commissioner) of Lands was unlawful, irregular and void *ab initio*,

c) a declaration that the second Grant I.R. Number 105610 issued to the appellant by the 3rd respondent was fraudulent, unlawful, and irregular as the suit property had already been alienated to the 1st respondent,

d) an order directing the 3rd respondent to rectify the relevant registers and documents and to cancel the second grant,

e) a declaration that the appellant's occupation and possession of the suit property in the circumstances amounted to acts of trespass for which the 1st respondent was entitled to general damages,

f) delivery of vacant possession of the suit property to the 1st respondent forthwith,

g) costs and interests.

In its response to the claim the appellant, through its director, Hon. William Kabogo Gitau maintained that it applied for allocation of the suit property in 2007 from the 2nd respondent; that the application was accepted by the 2nd respondent which granted it a lease for 99 years; that its attempt to sell the suit property to Investments Limited failed when it was alleged that its title was irregularly obtained; and that the title was cancelled by the 4th respondent. This forced it to move to the High Court for judicial review of the 4th respondent's decision. The High Court quashed that decision purely on the ground that the appellant was not heard before its title was cancelled. The High Court also ordered the entries in favour of the appellant, which had been cancelled, to be restored. This was complied with and a provisional title accordingly issued to the appellant. It was also contended that 1st respondent's claim was not brought within one year of accrual of the cause of action and was therefore barred by: **section 3** of the Public Authorities Limitation Act; **section 26** of the Government Proceedings Act; and for a claim of fraud against the appellant by **section 136(1)** of the repealed Government Lands Act; and **section 4** of the Limitation of Actions Act.

Finally, the appellant insisted that there was no amalgamation of the suit property with any other property and that the suit property has always belonged to it since 2007.

In a short statement of defence filed by the 2nd respondent, the City Council of Nairobi, (the Council), it was contended that the Council purchased the suit property for value and became its lawful owner. It also denied the jurisdiction of the trial court on account of another decision in H.C. Misc. Application No. 30 of 2009, which it argued substantially related to the matters being raised in the suit.

The 3rd respondent, the Commissioner of Lands (the Commissioner), the Registrar of Titles (the 4th respondent) and the Attorney General (the 5th respondent) filed a joint statement of defence. Priscilla Njeri Wango, a Land Surveyor in the Ministry of Land and Physical Planning, Department of Survey and Edwin Munoko Wafula, a Registrar of Titles, presented their case at the trial. It was to the effect that a grant and deed plan to the suit property was duly granted to the 1st respondent for a term of 50 years from 1st December, 1989; that the 1st respondent applied and was granted change of user. It was also granted an approval for the amalgamation of the suit property with LR No. 1870/V/3/1; that the whole of the amalgamated parcel became LR No. 1870/V/247. Subsequently, the lease period was also extended and a new deed plan number 234323 issued for a term of 99 years; that these developments notwithstanding, the 2nd respondent claimed ownership of the suit property in response of which the 3rd respondent then issued a grant to the former which in turn leased it to the appellant for a term of 99 years, constituting a second lease over the suit property.

To exonerate himself, the Commissioner explained that he registered the second lease in favour of the appellant pursuant to its statutory duty and in the honest belief that the suit property was held by the Government as a trustee for the 2nd respondent; that as soon as the Commissioner became aware of the fraudulent issuance of the second grant, it placed a caveat on the suit property; that the Director of Survey reported the forgery of the second deed plan to the Directorate of Criminal Investigations (DCI) and sought for investigations; and that, in view of the foregoing, the 4th respondent cancelled the second grant. The respondents concluded that since 1946 and therefore way before their amalgamation, the two properties had always existed as private properties.

With the foregoing evidence, the learned Judge asked the questions; whether the 1st respondent's suit was statute barred, whether the 1st respondent lawfully acquired the title to the suit property and whether the 2nd respondent's title to the suit property was capable of being passed to the appellant. To these questions he found that the question of limitation having been determined in a notice of preliminary objection raised by the appellant, it was not available to be argued and determined twice over. On the substance of the dispute which we believe covers the rest of the framed issues, the Judge found evidence that the 1st respondent purchased both the suit property and LR No. 1870/V/3/1 from Nairobi Housing Development Limited and was duly registered as the owner on 30th August, 1993; that the two properties were amalgamated and one title, that is, LR No. 1870/V/247 issued; and that after the lease was extended to 99 years, the 1st respondent surrendered the old grant and was issued with a new one.

The Judge was convinced, in arriving at the ultimate decision that there was a fraudulent scheme which began around 2006 to have the suit property transferred to the appellant. For example, he traced the fraud to a letter dated 19th December 2006, where the Director of Legal Affairs of the Council wrote to the Commissioner, and without any basis at all claimed that it owned the suit property and that unfortunately, it had not been registered in its name. In the same letter, it was indicated that the Council had committed the suit property to the appellant for residential development but explained that the appellant had not been able to develop it because there was no title. On the strength of this, the 3rd respondent allocated the suit property to the Council who in turn leased it to the appellant; that soon thereafter the appellant forcibly took possession of the suit property after ejecting from the property the guards who were employed by the 1st respondent; that it was only after the 1st respondent lodged a complaint with the Criminal Investigations Department and the then Kenya Anti-Corruption Commission, that the Council wrote a letter dated 4th June, 2007 advising the Commissioner that it had discovered that the deed plan which the appellant had presented in respect of the suit property was a forgery and recommended that the title be revoked. The Judge noted that the Council had actively participated in the fraud leading to the registration of the appellant as the owner of the suit property. He expressed surprise that in its defence the Council had claimed that it owned the suit property through purchase, a fact it reiterated in an application in High Court Misc.

Civil Application No. 30 of 2009 yet in its evidence in court it did an about turn and completely changed the story. It categorically stated that the suit property belonged to the 1st respondent.

The learned Judge was of the persuasion that the deed plan No. 228330 which the appellant presented and upon which the Council asked the Commissioner to register the appellant as the owner was forged; that that deed plan was similar and bore the same date as the one presented by the 1st respondent much earlier for the amalgamation of the suit property save for the fact that it reflected the acreage as 2.105 hectares whereas the original deed measured 3.069 hectares; that when the scheme to take the suit property started, the relevant file went missing and a temporary file was opened; and that as part of the fraud, receipts were being issued even on Sunday, for example on 4th March 2017, when offices would ordinarily be closed for the weekend.

The Judge also relied on the 1st respondent's testimony that the guards it had deployed in the suit property were chased away when the appellant forcefully invaded the suit property; and that even after finding that there was forgery of the deed plan, the police took no steps to prosecute the perpetrators and instead advised the 1st respondent to seek civil remedies.

The Judge formed the opinion that the instances enumerated above constituted proof of fraud.

In the end the learned Judge summarised his determination on this point in favour of the 1st respondent thus;

> **"The plaintiff's acquisition of the two properties which were later amalgamated was lawful. If there was any anomaly in the manner in which the properties were transferred as conceded by the Registrar of Titles in the 70's, that anomaly cannot be attributed to the plaintiff who had not acquired the two properties by then. I find that the two properties were lawfully acquired by the plaintiff and subsequently lawfully amalgamated into what is now known as LR No. 1870/V/247…… It is important to note that the suit property was not available for allocation to the First Defendant. The suit property had already been purchased by the plaintiff and the same had already been amalgamated with another property…...**
>
> **…….it is clear that the title by the First Defendant which was subsequently transferred to the Fifth Defendant was obtained illegally, unprocedurally and through a corrupt scheme. I have demonstrated herein above that the Fifth Defendant was part of this illegal scheme from the beginning. The title to the suit property had ceased to exist as an independent title upon amalgamation. The action of resurrecting the title to the suit property was therefore illegal and this was done fraudulently……..**
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> **The position in law is that once land has been allotted to an individual or an entity, that land is no longer available for alienation to a third party. What happened in this case was not a case of double allocation. What happened was actually an illegal allocation of a property which had already been alienated".**

Consequently, the Judge entered judgement in favour of the 1st respondent against the appellant and the rest of the respondents and declared that;

a) the 1st respondent was the sole and lawfully registered proprietor of the suit property (LR No. 1870/V/6).

b) the lease dated 4th May, 2007 made between the Council and the appellant in respect of the suit property was irregular, unlawful and void *ab initio.*

c) the allotment of the suit property to the appellant by the Commissioner was unlawful, irregular and void *ab initio.*

d) the Grant I.R number 105610 issued to the appellant by the 4th respondent was fraudulent, unlawful, irregular and void *ab initio.*

e) the appellant unlawfully and illegally occupied and took possession of the suit property and therefore committed acts of trespass for which the 1st respondent was entitled to be compensated.

The Judge also directed the 4th respondent to rectify the relevant register in accordance with his decision and to cancel the second grant and the lease issued, first to the Council and subsequently to the appellant. He directed the appellant to deliver vacant possession of the suit property to the 1st respondent forthwith. The appellant, 2nd to 5th respondents were also restrained by an order of permanent injunction from charging, selling, leasing, transferring, alienating or dealing in any manner howsoever with the suit property, and from accepting, acting upon or effecting any sale, lease, charge, transfer or alienation of the suit property.

On general damages for trespass, the Judge justified the award of Kshs. 100,000,000 as follows;

> **"38. The Fifth Defendant undertook a valuation of the suit property on 17th June 2013 through Amazon Valuers limited. The suit property then was valued at Kshs. 1,800,000,000. As the plaintiff has been kept off its property for over 10 years, it is entitled to general damages…….. The suit property is 2.105 hectares which is about 5.2015 acres. The property is in Westlands area which is 4.8 kilometres from the city centre. The property is off Mvuli Road in Westlands and is surrounded by upmarket residential neighbourhood with executive apartments and maisonettes according to the valuation report. I have considered the fact that since 1993 when the Plaintiff had acquired the suit property, there is no development which had been undertaken for 14 years until the suit property was invaded in 2007. This however does not mean that the property would have remained undeveloped until now. Considering the location and value of the suit property I assess general**

damages in the sum of Kshs. 100,000,000".

Costs of the 1st respondent's suit was to be borne by the 2nd respondent and the appellant.

To challenge this outcome, the appellant has presented 14 grounds which we summarise here below.

In the first place, the appellant argued that the Judge was in error for failing to determined the issue of limitation; that having himself framed the question of limitation as the first issue for his determination, the learned Judge was obliged by **order 21 rule 5** of the Civil Procedure Rules to state his findings on the issue; and that it was in error for him to have rejected the ground merely because the question had been decided in a ruling rendered on 26th September, 2011 on an interlocutory application. Citing the cases of **Uhuru Highway Development Limited v. Central Bank of Kenya & 2 Others [1996] eKLR** and **Loise M. Wambua v. Kenyatta University & another [2015] eKLR** the appellant argued that a decision made in respect to an interlocutory application does not bind the trial court; that if fraud was committed as alleged by the 3rd and 4th respondents on 11th April, 2007 and 4th May, 2007, respectively and the 1st respondent learnt of the second grant to the appellant on 31st May, 2007 and even pursued criminal investigations, the suit filed on 25th November, 2010 was as a result out of time. The suit ought to have been instituted within 12 months, that is by August, 2008, and August, 2010, respectively, in accordance with **Section 3 (1)** of the Public Authorities Limitation Act and **section 136 (1)** of the Government Lands Act.

In the second ground, the appellant has questioned the propriety of the 1st respondent's title to the suit property and submitted that, although the 1st respondent pleaded that it acquired the suit property for Ksh. 4,500,000 it provided no evidence of the existence of any such agreement for sale or payment of the purchase price.

Thirdly, the appellant on several fronts has contended that the amalgamation of the suit property with L. R. No. 1870/V/3/1 was irregular. First, that there was no evidence before the trial court of amalgamation of the two properties; that if indeed the two were amalgamated, the extension of the lease to 99 years ought to have preceded the alleged amalgamation; that if the contents of the letter dated 14th July, 1988 from the Council to the 3rd respondent was to be relied on as approval for the alleged amalgamation of the two properties then the approval was given before the 1st respondent claimed acquisition of the two properties; that there was no evidence of approval from the Council to 5th respondents for the amalgamation; that Nayan Patel, the 1st respondent's Director confirmed in cross-examination that the conditions set out in the letter, in particular, the condition requiring the 1st respondent to develop the properties within one year was not met; that, further that in the said letter of 4th February, 1997, giving an approval for the amalgamation of some nine plots which had been created out of a subdivision of the suit property, L.R No. 1870/V/3/1, was curiously inserted in pen, which was an attempt to backdate the alleged amalgamation by the Council; that after the deed plan for suit property was surrendered for subdivision, the suit property could not have been amalgamated with property L. R. No.1870/V/3/1 to create L.R. No. 1870/V/247 in the manner claimed by the 1st to 4th Respondents or at all; that in view of the fact that there was no extension of lease, the 1st respondent ceased being the owner of the suit property on 1st April, 2003 and in the absence of any evidence of the suit property being amalgamated with L. R. No 1870/V/3/1; that the suit property was therefore available for allotment to the appellant; and that the learned Judge was in error in using the difference in acreage of the two deed plans to arrive at the conclusion that the deed plan held by the appellant was a forgery and the one held by the 1st respondent was genuine. On the finding that the payment receipt was issued on a Sunday, the 4th March, 2017, it was submitted that the day was in fact a Saturday; that as a matter of practice the County Government Finance Department works for half a day on Saturday to reconcile and conclude payment received on Friday as well as payments made on Saturday at the markets and parking. The appellant complained that this issue was not pleaded or canvassed yet the Judge did not give parties an opportunity to submit on the date.

The appellant believed that having demonstrated what it considered numerous flaws in the 1st respondent's title, the Judge ought to have declared the appellant the lawful owner of the suit property or at the very least, that this was a case of double allocation; that the learned Judge should have deprecated the flip flop approach taken by the 2nd to 5th respondents on the issue of the two parallel titles and ought to have found that there was a case for double allocation in respect of which the appellant was to be compensated by the 3rd to 5th respondents, if at all, the title claimed by the 1st respondent were to be held as first in time, as was the case in **Gitwany Investment Limited V. Tajmal Limited & 3 others** (2006) eKLR.

Regarding the award of Ksh. 100,000,000 as general damages for trespass, it has been argued that the award was made without any legal basis; that, in any case the claim in trespass was time barred; and that the claim for trespass could not be maintained as the appellant had a title in its name over the suit property and was entitled to occupy it as it did.

Finally, it was contended that the 1st respondent and the appellant entered into an agreement to settle the dispute by agreeing that the former would purchase the appellant's interest in the suit property at Ksh. 350,000,000; that that gesture was, in itself an acknowledgment that suit property belonged to the appellant.

The combined effect of the respondents' submissions in reply to the foregoing was that in regard to the question of limitation, P.M. Mwilu, J (as she then was) in a ruling of 26th September, 2011 having rejected the issue of limitation, the same could not be revived through submissions at the trial. The appellant did not appeal that decision or sought a review by the learned Judge.

On the substance, it was submitted that by two indentures dated 17th August, 1993 and registered on 30th August, 1993 in the Lands Registry, the 1st respondent purchased the suit property and L.R. No.1870/V/3/1, applied to the Planning Director of the City Council of Nairobi, for change of user, which request was approved by a letter written on 14th July, 1988 and issued subject to, among other conditions, that the two parcels be amalgamated. It then applied and got permission to amalgamate the two properties. Next, it applied and obtained extension of the lease from the initial period to 99 years.

It came therefore as a surprise to the 1st respondent when, by a letter dated 19th December 2006, Council wrote to the Commissioner stating

that the suit property belonged to it and that a certificate of title should accordingly be issued to it. Strangely, the Commissioner proceeded on the basis of deed plan No.228330 to unlawfully and illegally issue an allotment letter to the Council. This was the same number for the deed plan used for the amalgamation of the two properties. Within two weeks of the second grant, the Council issued to the appellant a lease dated 4th May, 2007 for a period of 99 years; and that this was done even though the suit property had long ceased to exist as it had been amalgamated with another.

The 1st respondent stated that immediately after these events the appellant forcefully invaded the suit property, evicted the 1st respondent and took possession. The invasion was reported to the police who offered no help. On 6th September 2007, the appellant attempted to sell the leasehold interest in the suit property to a company known as White Horse Investments Limited for a sum of Ksh. 200,000,000. The sale was frustrated when on 11th April, 2008 the Chief Lands Registrar wrote to the advocates of White Horse Investments Limited informing them that the transaction would not be registered because the grant was invalid. In under 1 month of the transfer of the suit property to the appellant, the Council and the Commissioner admitted in writing that the deed plan No.228330 used in allocating the suit property to the appellant was a forgery; that, for that reason the second grant issued to the appellant should be revoked; that indeed following these developments the Registrar of Titles cancelled the second grant. That cancellation was the subject of Judicial Review proceedings in the High Court Misc. No. 30 of 2010 where orders of *certiorari* and mandamus were issued to quash the decision of the registrar who was also ordered to restore the second grant to the appellant, thereby maintaining the two parallel titles. The 1st respondent preferred an appeal against this decision.

For all these reasons, it was the respondents' unanimous position that the transaction leading to the issuance of the second grant to the appellant was a well-orchestrated fraudulent scheme to defraud the 1st respondent of the suit property; that the allotment of the suit property to the Council and the subsequent issuance of the second grant while there was a prior title in favour of the 1st respondent was itself fraudulent, irregular, unlawful and void *ab initio.*

On the award of Ksh. 100,000,000 as damages for trespass it was submitted that the Judge properly exercised his discretion and was guided by evidence, took into account factors such as the net value of the property, which in 2017 stood at Ksh. 1,800,000,000, the period the 1st respondent has been kept away from the suit property and the investment opportunities it had lost.

This is a first appeal, and as this Court said in the oft-cited **Selle and Another V. Associated Motor Boat Co. Ltd & Others** (1968) EA 123, and in a long line of other decisions, an appeal from the High Court to this Court is by way of retrial. As such, the Court is not bound to follow the trial Judge's findings of fact if it appears either that the Judge failed to take account of particular circumstances or probabilities of if the impression of the demeanor of a witness is inhabited with the evidence generally.

Upon our own independent assessment of the evidence, it is our considered view that the two broad issues in controversy in the appeal as were before the court below are simply whether the 1st respondent's suit was statute barred and whether the suit property belonged to the 1st respondent or the appellant.

On the first issue it has been argued that the claim to the effect that the appellant's title to the suit property was fraudulently obtained with the help of the 2nd to the 5th respondents having not been brought within one year of accrual of the cause of action was barred by **section 3** of the Public Authorities Limitation Act and **section 26** of the Government Proceedings Act in so far as those respondents were concerned. Likewise, claims of fraud against the appellant were also statute barred because the action was not brought against it within three years from the date of accrual of the cause of action as required by **section 136(1)** of the repealed Government Lands Act and **section 4** of the Limitation of Actions Act. The learned Judge was therefore faulted for failing to determine the issue of limitation on the merit of the arguments presented; that though the High Court had, at an interlocutory stage given an opinion on the question, that opinion, by dint of **Uhuru Highway Development Limited v. Central Bank of Kenya & 2 Others [1996] eKLR** and **Loise M. Wambua v. Kenyatta University & another [2015] eKLR,** being on an interlocutory opinion, did not bind the trial court.

It is on record that by a notice of preliminary objection, the appellant challenged the jurisdiction of the court below to entertain the 1st respondent's action, on among other grounds that;

> **"…the causes of action on fraud and trespass are barred by sections 136(1) of the Government Lands Act cap 280 and section 4 of the Limitation of Actions Act cap 22 of the laws of Kenya"**

In her ruling of 26th September, 2011 P.M. Mwilu, J (as she then was) directly responded to this objection thus;

> **"…objection number 5 concerns itself with the fraud and trespass and therefore limitation of causes. A careful perusal of the amended plaint will show that the plaintiff's claim is that of holding a good indivisible title since the year 2001. It is the plaintiff's position that the second title that issued was so issued on the strength of a fake deed plan and to my mind the question to be answered is whether if during 2001 a title issued over the same parcel of land was anything left for alienation by the third defendant? And if indeed there was fraud in the process, the question to be answered is when the plaintiff became aware of the same and I find that these issues were raised during 2009 in the Judicial Review proceedings therefore there cannot be the issue of limitation arising in those circumstances…"** (Our emphasis).

It is firmly settled that a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. An objection to the jurisdiction of the court, or a plea in limitation are some of the examples. See **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd** (1969) EA 696. Because a preliminary objection may dispose of the suit, if argued successfully, it cannot be, as suggested by the appellant, that a successful determination at the interlocutory stage may be subject to further consideration at the trial.

The object of the doctrine of *res judicata*, which is legislated in **section 7** of the Civil Procedure Act is based on the need to give finality to judicial decisions; that there should be an end to litigation; that parties cannot be allowed to litigate on the same issue which has been determined by a court of competent jurisdiction; and that courts must ensure that a party is not vexed twice for the same cause. This doctrine was well articulated in the English case of **Henderson V. Henderson** [1843- 67] ALL ER 378 thus:

> **"……where a given matter becomes the subject of litigation in and adjudication by a court of competent jurisdiction, the Court requires parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, accident, omitted part of their case. The plea of *res judicata* applies, except in special cases not only to a points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject litigation, and which the parties exercising reasonable diligence might have brought forward at the time"**. (Our emphasis).

This passage has been relied on in a number of local cases such as **Thomas Owen Ondiek & another V. National Bank of Kenya Limited & another** (2015) eKLR, **Okiya Omtatah Okoiti & another V. Attorney General & 6 others** (2014) eKLR, among others. In other words, those cases stress that a party may not raise any claim in subsequent litigation which they ought properly to have raised in a previous action.

The issue of limitation was expressly raised before the High Court and unequivocally determined. It could not be raised again. With respect, the learned Judge properly directed himself on this question.

Turning to the next issue, the overriding question being whether the 1st respondent lawfully acquired the title to the suit property; or put differently, whether the suit property was lawfully transferred to the appellant. We consider this question to be at the heart of this dispute.

It is evident from the record and evidence that the suit property has always been, as far back as 1946 under private ownership. The two indentures of 23rd January, 1946 and 19th April, 1973 are proof of this fact.

It is common factor that before the amalgamation, the suit property and L.R. No.1870/V/3/1 were two adjacent but distinct parcels. The 1st respondent claimed that by two indentures of the same date (17th August, 1993) and registered on 30th August, 1993 it acquired the two parcels from Nairobi Housing Development Limited at consideration of Kshs. 6,500,000 and Kshs.4,500,000,respectively. Those two indentures are on record and their authenticity was never at all challenged.

The indentures contain the particulars of the two parcels, the identities of the parties, the consideration and the other conditions upon which they were made.

On the basis of the indentures, the 1st respondent applied and was granted change of user. On record are letters and internal memos to this effect. For example, on 14th July, 1988 the Council conveyed to the Commissioner its recommendation for approval for change of user. That letter was issued conditionally upon the 1st respondent submitting building plans within one year, payment of revised rates, and on condition that **"the two Plot** (sic) **to be amalgamated"**. In an internal memo originated on 3rd July, 1991, the Commissioner gave his approval.

The 1st respondent then pursued the matter of amalgamation. By its letter dated 4th February, 1997 the Council informed the Commissioner that the request for amalgamation was approved by the Town Planning Committee at its meeting of 13th September,1996. The Commissioner in response accorded final approval to the amalgamation scheme. The resultant new certificate of title after amalgamation became L.R No. 1870/V/247. The Commissioner subsequently advised the 1st respondent of the new annual land rent as Kshs 1,490,645 and the surrender fee of Kshs 33,320.

The 1st respondent explained to the Commissioner in a letter dated 6th June, 1999 that it intended to invest Kshs. 100,000,000 on the amalgamated property, which capital expenditure would require a longer term of the grant; and that the Council having considered the request for extension of the term and recommended it, the Commissioner was requested to extend the term to 99 years. The request was granted and the lease converted to 99 years with effect from 1st July 2001. That is as clear as it can be of the 1st respondent's title to the suit property.

What is the appellant's claim? The appellant's claim, on the other hand, was emphatically stated thus in paragraph 9(a) of what the appellant headed **"Defence Under Protest (for want of jurisdiction)"**;

> **"…the 5th defendant is the registered owner and occupier of property L.R No. 1870/V/6 Grant No. I.R 105610 pursuant to a transfer or transmission by the 1st defendant under a lease registered on 11th May, 2007".** (Our emphasis).

The 1st defendant at the trial was the Council. It was the appellant's case throughout, as reflected in the above paragraph, that the suit property was transferred to it by the Council. The single overarching question is whether the Council had any title or interest in the suit property capable of being transferred. To begin with, we find it not only baffling but also curious, how the Council that had all along from 1988 been writing numerous letters to the Commissioner confirming that the 1st respondent was the duly registered owner of the suit property, backtracked and suddenly declared in a letter dated 19th December, 2006, to the Commissioner that;

> **"The City Council of Nairobi owns the above mentioned parcel of land….The City Council of Nairobi committed the land …**

to Caroget Investment Limited…However the developer has not been able to implement the project because of lack of title. Going through the City Council of Nairobi records it is confirmed that there was no formal title issued to the Council. This is therefore to request you to issue the same so that records can be rectified".

It is this letter that triggered the flurry of activities that culminated with the second title being granted to the appellant. After only some 3 months after the aforesaid letter of 19th December, 2006, a grant was issued, first to the Council on 1st April, 2007. A letter of allotment in favour of the appellant was then given on 11th April, 2007, just 10 days after the grant to the Council was issued. The following month, with the speed of lightning, on 4th May, 2007 the suit property was leased to the appellant. With the lease, the appellant moved in and took possession of suit property after evicting the 1st respondent. Barely four months later, on 6th September 2007, the appellant purported to sell the leasehold interest in the suit property to a company known as White Horse Investments Limited for a sum of Ksh. 200,000,000. Then another strange twist emerged. The Chief Land Registrar wrote to the advocates acting for White Horse Investments Limited in the transaction on 11th April, 2008 informing them that;

"I am unable to register the said documents due to the following reasons; the title issued to the City Council is invalid. The subject land is a portion of an already existing title under private ownership since 1946. The lease held by Caroget Limited is invalid and a nullity *ab initio*".

The Council then jumped into the fray. Ms. M.N. Ngethe, the Council's Director of Legal Affairs wrote to the Commissioner on 4th June, 2007 stating that;

"Re: <u>LR No. 1870/V/6.</u>

We have discovered that the Deed Plan No. 228330 used by Carogate Limited for the above mentioned property was fake. Under the circumstances, we are hereby advising that the said title should be revoked".

It will be remembered that it is the very same Ms. M.N. Ngethe who had few months earlier written to the Commissioner claiming that the suit property belonged to the Council.

From the testimonies of the 2nd through to the 5th respondents, the position maintained was that the property was not available for alienation. For example, Issac Nyaoke, the Chief Valuer with the Council testified that;

"…The City Council had no right to write a letter to the Commissioner on 19th December, 2006. …..the city council of Nairobi did not own the property, I cannot recall when title was issued to the plaintiff. I did not know that the history of the title dates back to 1946. I still maintain that the title in favour of the 5th defendant is invalid.... It was found that the deed plan used by Caroget Investment Limited was fake. A deed plan ceases to exist upon amalgamation of a property…The property claimed by the 5th defendant did not exist as it was not available. I could not understand why the City Council was claiming the land yet it had approved amalgamation to an individual in 1988.."

Edwin Muroko Wafula, the Registrar of Titles, in whose custody the title documents are entrusted, traced the history of the suit property to 1946 and affirmed to the court that from the perusal of his records, the 1st respondent was the registered owner of the suit property; that its application and approval for the extension of the lease was on the register, endorsed by the Commissioner. He was also unequivocal that;

"It is the plaintiff's title which is genuine. The deed plan which generated the 5th defendant's title was not genuine….The 5th defendant came into the picture much later. The City Council of Nairobi was claiming that the property belonged to them. As at the time this letter was written, the property was registered in the plaintiff's name…..It is the lands office which gave both titles. The deed plans originated from the Survey Office".

From the Survey Office, Priscillah Njeri Wango confirmed that the only genuine deed plan was that held by the 1st respondent and that the deed plan held by the appellant did not emanate from the office of the Director of Survey.

She enumerated the following anomalies in the deed plan presented by the appellant. The deed plan, according to her, for the resultant parcel upon amalgamation was number 228330 and the amalgamated parcel became L.R.1870/V/147. Its size was given as 3.069 Ha (approximately 7.583 acres). Yet that very deed plan was relied on by the appellant. It also bore the same number 228330, ignoring the fact that it related to a single parcel that had disappeared into the amalgamated whole. The acreage in the questioned deed plan was shown as 2.105HA (approximately 5.262 acres), which was the size before amalgamation. Because the deed plan number was the same the dimensions ought not to have been different. The Commissioner had to open a temporary file No. 259341 after the main file No. 34027 which contained correspondence and other documents in respect of the suit property disappeared from the land registry. The signature of the Surveyor named on the deed, P. Gatimu, did not belong to him. Whereas the original deed plan, 228330 was prepared by D. Nyika, a licensed surveyor, the one presented by the appellant did not disclose who prepared it. Finally, the registration format in the questioned deed plan was said not conform to the normal format where the registration details are on the right margin, starting with the Land Reference and the area in Hectares.

All the Government offices, as illustrated above were united on the irregularities in the issuance of the document of title to the appellant. The transfer of the suit property to the appellant was subject of investigations by the then Criminal Investigations Department, the Office of the Attorney General and the former Kenya Anti-Corruption Commission. These agencies were equally unanimous. For example, the Kenya Anti-Corruption Commission in its report to the Commissioner stated that;

> **" It is evident that the property in dispute was at all material times private property and there was no room for its allocation by the Council in 1997. There has been an unbroken chain of private ownership of the disputed land since 1946 and it is not clear why the City Council of Nairobi purported to allocate the land to Caroget Limited in 1997. The issuance of another title document to the City Council of Nairobi therefore resulted in the creation of a parallel title with respect to the same property".**

We clarify that reference to 1997 is erroneous as the allocation to Caroget Investments Limited was in 2007. The Criminal Investigations Department in their many letters that were no doubt geared to muddle the situation in favour of the appellant was at least consistent that both leases over the suit property were issued by the Commissioner; and that the second title was suspect. In the final letter of 27th September, 2007 the Provincial CID officer, Nairobi Area stated that;

> **"What was in doubt was how the double allocation was done, which cannot be effectively adjudicated by fraud investigations but by the High Court with a jurisdiction to revoke a title and determine which among the two titles was lawful".**

In the office of the Attorney General, a similar scheme to sweep under the carpet the anomalies identified above, and to sanitize the second grant appeared to have been detected by the former Director of Public Prosecutions, Mr. Keriako Tobiko. He dismissed an earlier letter by Mr. B.L. Kivihya, an officer in his office who had purported to direct the closure of investigations file for the reason that there was double allocation which issue could only be adjudicated by the High Court in its civil jurisdiction. In his letter of 9th June, 2009, Mr Tobiko, suspecting interference with the investigations, directed the Director, CID to disregard the advice to close the file and instead to go ahead and record statements from various persons including the Provincial CID officer, Nairobi Area who had written letters in the matter. The focus of investigations turned more to how the suit property was registered in the appellant's name.

With the foregoing and the explicit and obvious admission by the Council that it had no interest in the suit property, the foundation of the appellant's title dissipated. The suit property was not available for alienation, especially after it had been acquired by the 1st respondent many years before the issuance of the second grant and indeed after its subsequent amalgamation with another property. The 1st respondent had surrendered to the Government the initial grant by a deed of surrender dated 2nd August, 2001 which was duly registered on 13th August, 2001 in exchange for a new grant I.R. number 86672 which was also registered.

From the evidence on record and what we have said above, this was not a case of double allocation but one of shameless outright typical Kenyan-style land grabbing, where, the appellant, in collusion with some of the officials working for the 2nd to 5th respondents, attempted to alienate private land that already had been alienated.

Section 20 of the repealed Registration of Titles Act directs that land comprised in a grant issued under the Act would only be subject to the provisions of the Act, and;

> **"shall not be capable of being transferred, transmitted, mortgaged, charged or otherwise dealt with except in accordance with the provisions of this Act, and an attempt to transfer, transmit, mortgage, charge or otherwise deal with it, except as so provided, shall be void and of no effect".**

Under the Act, where land comprised in a grant has been transmitted, the registrar is required, on payment of the prescribed fee, to issue a certificate of title in favour of the new proprietor and ensure that all previous certificates of title in respect of that land are delivered up to the registrar and cancelled by him.

See **section 22** of the Registration of Titles Act. **Section 23(1)** of the Act is significant. It stipulates that;

> **"The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party".** (Our emphasis).

This section has been the subject of interpretation in numerous cases. It gives an absolute and indefeasible title to the owner of the property. This presumption of indefeasibility and conclusiveness of title is rebuttable only by proof of fraud or misrepresentation, and only if it is proved that the buyer was involved in such fraud or misrepresentation. It has also been observed by the cases that the land registration system in Kenya is largely a product of the Torrens system of registration – a system which places premium on the accuracy of the land register and insists that the register must mirror all registrable interests affecting land; that the Government, as the keeper of the master record of all land and their respective owners, guarantees the accuracy of that record and assures all of the indefeasibility of the rights and interests shown in the register against the entire world.

Section 2 of the repealed Registration of Titles Act defines "fraud" in the context of the Act 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."**

Because of the seriousness of allegation of fraud, a criminal act, the burden of proof is on the party who alleges it and the standard of proof is more than a mere balance of probabilities. This point was recently explained by this Court in **West End Butchery Limited V. Arthi Highway Developers Limited & 6 others,** (2015) eKLR thus;

> **"Section 23 of the Registration of Titles Act is still the applicable law in this regard, and this court has already made several findings on its applicability in this case. It has been found that there was complicity by the 1st defendant in the 2nd and 3rd defendants' fraud specifically with respect to the subsequent sale and transfer of the suit property to the 5th, 6th and 7th defendants. It has also been found that because of the 2nd and 3rd defendants' fraud, the 1st defendant cannot invoke the principle of indefeasibility of title. It therefore follows that the 1st defendant had no interest or title to the suit property that it could lawfully pass on to 5th, 6th and 7th defendants and it was therefore not a proprietor of the suit property within the meaning of section 12(1) of the Registration of Titles Act. It is therefore the finding of this court that for these reasons the 5th defendant cannot invoke the principle of indefeasibility of title with respect to the titles transferred to it by the 1st defendant for L.R. numbers 7149/112. 7149/113 and 7149/114, neither was any interest in the suit property or sub-divisions thereof passed on to the 6th and 7th defendant pursuant to the sale agreements entered into with the 1st defendant."**

From the testimonies of the witnesses and documentary evidence presented at the trial, the suit property has had a long but unbroken history of private ownership from 1946. At the time the Council claimed to own the suit property the register reflected the 1st respondent as the registered proprietor. That alone would have made it obvious to the appellant, and indeed the whole world, with the exercise of due diligence that the Council had no proprietary interest over the suit property. The 1st respondent, on the other hand had a certificate of title which in law was conclusive evidence of its proprietorship over the suit property. It was also in possession of the suit property, having demolished old structures to prepare for construction of new ones. The appellant forcefully ejected the guards deployed by the 1st respondent to provide security. No fraud on the part of the 1st respondent in the process of acquisition of the suit property has been suggested. There has never ever been any challenge of the process through which the 1st respondent acquired the suit property. On the other hand, what is on record and upon which the court below based its decision was a consistent and material evidence that the 1st respondent followed every step required by law to purchase the suit property; applied and obtained approval for amalgamation and extension of the term of the lease. It was untenable for the appellant to question the amalgamation and extension of the term of the lease. Where two parties assert competing proprietary interest over one parcel of land, each must produce evidence in support of his claim. This Court (Platt, Apaloo & Masime, JJA) recognized this in **James Henry Mundiar t/a Kabarak Development Services V. Tradewheel Kenya Ltd** (1987) eKLR, and said;

> **"But the plaintiff cannot attack the relative weakness of the Defendant's title by pleading *just tertii,* namely that the Council owns the land. The Plaintiff can only attack the position of the Defendant, on the strength of some title of its own. (See *The Law of Real Property* by Meggary and Wade, 4th Ed pp 1005 to 1009.)".**

This dictum was applied in **Samuel Otieno Otieno v Municipal Council of Malindi & another** [2015] eKLR.

Put differently, a claimant will succeed on the strength of his own case and not on the weakness of the opponent's case, save to add that the standard of proof in a case for declaration of title is on a preponderance of evidence.

The totality of what we have said is that the 1st respondent's title was unimpeachable while that of the appellant was tainted with fraud, illegalities and irregularities. The lightning speed with which the entire transaction was executed, from the moment the suit property was transferred to the appellant to the point it was set to sell it to White Horse Investment Limited, all within four months, smacked of fraud, bad faith and deceit. From the Council to the appellant and from the appellant to White Horse no title could be passed because *ex nihilo nihil fit* – out of nothing comes nothing.

The situation in this case is the complete opposite of what the High Court (Lenaola, J as he then was) alluded to in the following passage in the case of **Gitwany Investment Limited V. Tajmal Limited and 3 others Nairobi HCCC [2006] eKLR,**

> **"…… in the words of the Court of Appeal in Wreck Motors Enterprises vs Commissioner of Lands, C.A. No. 71/1997 (unreported): - is the "grant [that] takes priority. The land is alienated already." Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity".**

See also **Wreck Motors Enterprises V. Commissioner of Lands & 3 others** (1997) eKLR.

In the light of the clear facts in this dispute, we do not know what drove the 1st respondent into an attempt to enter into a settlement agreement with the appellant. However, according to the appellant's submissions, the negotiated settlement fell through for two reasons, first, the 1st respondent's advocate demanded to be paid part of the settlement sum; second, is that the 1st respondent's advocates' demanded to be paid Ksh. 30,000,000.00 from the settlement sum. For the reason that it became stillborn, and since it was made on a "without prejudice" basis, the agreement was of no effect and no inference could be drawn from it.

It is equally of no consequence that during the period the appellant occupied the suit property it paid land rents to the Commissioner and rates to the Council.

The final matter we propose to address before we turn to the cross-appeal, is the award of general damages for trespass. In the first place we reiterate that, in an act of impunity the appellant, with a questionable title forcefully invaded the suit property, evicted the 1st respondent and occupied it for over 10 years. The invasion was unlawful and the taking of possession of a privately owned property amounted to trespass. The 1st respondent's efforts to get assistance from the police was futile compelling it to institute an action for trespass.

In awarding Kshs. 100,000,000 the learned Judge, as we have seen earlier, considered several factors, including the appellant's own

valuation of the suit property undertaken on 17th June, 2013 and estimated at Kshs.1,800,000,000 given, the fact that the 1st respondent was kept off its property for over 10 years, the size of the suit property, its strategic location, the lost investment opportunities to the 1st respondent, the fact that prior to the invasion by the appellant, 1st respondent had failed for over 14 years after acquiring the property to carry out any development on it. In a passage from the judgment which we reproduced earlier the Judge reasoned that this failure to develop the property for this long period did not;

> **"mean that the property would have remained undeveloped until now. Considering the location and value of the suit property I assess general damages in the sum of Kshs. 100,000,000".**

In his lead judgment in the case of **Moya Drift Farm Ltd V. Theuri** [1973] EA 114, Spry, V.P, emphasised the import of **section 23** aforesaid; that the absolute and indefeasible ownership of a property must, of necessity, entitle the rightful owner to evict a trespasser wrongly on his land.

In an action for trespass, all a party needs to prove is that he has suffered damage and loss as a result of the trespass. In assessing damages, no mathematical or scientific formula is required. For ourselves, we think the learned Judge did not misdirect himself in taking into account all the factors he considered which we have set out above.

We can do no better than to restate what this Court said in **Butt V. Khan** [1981] KLR 349, about its jurisdiction in matters of award of damages; that:

> **"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge preceded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."** *per* E.J.E Law, J.A.

We are not persuaded that the learned Judge took into account any material which he ought to have avoided or that he failed to consider something material, as a result of which he arrived at an erroneous decision.

In its cross-appeal the Commissioner has asked that the impugned judgment be **"varied or reversed to the extent"** that the Judge erred in holding him liable for issuing the second title yet he was not aware that the title was illegal at the time and therefore it was equally in error to have been condemned to pay costs yet upon discovery of the fake title documents, it successfully revoked the appellant's title; that it had had no intention to mislead the court. For those reasons, the Commissioner has prayed that this Court declares that he was not aware of any illegal transactions made at the time the title documents were issued and that the order for costs against it ought to be set aside.

The learned Judge entered judgment in favour of the 1st respondent against the appellant and the 2nd to the 5th respondents. The judgment was specific in its terms, one of which was that the costs of the case would be borne by **"the First and Fifth Defendants",** that is, the Council and the appellant, respectively. Apart from being found liable to the 1st respondent, 6 out of the 11 specified terms were directed at the Council. The letter of allotment to it was declared unlawful, irregular and void *ab initio.* The grant to the Council was found to have been issued fraudulently and irregularly and the lease between the Council and the appellant was void.

As a result an order was issued directing the rectification of the register by cancelling the second grant and the leases issued to the Council and the appellant, respectively. The two were also ordered to deliver vacant possession of the suit property to the 1st respondent. The genesis of the whole dispute was the Council's letter demanding registration as the proprietor of the suit property, when there was absolutely no basis for that claim.

It was on the strength of that baseless claim that the Commissioner issued a letter of allotment Ref No. 259341/4 to the Council on 14th April, 2007 and thereby triggered the whole process that would later culminate in the Commissioner registering the appellant as proprietor of LR 1870/V/6. This parcel, the Council ought to have known did not exist at this time.

Therefore, it is ludicrous for the Council to plead its innocence and to rely on its belated action, the revocation of the appellant's title, to avoid blame.

In short, both the appeal and the cross- appeal are bereft of any merit and are accordingly dismissed. The costs of the appeal to be borne by the appellant and the 2nd to the 5th respondents. We award no costs on the cross-appeal.

Dated and delivered at Nairobi this 6th day of December, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR