



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 127 OF 2014

(CORAM: WAKI, KARANJA & KIAGE, JJA)

BETWEEN

**MARGARET WAIRIMU WARIMA
APPELLANT**

AND

PHYLIS WANJIRU THAIRU1ST RESPONDENT

GRACE WANGECHI NDIRANGU2ND RESPONDENT

NAIROBI CITY COUNCIL3RD RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Sitati, J.) dated 17th March, 2010

in

H. C. C. No. 2670 of 1998)

JUDGMENT OF THE COURT

1. The dispute herein relates to a piece of land in Umoja Estate Nairobi known as **Nairobi/Umoja Block 107/1/CU/999** (hereinafter „**the disputed plot?**). Before 1988, it was held by the Nairobi City Council (NCC) as the head lessee and it was one of several units in Umoja Inner Core earmarked for a World Bank-funded housing project to assist city residents. A toilet and one room were constructed on each unit and, through a process of balloting the units were allotted to various applicants who would complete the development on the plot and repay a small loan of Sh. 75,000 by monthly installments of Sh. 730.

2. The disputed plot was balloted for and allocated to the 2nd respondent herein, **Phylis Wanjiru Thairu** (Phylis) on 16th September, 1988. It would appear that Phylis soon ran into difficulties in repaying the loan, judging by demand notices served on her by NCC in May 1989, and wanted to sell and transfer her interest in the plot. At that time she was working with M/S DT Dobie and one of her work mates was **Hezron Ndirangu** (hereinafter „**the deceased?**). The deceased was at the time cohabiting with the appellant herein, **Margaret Wairimu Warima (Margaret)** as his girlfriend since 1985. Phylis was then introduced by the deceased to Margaret and in July 1989 she orally agreed to sell the disputed plot to her for Sh. 95,000. Margaret paid her in cash Sh. 20,000 and subsequently gave another Sh.75,000 to the

deceased who issued a cheque to Phylis on 21st July, 1989 to complete the purchase. The agreement between Phylis and Margaret was reduced into writing on 21st August, 1989 and Margaret took over the responsibility of repaying the monthly loan and other outgoings on the plot to NCC, the third respondent. She produced supporting receipts for those payments. She was also given vacant possession and commenced further developments thereon from January 1990. By 1996 she had built a bedroom, kitchen, sitting room and an extension to the main house which she rented out as a shop. She called witnesses to confirm those developments.

3. The cohabitation and friendship between Margaret and the deceased came to an end in 1996 when they fell out and the deceased left. Unknown to Margaret, the deceased approached Phylis and they signed another sale agreement between them on 27th November, 1997 to purchase the same property for Sh. 89,000. They in fact signed two such agreements drawn by an Advocate who could not explain why one of the agreements described the property sold while the other did not, but the advocate simply said the parties wanted it that way. The advocate did not see any payment being made to Phylis as stated in the agreement but she signed the agreement to confirm receipt of the money on that day. Phylis also gave the deceased an irrevocable Power of Attorney dated 26th March, 1998 to do anything and everything on the disputed plot and execute all instruments that may be necessary. With that Power of Attorney, the deceased approached NCC and paid off the remaining balance of the loan, Sh.38,000, and started processing other documents to facilitate the assignment of the lease to him by NCC.

4. When Margaret got wind of these maneuvers on the property, she approached NCC in October 1998 and was informed that someone had paid the balance of the loan in full and was given the transfer forms for completion on 13th July, 1998. She lodged an objection with NCC and proceeded to the High Court where she filed suit on 30th November, 1998 against Phylis, the deceased and NCC alleging illegality and fraud. She claimed ownership of the disputed plot and sought a declaration that any documents signed by Phylis in favour of the deceased were invalid, null and void. Contemporaneously, she filed an application for an injunction to prevent interference with her possession of the disputed plot and to prevent the transfer or any other disposition of the disputed plot by Phylis and the deceased. She sought a further order against NCC restraining it from processing any transfer to the deceased or in any other manner dealing with it until the hearing and determination of the suit.

5. The deceased died of natural causes on 24th January, 1999, about two months of the filing of the suit. Before he died he had sworn an affidavit opposing the application for injunction and also filed a joint defence with Phylis on 10th December, 1998. In both the defence and the affidavit in reply, the deceased denied that he and Margaret were married, as she had asserted in the plaint, but conceded that they were intimate friends who had cohabited for several years as his girlfriend with an intention of entering into a marriage but it never happened. He and Phylis also conceded that there was a written agreement between Margaret and Phylis for purchase of the disputed plot in 1989 but contended that she never paid the purchase price and therefore the sale agreement was rendered null and void. He also conceded that possession was given to Margaret but contended that he is the one who made the developments on the property. He further swore that the agreement he entered into with Phylis in 1997 was valid and he was entitled to have the property conveyed to him after he paid the balance of the outstanding loan to NCC. NCC for its part denied knowledge of any transactions made between any of the three parties contending that it was bound to receive any monies paid lawfully towards the disputed plot. The alleged illegality and fraud were denied by all three.

6. At the first appearance in court for the application for restraining orders on 3rd December, 1998, counsel for both Phylis and the deceased stated that he had no objection to the application and **Onyango Otieno, J.** (as he then was) recorded an order for maintenance of the *status quo* when the application was adjourned. It was extended on 18th December, 1998 by **Aganyanya, J.** and then again on 19th April, 1999 when counsel disclosed the deceased's death. **Kuloba, J.** on that day ordered:

“By consent stood over generally; interim orders extended sine die unless otherwise ordered or varied on application”.

Finally, on 10th June, 1999, **Aluoch J.** (as she then was) recorded the following consent order:

“The present status quo ie if the transfer has not been signed, the same should be stayed awaiting further orders of the court”.

7. It is not clear from the record what happened between the order of 10th June, 1999 and 14th December, 1999 when **Kasanga Mulwa, J.** made an order for dismissal of the suit for want of prosecution. However, when the circumstances leading to the failure to prosecute were subsequently explained to Kasanga Mulwa, J. he reinstated the suit three months later on 14th March, 2000.

8. Unknown to Margaret, the deceased had a common law wife in his rural area in Nakuru where she lived while the deceased was in Nairobi. That was **Grace Wangechi Ndirangu**, the 2nd respondent before us (**Grace**) who was married in 1972 under Kikuyu Customary Law. After Margaret and the deceased parted ways

in 1996, he went to the AIC Church in Mbaruk and solemnized his marriage to Grace on 30th November, 1996. A copy of the marriage certificate was produced in evidence. Grace knew nothing about the disputed plot before she collected her husband’s documents upon his death and found the sale agreements dated 27th November, 1997 and other documents obtained from Phylis. The deceased never informed her about the case in court before he died but she was informed by his advocate that the case had not been finalized. On 7th July, 1999, she and her son obtained a temporary grant of Letters of Administration in respect of the estate of the deceased and she proceeded to process the transfer of the plot through NCC who issued her with a certificate of lease on 23rd March, 2001. She confirmed that Margaret was in possession of the disputed plot and that she had unsuccessfully attempted to use auctioneers to evict her on the pretext that she was a tenant.

9. The plaint had to be amended to enjoin Grace as a party and to give particulars of the alleged fraud by the deceased, Phylis, NCC and Grace. This was done in June 2002 and Re-Amended in September 2003 to include an averment that there has not been any other suit between the parties over the disputed plot. No other pleadings were filed thereafter, and no issue thereon was raised, until the hearing commenced on 15th July, 2003 before **Ondeyo, J.** who heard Margaret in full before retirement. **Mutungi, J.** took over and heard the three witnesses called by Margaret; the evidence of Grace and the lawyer who drew up the sale agreement between Phylis and the deceased; an employee from NCC; and an expert witness called by the court itself to explain the process of conveyancing in NCC. Phylis never attended court to give any evidence. Mutungi, J. finally admitted the written submissions made by counsel on both sides but he too retired before writing and delivering the judgment. That mantle fell on **Sitati, J.** who was appointed by the Chief Justice to peruse the file and write and deliver the judgment and she did so on 17th March, 2010.

10. In her judgment, Sitati, J. lamented about the total lack of transparency in the way transactions were done between the parties. She also wondered why Phylis, who would have shed light to the chain of events leading to the issuance of a certificate of lease to Grace, did not testify. Nevertheless, the learned judge framed several issues for determination and made the following findings, in summary:-

a) That the lawful owner of the disputed plot was Grace who had a certificate of lease issued on 2nd March, 2001.

b) That the ownership was absolute and protected under Section 27 and 28 of the Registered Land Act (now repealed).

c) That there was no binding agreement between Margaret and Phylis because the one exhibited does not show who drew it up, the names of the parties were written by hand, and it was not duly stamped.

d) That any transactions made pursuant to the said sale agreement were null and void.

e) That Margaret was never married to the deceased and there was no evidence that they lived as man and wife.

f) That although there were two agreements drawn between Phylis and the deceased, they were not fraudulent since, as explained by the advocate who drew them up, the parties wanted it that way in order to use one for avoidance of Stamp Duty payment.

g) Margaret was in possession of the disputed plot since early 1990 but she was a tenant alongside other tenants.

h) There was no evidence that Margaret purchased the building materials for the developments made on the disputed plot although she may have been on site when the deceased carried out the developments.

i) The transfer of the disputed plot from Phylis to Grace was legal, procedural and regular and it was a full defence to the claim by Margaret.

The entire suit was dismissed thus provoking the appeal before us.

11. Eight grounds were laid out by **M/S W. G. Wambugu & Co. Advocates** for Margaret and were canvassed through written submissions as agreed between counsel. The following issues, which may also be summarized, were raised and argued:-

a) The learned Judge erred in failing to find, as submitted, that there was no defence filed by any of the defendants to the pleadings on fraud and the particulars given thereunder in the Re-Amended plaint and therefore, by dint of **Order 6 rule 9(3)** of the **Civil Procedure Rules (CPR)**, all the defendants were deemed to have admitted the fraud. The case of **Pharmaceutical Manufacturing Co vs. Novelty Manufacturing Ltd [2001] eKLR** was cited in aid.

b) Fraud was in any event proved to the standard set in the case of **Koinange & 13 Others vs. Koinange [1986]KLR 23** because:

i. The plot was transferred contrary to a court order prohibiting any transactions on it and against express objections filed with NCC.

ii. The transfer was contemptuous and in breach of the equitable doctrine of *lis pendens* since Grace was made aware of the pending suit soon after the deceased's death. The case of **Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another [2015] eKLR** applied.

iii. The transfer was based on two agreements drawn and executed on 27th November, 2007 the fundamental differences of which the drawing advocate could not explain or authenticate payment of any purchase price. They were fake agreements meant to defraud Margaret.

iv. Phylis conveniently avoided giving evidence and the presumption was that it would have been adverse to all the defendants and favourable to Margaret.

v. The expert witness from NCC confirmed that the transfer of the disputed plot had not been regularly processed through the relevant organs of NCC which was awaiting the conclusion of the court case and therefore any certificate issued did not convey any valid title or interest to the holder.

c) The learned judge was wrong to hold that a certificate of Title or any land Title obtained by fraud or illegality is protected under the law. On the contrary, the law frowns on fraud and illegalities. See the case of **Festus Ogada vs. Hans Mollin [2009] eKLR**.

d) The agreement between Margaret and Phylis had all the ingredients of a valid sale agreement

including the signatures of the parties, acknowledgement of payment of the purchase price and loan repayments, putting the purchaser in possession and allowing major developments thereon. The agreement was also admitted by both Phylis and the deceased, the only contention being want of payment of the purchase price, which Margaret proved. The learned Judge erred in dismissing it summarily.

e) There was admission by the deceased in sworn affidavits that he was intimately involved with Margaret for several years and had intentions of marrying her but they fell out. The learned Judge did not sufficiently appreciate this evidence before deriding Margaret as having lied about their relationship.

12. In their short written submissions, the advocates for Phylis and Grace, **M/S Rombo Company**, basically agreed with the findings made and orders given by Sitati, J. They agreed that the property was owned by Grace because she had the certificate of lease and was therefore protected under the Registered Land Act; that the transfer of the disputed plot was regular as there was no court order preventing it; that the agreement between Margaret and Phylis was a nullity because it did not comply with the **Advocates Act** and the **Law of Contract Act**; that the agreement between the deceased and Phylis was not fraudulent; that the disputed plot was developed and Margaret was in possession but there was no proof that she carried out the developments; and that the claim by Margaret had no basis at all.

13. We have re-evaluated the evidence on record in the manner of a retrial, and considered the submissions of counsel and the law in order to arrive at our own conclusions as we must on a first appeal. That power is donated under **Rule 29(1)(a)** of the **Court of Appeal Rules, 2010**. Ordinarily we would not differ lightly with the findings of fact by the trial judge if they were based on the court's observation and assessment of the credibility of witnesses, but no witnesses appeared before the learned Judge who wrote the judgment in this matter. We therefore have considerable latitude to make our own conclusions on the recorded evidence.

14. In our view, the germane issues that are dispositive of this appeal are four:-

a) Whether the failure by the respondents to file amended defences to the Re-amended plaint amounted to admission of fraud.

b) Whether the agreement between Phylis and Margaret was valid and enforceable or was null and void.

c) Whether the transfer of the disputed plot to Grace was vitiated by fraud or was protected under the Registered Land Act, Cap 300 (now repealed).

d) What are the appropriate remedies consequent upon the findings on the above issues.

15. The first issue was raised in the written submissions of counsel for Margaret and was elaborately set out in the judgment of Sitati, J. But there was no decision on it. The reason, we think, is because it was not among the 9 issues framed for determination by the Court. Nevertheless it is a germane issue which has again been raised before us. The record shows, and there is no denial of it, that after the filing of the initial plaint in November 1998, there were defences filed by the three defendants in the suit traversing the averments made by the plaintiff, including allegations of fraud and illegality. But there were no particulars of fraud pleaded and so the pleading was bad in law.

16. That realization came four years later in June 2002 when the Margaret made an application to amend the plaint, not only to enjoin Grace in place of the deceased, but also to particularize the fraudulent acts of the three defendants as follows:-

“(a) Purporting to enter into a sale agreement over the suit premises while fully aware there was a valid sale agreement between the plaintiff and 1st defendant for which consideration had been given and in respect of which parties had partly performed.

- (b) Colluding to transfer the suit premises to the deceased while fully aware that the 1st defendant had received full consideration for the suit premises from the plaintiff.
- (c) Purporting to enter into a sale agreement in respect of the suit premises without the knowledge or consent of the plaintiff while fully aware that the plaintiff was the beneficial owner of the said premise.
- (d) Conspiring to defraud the plaintiff and to dispossess her of the suit premises.
- (e) Causing the transfer of the suit premises to the 2nd defendant while fully aware of a valid court order to maintain the status quo in relation to the transfer.
- (f) Preparing the said transfer without the knowledge or consent of the plaintiff while fully aware that the issue of ownership was pending before the court for determination.
- (g) Conspiring to defeat the course of justice.
- (h) Conspiring to defraud the plaintiff and to dispossess her of the premises.”

The following year, there was a Re-Amendment which is not relevant here.

17. The record further shows, and it is not contended otherwise, that there was no further pleading filed by the three defendants subsequent to the amendment particularizing fraud. It is thus contended by the appellant that those particulars of fraud were deemed to have been admitted; and the response by the respondents was that the original traverse was a sufficient answer to the allegations on fraud. The law is clear on the issue and is spelt out in **Order VI rule 9** of the CPR [*now Order 2 rule 11*] as follows:

“9 (1) Subject to subrule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it.

(2) A traverse may be made either by denial or by a statement of non-admission and either expressly or by necessary implication.

(3) Subject to subrule (4), every allegation of fact made in a plaint or counter-claim which the party on whom it is served does not intend to admit shall be specifically traversed by him in his defence or defence to counter-claim; and a general denial of such allegations, or a general statement of non-admission of them, shall not be a sufficient traverse of them”.

18. **Rule (1)** relates to any allegation made in any pleading by any party while **Rule (3)**, which is relevant in this case, is specific on plaints and defences in relation to specific averments of fact. There are many authorities including the ***Pharmaceutical Manufacturing Co. case (supra)*** relied on by the appellant, which have construed the rule to the effect that failure to traverse or sufficiently traverse a pleading under **sub-rule (3)** amounts to admission of those facts. We find no reason to construe the rule otherwise and we must therefore find, as we now do on the first issue, that the failure by the respondents to deny the particulars of fraud amounted to admission thereof.

19. Was fraud proved regardless of the failure to deny it in the pleadings? We shall answer that question as we deal with the second and third issues together. The sale agreement between Margaret and Phyllis was declared null and void by the High Court because it was not drawn by an advocate and the names of the parties were inserted by hand on a typed document. We may reproduce it fully:

“I PHILLIS W. THAIRU of P. O. Box 52704 NBI ID No 1879550/64 have sold my Umoja II Plot No 999 to MARGARET W. WARIMA of P. O. Box 32990, NAIROBI ID No 1986559/64 for amount of Kshs 95,000/- (Kenya shillings ninety five thousand only). The plot is situated at Umoja II zone six type “CORE UNIT” which is funded by Housing Development Nairobi City

Commission. By this agreement which I have read and understood I cease to be the owner of the above Plot which now belongs to MARGARET W. WARIMA and I have no other claim whatsoever on the Plot. I also agree to give my full assistance for any correspondence or transfer of ownership concerning the plot when such time comes.”

It was executed by Phylis in the presence of her husband, and by Margaret in the presence of the deceased, both of whom signed as witnesses.

20. Contracts for the disposition of an interest in land are governed by **Section 3 (3)** the **Law of Contract Act, Cap 23** which commenced in 1961 but has been amended three times in 1990, 1996, and 2002. As it existed when the agreement between Margaret and Phylis was signed on 21st August, 1989, **Section (3) (3)** stated as follows:-

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it:

Provided that such a suit shall not be prevented by a reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

(i) has in part performance of the contract taken possession of the property or any part thereof; or

(ii) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

21. There was no reference to those provisions of the law by the High Court before summarily dismissing the sale agreement as null and void.

22. There was no requirement in law that the agreement be drawn by a lawyer or that it be typed out as suggested by that court. For all intents and purposes, the agreement complied with the law as it was at the time. At all events, the agreement was conceded by the seller and the deceased who merely contended that the purchase price was not paid. Furthermore, there was evidence that Margaret was put in possession of the disputed plot and she testified and called three witnesses to confirm it, that she carried out developments on the plot between 1990 and 1996. One was **Mrs. Veronica Gateri (PW2)** the supplier of the building materials who confirmed that she was being paid by Margaret. The other was **Samson Otieno (PW3)**, the building contractor who confirmed that he was given the contract by Margaret and received payments from her. The last witness was the next door neighbor, **Mburu Kinyanjui (PW4)** who assisted Margaret in looking for labourers and provided her with storage space in his compound for building materials as she carried out the extensions. In all those years, Phylis never raised any complaint about non-payment of the purchase price and did not attend court to refute the evidence tendered by Margaret on oath that she paid to her the purchase price in two tranches of Sh.20,000 in cash and Sh.75,000 by cheque. Margaret also continued to pay the loan instalments on the plot and she had receipts issued by NCC to show for it. In the face of such evidence, the finding made by the High Court on the sale agreement had no basis and is quashed.

23. Having found that Margaret had a valid and enforceable agreement, was it open for the deceased to enter into another agreement with Phylis and for Grace to process the transfer of the disputed plot in her name? We answer that question in the negative for the following reasons: The agreement came 8 years after the first agreement and was entered into without the knowledge of Margaret. The lawyer who drew up the agreement, **Julius Ogamba (DW2)**, was unable to explain the necessity for the two agreements and the fundamental differences between them, only insinuating that the parties wanted to avoid payment of stamp duty. That would be unlawful. The lawyer did not see any payment of the purchase price being made to Phylis either. In all probability, the two workmates conspired to short change Margaret who had fallen out with the deceased one year earlier, and the purported agreement was a mere instrument of

fraud. Once again, Phylis did not avail herself in court to shed any light on these agreements and such conduct must be construed against her.

24. It was in evidence that as soon as she learned about the activities of the two, Margaret filed a complaint with NCC and proceeded to file suit in court. We have reproduced above various orders made by the court between 1998 and 2001 for maintenance of the *status quo* pending the determination of the case. The *status quo* throughout was that the disputed plot in the records of NCC was in the name of Phylis and Margaret was in physical possession of it. Despite such orders, and knowledge by Grace that the case was still pending in court, she managed to have the plot transferred in her name with the assistance of Phylis and some officers at NCC in March 2001. However, the officer from NCC called by the court as an expert witness, **Mr. Evans Mogire**, confirmed that the requisite procedures were not followed in transferring the plot, especially the mandatory approval by the Housing and Development Committee of NCC, which would not have approved the transfer owing to the case in court where NCC was a party. According to the witness, the property was still in the name of Phylis.

25. Apart from the court orders, which we find were operative at all times material to the suit, there is a common law doctrine of *Lis pendens* which is unaffected by statute and has been upheld by this Court. The common sense of it was explained by Lord Justice Turner in the case of **Bellamy vs. Sabine [1857]** 1 De J 566, as follows:-

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

26. In the case of **Mawji vs. US International University & Another [1976]** KLR 185, this Court stated thus:-

“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other.....Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore purchase made of a property actually in litigation pendete lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”

See also **Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another [2015]** eKLR.

27. We are satisfied on the basis of the evidence on record and the law, that Margaret discharged the burden of proof to a standard higher than a balance of probability, on the assertions of fraud pleaded in the amended plaint. What is the consequence of that finding? That is the last issue.

28. The High Court found that the Certificate of Lease issued to Grace dated 2nd March, 2001 was protected under **Sections 27 and 28** of the **Registered Land Act** except only if it was held in trust for Margaret which was not proved. The two sections in effect state that the rights of a registered proprietor of land registered under the Act are absolute and indefeasible and are only subject to rights and encumbrances noted on the register or overriding interests which are set out in **Section 30** of the Act. In some cases it has been held that the protection extends even to titles obtained illegally or through fraud. But Makhandia. J. (as he then was) in the case of **Mutete Ndonye vs. Muli Munyao & 4 Others [2012]** EKLR expressed the following view:

“I entertain no illusions whatsoever that such registration is not absolute and can be revoked or impeached in appropriate circumstances where there is obvious fraud, illegality and where a party is clearly bent on stealing a match on the other. A party cannot be allowed to benefit from her own mischief on account of the provisions of law. It is just harsh and unconscionable. I do not think that a plaintiff who has unlawfully and un-procedurally caused herself to be registered as the proprietor of the suit premises in this case, should be protected by court from her unconscionable act. This is good for the rule of law and accords well with the dictates of public policy. A court should not be called in aid of a party who is guilty of unlawful acts. In the circumstances of this case, I decline to entertain the thought that the aforesaid provisions were intended to protect fraud as perpetrated on the defendants by the plaintiff. Obviously it is against public policy and order, for a court of law to protect instances of fraud regardless of the justification.”

29. We have considerable sympathy for those sentiments. But the case before us is not about a first registration and that is where the High Court in this case went wrong. The first registered owner of the disputed plot was the Nairobi City Council. It was the head lessee. That is why Grace was issued with a Certificate of Lease because she was a sub-lessee. In that event, the same Act in **Section 143** empowers the court to interfere with registrations which are obtained by fraud or mistake. It provides thus:

“143(1) Subject to sub-section 2 of this Section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default”.

30. Grace was made aware by her Advocate of the pendency the case involving the disputed plot. NCC was certainly aware of the restraining orders issued by the court since they were parties thereto. Grace was not in possession and did not pay any consideration for the transfer and so **Section 143 (2)** does not apply. We have found that Phylis and the deceased conspired to defraud Margaret and that fraud as a whole was proved. In those circumstances, we find and hold that the High Court erred in upholding the sanctity of an interest in the disputed plot which was tainted with fraud. The certificate issued to Grace must be cancelled. We so order.

31. In sum, the appeal is meritorious and is allowed. The orders issued by the High Court are set aside and substituted with an order for Judgment in favour of the plaintiff in terms of prayers (a), (ai), (b) and (bi) of the Re-Amended plaint dated 25th September, 2003. The appellant shall also have the costs of this appeal and of the suit before the High Court. Orders accordingly.

Dated and delivered in Nairobi this 10th day of March, 2017.

P. N. WAKI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR