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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

LAND AND ENVIRONMENT DIVISION

CIVIL SUIT NO. 1400 OF 2004

TELPOSTA PENSION SCHEME REGISTERED TRUSTEES.....PLAINTIFF

VERSUS

INTERCOUNTRIES IMPORTERS AND EXPORTERS LIMITED.....1<sup>ST</sup> DEFENDANT

COMMISSIONER FOR LANDS.....2<sup>ND</sup>  
DEFENDANT

ATTORNEY

GENERAL.....3<sup>RD</sup> DEFENDANT

JUBILEE INSURANCE COMPANY LIMITED.....4<sup>TH</sup> DEFENDANT

PARK AVENUE INVESTMENTS LIMITED.....5<sup>TH</sup> DEFENDANT

(BY ORIGINAL ACTION)

PARK AVENUE INVESTMENTS  
LIMITED.....PLAINTIFF

VERSUS

TELPOSTA PENSION SCHEME REGISTERED TRUSTEES.....1<sup>ST</sup> DEFENDANT

INTERCOUNTRIES IMPORTERS AND EXPORTERS LIMITED.....2<sup>ND</sup> DEFENDANT

JUBILEE INSURANCE COMPANY LIMITED.....3<sup>RD</sup> DEFENDANT

TRUST BANK LIMITED (IN LIQUIDATION).....4<sup>TH</sup> DEFENDANT

(BY WAY OF COUNTERCLAIM)

JUDGMENT

INTRODUCTION

1. This matter is long winding dating back to more than a decade ago. The property in question is a piece of land measuring about **0.7837** of a hectare (**1.930acres**), known as **Land Reference No. 209/13238 (originally LR 209/2397)** located at Muchai road off Ngong Road, Nairobi and whose open market value as at February 2010, was put at **Ksh. 240,000,000/** (referred herein as “**the suit property**”). Multiple transactions have been carried out with regard to the suit property over time, hence

the various parties, claims and counterclaims to this suit.

2. The plaintiff, Telposta Pension Scheme Registered Trustees (referred in this judgment as “**Telposta**”) was formed on 17<sup>th</sup> September 1999 by Trust Deed with its primary duty being to pay pension benefits due to the workers of Telkom Kenya Ltd.

3. Telposta is aggrieved by the action of the Commissioner of Lands in allocating the suit property to a private entity, namely Park Investments Limited, the 5<sup>th</sup> defendant, and the subsequent dealings thereof. Telposta contends that it is the sole owner of the suit property by virtue of a vesting Order issued in 2001 by then Minister of Finance, pursuant to the provisions of the Kenya Communications Act, 1998 (No 2 of 1998) (*now repealed*).

4. The suit was initiated before this Court through a Plaint dated 23<sup>rd</sup> December 2004. The Plaint was subsequently amended on 10<sup>th</sup> February 2005 and 20<sup>th</sup> May 2005. It is the basis of the Further Amended Plaint that this matter rests.

## **BACKGROUND**

5. The background of the suit property and controversies surrounding it can be deciphered from the uncontroverted evidence before Court as follows: The suit property was originally under occupation and ownership by East African Community Common Services later East African External Telecommunications Company Limited(now defunct) and subsequently vested in the Kenya Posts and Telecommunications Corporation, the Plaintiff’s Predecessor. Telposta and its predecessors have been in occupation of the suit premises to date.

6. The Minister of Transport and Communications published in the Kenya Gazette Supplement of 11<sup>th</sup> March 1988, Legal Notice Number 133 of 1988 under which, all movable and immovable property vested and possessed by East African External Telecommunications Company Limited (‘EACS’) as at 3<sup>rd</sup> June 1982, were vested on the now defunct Kenya Posts and Telecommunications Corporation, Telposta’s predecessor.

7. In the year 2001, then Minister for Finance published in the Kenya Gazette of 14<sup>th</sup> September 2001 a Vesting Order conferring all movable and immovable assets of the Kenya Posts and Telecommunications Corporation (EACS’s successor) on the Trustees of Telposta Pension Scheme. The Notice was to take effect retrospectively beginning 1<sup>st</sup> July 1999. According to the Gazette Notice, the suit property was vested in Telposta to enable it discharge the Pension liability in respect of:

a. Any person who on **30<sup>th</sup> June 1999**, was entitled to the receipt of a pension from Kenya Posts & Telecommunications Corporation.

b. The employees of Communication Commission of Kenya, Postal Corporation of Kenya and Telkom Kenya Limited.

8. In the mean time, in the year 1996, the Commissioner of Lands allocated the suit property (then Land Reference No. 209/2397) to the 5<sup>th</sup> Defendant, Park Avenue Investments Limited (“**Park Investments**”) vide a letter of allotment dated 30<sup>th</sup> April 1996. A Grant (I.R. 69308) dated 1<sup>st</sup> May 1996 was issued for a term of 99 years and was subsequently registered in favour of the Park Investments. Upon survey, the suit property received a new **Land Reference Number-209/13238**.

9. A year later, Park Investments charged the suit property to Trust Bank Limited (in liquidation)

(hereafter referred to as “**the Bank**”) as security for a loan facility, in the principal sum of Kshs 40 Million. A charge dated 10th June 1997 in favour of the Bank was annexed.

10. On or about end of year 2001, Park Investments defaulted in repaying the loan whereupon the Bank, in exercise of its statutory power of sale, advertised the suit property for sale by public auction. The Bank sold the property to the 1st defendant, **InterCountries Importers and Exporters Limited** (hereafter ‘**1st defendant**’) for a consideration of **Kshs. 28,000,000/=**. A sale agreement and Transfer document dated 6th February 2003 and 6<sup>th</sup> February 2004 respectively were produced. The transfer was registered on **23<sup>rd</sup> February 2004**.

11. On 24<sup>th</sup> November 2004, the 1<sup>st</sup> defendant charged the suit property to Jubilee Insurance Company, the 4th defendant (“**Jubilee**”) for Kenya Shillings Twenty Five Million (**Kshs. 25,000,000/=**). The charge was discharged on 4<sup>th</sup> December 2006 upon full payment and all original Title Documents then held as security were returned to the 1<sup>st</sup> Defendant.

12. Through its, Chairman, the National Land Commission vide Gazette Notice Number 15325 of 6th December 2013 (as amended by Corrigenda carried in the Kenya Gazette Vol. CXV-No. 178 of 20th December 2013), directed the revocation of the title to the suit property. The Notice stated in part, “*the National Land Commission has determined that the allocation is illegal and Grant Number I.R. 69308 was unlawfully acquired by Park Avenue Investments*”. The said Gazette Notice was issued following complaints by Teleposta.

13. The 1st defendant in a Petition dated 11th August 2014 supported by the affidavit of Arif Madhani, its Director sought to quash the above Gazette Notice. In its petition against the National Land Commission, Chief Land Registrar, the Attorney General and Telposta Pension Scheme Registered Trustees, the 1st defendant claimed that, the National Land Commission had infringed its fundamental rights to property and fair administrative action, contrary to Articles 40 and 47 of the Constitution. Upon hearing the parties and preliminary objection as regards the admission of the petition within the suit, I delivered a ruling on 17th October 2014 in which I ordered that the petitioner files a proper petition as a separate suit within 14 days from the date of the ruling. After hearing the parties on this particular Gazette Notice, this Court delivered a judgment in the Petition that was filed, quashing the said Gazette Notice.

### **THE PLAINTIFF’S CASE (TELPOSTA PENSION SCHEME REGISTERED TRUSTEES)**

14. Telposta’s case is that it is the lawful owner of the suit property, having been vested upon it by the Government of Kenya. It relies on the Vesting Orders of 1988 and more especially the one of 2001, which vested in it, all movable and immovable property belonging to its predecessor, the Kenya Posts and Telecommunications, to enable it discharge a public duty mainly to pay the pensioners of the defunct Kenya posts and the Telecommunication.

15. Telposta asserts that it has since 1st July 1999 been in legal and actual occupation of the suit property and has been dutifully paying land rate and other statutory levies. It has rented out the premises from which it continues to derive income. That it was not until sometimes in 3rd June 2003 when advocates for the Bank served it with Notice to vacate the suit property that it sensed all was not well.

16. Through its counsel, Mr Bundotich Telposta was emphatic that the suit property was set aside by the Government to a public entity, Telposta for the purpose of discharging certain objectives. It was the Plaintiff’s submission that the Commissioner of Lands purported to issue an allotment letter to Park Avenue Investments Ltd while the vesting notice to its predecessor subsisted. It was Telposta’s

contention that the suit property, having been alienated to its predecessor was not and could not be categorised as unalienated government land which the President of Kenya through the Commissioner of Lands could alienate to Park Investments and from which the 1<sup>st</sup> defendant could derive title.

17. Moreover, Telposta contends that even if it were to be proved that the suit property was unalienated Government land, the Commissioner of Lands acted *ultra vires* and in violation of the procedural requirements of the Government Lands Act in alienating the suit property to Park Investments and as such, no valid title could pass to the 5<sup>th</sup> Defendant and subsequently to the 1<sup>st</sup> Defendant. Reliance was placed on the Court of Appeal decision in **Henry Muthee Kathurima v Commissioner of Lands & Another [2015] eKLR**, in which the Appellate Court sitting at Meru held that the Commissioner of Lands lacked powers to alienate public land and further that the concept of indefeasibility of title and the constitutional right of protection to property was inapplicable to the extent that title to property was unlawfully acquired.

18. Telposta imputes fraud on the part of the **2nd, 3rd and 5th defendants** in their dealings regarding the suit property. The particulars of fraud are specified in the Further Amended Plaintiff. Telposta avers that the Commissioner of Lands and Park Investments (the 2<sup>nd</sup> and 5<sup>th</sup> Defendants respectfully) colluded to illegally register the suit property in the 5th defendant's favour and fraudulently processed and dealt with the suit property, fully aware that the property belonged to Telposta and/or its predecessor. Teleposta also accused the defendants of attempting to dispose of the suit land to third parties in order to defeat its claim.

19. As against the **1<sup>st</sup> and 4<sup>th</sup> Defendants**, Telposta castigated them for purporting to transact in the suit property despite prior knowledge that the title held by the previous charger was defective and therefore incapable of conferring any rights to Trust Bank Ltd. Telposta further accuses the defendants of negligence for ignoring or refusing to ascertain that the 1<sup>st</sup> Defendant had a proper title to the suit property before accepting the same as security for financial facilities.

20. According to Telposta, the Legal Notice dated 14<sup>th</sup> September 2001, overrides the Title to the suit property (L.R. No. 209/13238) which any of the defendants sought to claim. It is its case that the definition of 'unalienated government land' does not include land that has been allocated to public bodies. Thus, property vested in Telposta was not unalienated land which the Commissioner of Lands could allocate and issue title to the 5<sup>th</sup> Defendant and to which the 1<sup>st</sup> Defendant could derive any title by way of purchase.

21. Telposta submitted that the title registered on behalf of the 1st defendant was registered without the consent of the Commissioner of Lands, and therefore, the title and subsequent transactions were null and void.

22. Telposta also takes issue with the legality of the charge created over the suit property in favour of Trust Bank noting that it was not sanctioned by the Commissioner of Lands, contrary to Condition 9 of the Certificate of Title. It is Teleposta's position that there was no lawful title with which the Bank could register a charge and pass over to the 1st defendant by way of power of sale. In any case, argued Telposta, there was no evidence of a statutory notice being effected by the Bank and furthermore, the charge purported to sell the property below the reserve price. For these reasons, Telposta asserts that the 1st and 5th defendants cannot claim absolute and indefeasible title to the suit property as the titles they hold are null and void *ab initio*.

23. In support of its case, Telposta filed two witness statements: One by Mr Peter K. Rotich, its Administrator and Trust Secretary dated 13<sup>th</sup> May 2011 and 10<sup>th</sup> July 2012. The other statement dated

17<sup>th</sup> May 2011 was filed by Daniel Cheruiyot, a valuer working with Regent Valuers International Ltd. The latter testified that a draft valuation report on L.R. No. 209/2397 dated 31<sup>st</sup> March 2010 prepared at the behest of the Plaintiff in February 2010 indicated the open market value of the property was Kenya Shillings Two Hundred and Forty Million Shillings (**Ksh. 240,000,000/=**).

24. In his testimony, Mr Rotich *inter alia* explained the operations of the Pension scheme: The Scheme generated income from the properties vested by the government through rental income, which investment income would be used to pay the pension benefits. Over seven thousand pensioners, employees of CCK, Telkom Ltd stood to benefit from the scheme.

25. It is Telposta's evidence that the gazette notice vesting on it the suit property has not been revoked to date. To further buttress its case, Telposta later produced before court the **Gazette Notice Number 15325 of 6th December 2013** in which the Chairman of the National Land Commission directed the revocation of the title to the suit property. I have already addressed myself on this issue earlier in the judgment.

26. In its Further Amended Plaint dated 20<sup>th</sup> May 2005, Telposta sought Judgment against the Defendants jointly and severally for:-

***a. A declaration that the purported ownership by the 1<sup>st</sup> defendant of the property known as Land Reference Number 209/13238 (formerly 209/2397) and subsequent charge by the 4<sup>th</sup> defendant is fraudulent, illegal, wrongful, null and void.***

***b. An order directing the Commissioner of Lands to cancel the grant issued in favour of the 1<sup>st</sup> Defendant and issue of a new grant in favour of the Plaintiff; or in the alternative to (b) and (bi).***

***bi) An order directing the 4<sup>th</sup> Defendant to execute a discharge of charge over the suit property and in default thereof the Deputy Registrar of High Court to execute the same on their behalf.***

***bii) An order that the Commissioner of Lands (2<sup>nd</sup> Defendant) compensates the Plaintiff by paying to it a sum commensurate to the market value of the property at the time of judgment.***

***c. Vacant possession of the suit property.***

***d. A permanent injunction restraining the Defendants whether by themselves or their agents and/or servants or otherwise from doing the following acts or any of them that is to say from interfering with rights of possession, advertising for sale disposing of selling by public auction or otherwise however at any time or by completing by treaty, leasing, letting otherwise however interfering with ownership of title to and/or interest in all that piece of land known as L.R. No. 209/13238 (formerly 209/2397).***

***e. Damages for fraud and trespass.***

***f. Costs of the suit and interest at court rates.***

***g. Any other relief which the Honourable Court may deem fit to grant.***

***h. An order that should any of the Defendants be found liable, the costs of such Defendants be paid by the Defendant found liable.***

## **CASE FOR 1ST DEFENDANT (INTERCOUNTRIES IMPORTERS AND EXPORTERS LIMITED)**

25. The 1st defendant, InterCountries Importers and Exporters Limited is a private company limited by shares, duly incorporated in August 1983 under the Companies Act, Chapter 486 of the Laws of Kenya. According to its Memorandum of Association, its business is to among other things, “*carry on business as importers and exporters of and dealers in produce, merchandise and goods and materials of all description, and as warehousemen, clearing and forwarding agents commission agents.....*”. It is the registered owner of the suit property.

26. In response to the Plaintiff and Further Amended Plaintiff, **InterCountries Importers and Exporters Limited** (**‘the 1st defendant’**) filed a Statement of Defence dated 20<sup>th</sup> January 2005 and subsequently, the Amended Statement of Defence and Counterclaim dated 23<sup>rd</sup> October 2009.

27. The gist of the 1st defendant’s case is that it is the *bonafide* registered owner of the suit property and enjoys statute protection of the title under the indefeasibility doctrine. It contends that it is a bonafide purchaser for value without notice, having legally purchased the suit property from Trust Bank and its rights should therefore not be interfered with. According to the 1st defendant, the Certificate of Title to L.R. No. 209/13238 (formerly L.R. No. 209/2397), the suit property was duly registered in the name of Park Avenue Investments Limited, on 23<sup>rd</sup> May 1996 by the Registrar of Titles.

28. In dismissing the Vesting Order carried in Gazette Notice No. 131 of 2001 relied on by Telposta, the 1st defendant notes that the suit property was already registered in the name of Park Avenue Investments Limited at the time the Legal Notice was published, and as such, is of no consequence to the issue at hand.

29. The 1st defendant doubts the effectiveness of the legal notice in conferring title submitting that a Gazette Notice is simply an announcement by the government which by itself, could not confer legal title. The cases of **Republic v The Registrar of Titles, Mombasa & 2 others ex-parte EMFIL Limited [2012]eKLR** and **Kuria Greens Limited v Registrar of Titles & Another (2011) eKLR** were cited in support of the proposition that neither the Land Registrar nor Government had no power to revoke registered title through a gazette Notice, in the absence of a court order. Thus, summed the 1st defendant, the Gazette Notice of 2001 could not be invoked to defeat an earlier duly registered title under Park Avenue Investments Limited.

30. Moreover, the 1st defendant contends that Telposta has not produced any registration documents or any document to prove that the suit property was registered in the name of Kenya Post and Telecommunications under any regime of law at the time of registration to Park Avenue Investments Ltd. Relying on the principle ***Nemo dat quod non habet (no one can give what he does not have)***, the 1st defendant avers that East African External Telecommunications Company Ltd did not have registered title to pass to Kenya Post and Telecommunications Corporation. Consequently, the Plaintiff could not have acquired good title at all.

31. The 1st defendant further took issue with the plaintiff’s competence to sue over the suit property. According to the 1st defendant, Telposta had no cause of action against the 1<sup>st</sup> defendant since the trust deed that created the Plaintiff indicated Telkom Kenya Limited as the founder of Telposta, which came into operation after the defunct Kenya Posts and Communications Corporations ceased to exist. That therefore, Telkom Kenya Limited was the proper party to file this suit against the Commissioner of Lands and not the Telposta.

32. It is the 1st defendant’s contention that it was an innocent purchaser for value without notice and

that Telposta had not proved on a balance of probabilities the particulars of fraud against the 1<sup>st</sup> Defendant. That before purchasing the suit property, an official search had been conducted, which revealed that there were no encumbrances or prohibitions in the Land's office or on the Title.

33. The 1<sup>st</sup> defendant relied on the doctrine of sanctity of first registration and indefeasibility of title secured under **section 23** of the Registration of Titles Act. Such title could only be challenged on grounds of fraud or misrepresentation. A line of cases including ***Nairobi Permanent Market Society & Others v Salima Enterprises & Others [1995-1998]EA 232, Vekariya Investments Limited v Kenya Airports Authority & 2 others [2014]eKLR, Joseph N.K. Arap Ngok v Moiyo Ole Keiwua & 4 others [1997]e KLR, Paul Mulira & another v Jane Kendi Ikinyua & 2 others [2014] eKLR and Wreck Motor Enterprise v Commissioner of Lands & 3 Others [1997] eKLR*** were cited in support of this assertion. According to the 1<sup>st</sup> defendant, therefore, the first registration of the suit property under Park Investments was protected under law and could not be defeated and so was the title held by the 1<sup>st</sup> defendant upon subsequent purchase.

34. Three witness statements were filed in support of the 1<sup>st</sup> defendant's case. In his statement, **Mr Arif Madhani**, the Managing Director of the 1<sup>st</sup> Defendant stated that the suit property was sold to them by Trust Bank Limited by way of private treaty for a consideration of **Kenya Shillings Twenty Eight Million (Kshs. 28,000,000/=)**. The Agreement for Sale of the suit property was dated 6<sup>th</sup> February 2003.

35. Arif Madhani further testified that on 19<sup>th</sup> December 2003, the 1<sup>st</sup> Defendant paid **Kshs. 1,133,999/=** for outstanding rates in arrears in the name of the 5<sup>th</sup> defendant and a further amount of **Kshs. 1,120,000/=** was paid as stamp duty to the Commissioner of Lands, and thereafter consent to transfer was issued by the Commissioner of Lands. A copy of the Transfer document dated 6<sup>th</sup> February 2004 was produced in court.

36. It was further the case for the 1<sup>st</sup> defendant that Telposta allowed commercial businesses on the property, namely Total Security Surveillance Limited and Multi Options Motors, in contravention with Special Condition Number 5 on the Title. That this prompted the filing in court of Application dated 8<sup>th</sup> December 2006, seeking an injunction to restrain Telposta from interfering with the 1<sup>st</sup> Defendant's quiet possession of the property.

37. Arif further testified that at the time of purchase of the suit property, the 1<sup>st</sup> Defendant had conceptualized, drawn and finalized plans for the conversion of the property into several high rise apartments in line with its company objectives. That as such, since 2004, the 1<sup>st</sup> Defendant has lost revenue as conceptualized in the counterclaim prayer (8) and (9), namely:

"8) Mesne profits for rent charged and received on commercial basis by the Plaintiff through its agents, servants and assigns since November 2006 to February 2013 at **Kshs. 38,950,000/=**.

9) Loss of income for the proposed residential apartments from January 2009 to February 2013 at **Kshs. 172,000,000/=**."

38. The 2<sup>nd</sup> witness was Architect **Rueben Kabbau** of Dream Architects Ltd, who received instructions from the 1<sup>st</sup> Defendant, appointing the firm to design high-end three bed roomed apartments on the Plot L. R. No. 209/13238. Reuben testified that the 1<sup>st</sup> Defendant accepted the designs and the City Council of Nairobi accepted the proposal as well by a letter dated 4<sup>th</sup> September 2003. However, owing to the ownership dispute over the property where the apartments were to be constructed, the City Council of Nairobi declined to process the request any further until the dispute was resolved. It is the 1<sup>st</sup> defendant's case that therefore, it lost income for the proposed residential apartments, totaling **Kshs.**

**172,000,000/=.**

39. The final witness was **Charles K. Migwi**, a valuer employed at Lloyds Masika Limited, who received instructions from the 1<sup>st</sup> defendant on 30<sup>th</sup> May 2012 to carry out a rental assessment on the suit property. The assesment was as follows:

a. The rental assessment on the basis of residential user for existing houses is valued at a sum of Kenya Shillings Twelve Million, three Hundred and Forty Thousand (**Kshs. 12,340,000/=**)

b. The rental assessment on the basis of commercial user for the existing houses valued at Kenya Shillings thirty Three Million, Nine Hundred and Fifty Thousand (**Kshs. 33, 950,000/=**)

c. The rental values of the suit property for the period of January 2009 to June 2012 on the basis of the proposed apartments development is valued at Kenya Shillings One Hundred and Forty Million, Four Hundred Thousand (**Kshs. 140,400,000/=**)

40. The 1st defendant prays to be compensated for the loss of rental income from the existing houses on the suit property as well as the projected income from proposed apartments it would have erected on the land.

#### **CASE FOR 2ND AND 3RD DEFENDANTS (COMMISSIONER OF LANDS AND ATTORNEY GENERAL)**

41. The Commisioner of Lands and Attorney General filed their Statement of Defence dated 14<sup>th</sup> April 2010 and an affidavit by one Mr. Gordon Ochieng, the Chief Lands Administration Officer at the Department of Lands on 2<sup>nd</sup> June 2011. They also filed written submissions dated 5th June, 2015.

42. It is their case that the registration in favour of Park Investments was legal and lawful. Further, that neither Telposta nor its predecessors ever lodged the vesting Orders of 1988 and 2001 for registration and the same were not reflected in the official register.

43. Mr. Gordon Ochieng testified that L.R. No. 209/2397 was allocated to M/S Park Avenue Investments Limited vide **Letter of Allotment Ref: 30120/X/96 dated 30<sup>th</sup> April 1996**. The allottees then accepted the offer and made the requisite payment where a Receipt No. D.447918 was issued. That the Director of Surveys vide his Letter dated 20<sup>th</sup> May 1996 did submit a Deed Plan No. 205560 in Respect of L.R. No. 209/13238 after carrying out a re-survey of the suit parcel. Thereafter, a grant (Title) I.R. 69308 in respect of LR 209/13238 was processed and registered at the Land Titles Registry on **23<sup>rd</sup> May 1996**.

44. Gordon testified that prior to allocation of the suit property to M/s Park Avenue Investment Limited on 30th April 1996, the land was previously owned by the East African Community Common Services. That upon winding up of the East African community common services, the land reverted back to the government in 1977 as unalienated government land. This position was communicated to the then Managing Director, Kenya Post and Telecommunications Corporation vide the Letter dated 20<sup>th</sup> January 1997. It was the 2nd and 3rd defendants' case that Telposta had not tabled any evidence to prove that the suit property was ever allocated to it.

45. The defendants further contend that the vesting order issued through Legal Notice 131 of 2001 and which Telposta relied upon came late, long after the title to the suit land had been issued to Park Investments (on 23<sup>rd</sup> May 1996). In any case, the Legal Notice referred to property that vested on Kenya Posts and Telecommunications Corporation as at 30th June 1999, the suit property was not available, having already been registered in the name of Park Investments. It is the contention by the 2nd and 3rd

defendants that the Legal Notice has no legal or factual basis and cannot be relied upon as a basis of a cause of action. Regarding consent, they countered that no provision was cited to show that a consent to sell was condition precedent, save for the special conditions on the Title.

46. The 2nd and 3rd defendants further assert that there was no evidence of payment of the purchase price of Ksh 28 Million to the Bank. On this, the defendants seem to agree with the plaintiff's contention that there was no money paid by the 1st defendant for the suit property and therefore the transfer document regarding payment of purchase price by the 1st defendant was ingenuine.

47. It is their further contention that the Bank never issued the mandatory statutory notice to Park Investments. They point to the Deed of Indemnity dated 13th December 2006 in which at paragraph 6 stated, "*The purchaser has withheld payment of the balance of the purchase price pending the hearing and determination of the suit*". This was notably, three years after the sale agreement between the Bank and 1st defendant entered on 6th February 2003.

48. The defendants deny the particulars of fraud alleged against them by Telposta and assert that the fraud allegations are unsupported by evidence. They asked the court to dismiss the plaintiff's suit as no basis had been laid for compensation.

#### **4TH DEFENDANT'S CASE (JUBILEE INSURANCE COMPANY LIMITED)**

49. Jubilee Insurance filed its Statement of Defence dated 24<sup>th</sup> May 2005. It is Jubilee's case that in the holding charge over the suit property, it exercised due diligence and followed the requisite procedures.

50. According to Jubilee, there was no indication on the Grant No. I.R. 69308/1 dated 1<sup>st</sup> May 1996 of any connection with L.R. No. 209/2397 or any other property, or any indication as to the Plaintiff's rights which would put Jubilee, then chargee on notice.

51. According to the testimony of **Ms. Margret Maimba**, an accountant with the firm, the correct procedure was followed in accepting the charged property. In her witness statement of 25<sup>th</sup> February 2013, the 1<sup>st</sup> Defendant approached Jubilee with an interest in obtaining a financial facility to meet their short term capital requirements. An agreement was reached to provide a loan of Kenya Shillings Twenty Five Million (**Kshs. 25,000,000/=**) which would be secured against L.R. No. 209/13238.

52. The 1<sup>st</sup> Defendant provided the original Grant No. I.R. 69038 in favour of Park Avenue Investments Limited and a Transfer dated 6<sup>th</sup> February 2004 made between Trust Bank Limited (in Liquidation) and the 1<sup>st</sup> Defendant. It was later established that the transfer was as a result of a Chargee's statutory power of sale that was duly executed. That after conducting searches, Jubilee confirmed that the 1<sup>st</sup> Defendant was the registered owner of the property.

53. Jubilee further averred that it received an original consent to charge the property in the standard form signed on behalf of the Commissioner of Lands, after which a charge against the suit property dated 24<sup>th</sup> November 2004 for Kenya Shillings Twenty Five Million (**Kshs. 25,000,000/=**) was executed between the 1<sup>st</sup> defendant and Jubilee. It was registered as Number I.R. 69308/4 and a copy of the certificate of registration was produced in the 4<sup>th</sup> Defendant's bundle of documents.

54. Upon payment in full, the charge was on 4<sup>th</sup> December 2006 discharged and all original Title Documents held as security were returned to the 1<sup>st</sup> Defendant as evidenced by a copy of the discharge of charge provided in the bundle of documents.

55. It is Jubilee's case that there was no proof or indication that the title registered in the name of the 1<sup>st</sup> Defendant had been fraudulently acquired or had any discrepancies. Furthermore, that Jubilee complied with all the legal requirements provided for under Sections 23 and 24 of the Registration of Titles Act.

#### **CASE FOR PARK AVENUE INVESTMENT LIMITED (5TH DEFENDANT)**

56. In a Notice of Motion dated 23rd February 2012, Park Investments sought leave of court to file its Defence and Counter claim. In its Counterclaim, Park Investments avers that it is the lawful owner of the suit property and that the purported transfer of the suit property to the 1st defendant is illegal, null and void.

57. The 5<sup>th</sup> Defendant's witness, **Mr. Ken Boit**, Director of Park Investments gave testimony by way of his witness statement dated 22<sup>nd</sup> February 2012. According to his evidence, Park Investments offered the suit property as security to procure a cheque for Kenya Shillings Forty Million (**Kshs. 40,000,000/=**) in favour of Trust Bank.

58. It is the case of Park Investments that the Bank, "secretly and fraudulently" transferred the suit property to the 1<sup>st</sup> Defendant on or about February 2004. That the Bank did not notify it of the intended sale, auction or advertisement. According to Park Investments, therefore, the purported sale to the 1<sup>st</sup> Defendant was irregular, fraudulent, null and void since the exercise of statutory power of sale by Trust Bank Limited (in liquidation) was illegal thus incapable of transferring any registrable interests in the suit property. It is the case of Park Investments that the Bank did not pass any Title to the 2nd Defendant, InterCountries Importers and Exporters Limited.

59. According to the witness, the Bank failed to issue Statutory Notices to them as required by law and as such, it committed mortgage fraud by secretly selling the subject property at an under value thereby defrauding the 5<sup>th</sup> Defendant. Thus, the Bank did not conduct a valid sale and therefore did not pass any title to the 1<sup>st</sup> Defendant.

#### **CASE FOR TRUST BANK LIMITED (IN LIQUIDATION)-4<sup>TH</sup> DEFENDANT IN THE COUNTERCLAIM**

60. Trust Bank Limited (In Liquidation) is the 4<sup>th</sup> Defendant in the Counterclaim. In the Counterclaim, the Bank filed a **witness statement** by Adam Boru, the Liquidation Agent for the Bank dated 28<sup>th</sup> May 2012 to support its case.

61. It is the case of the Bank that the realisation of security was done in accordance with the law. In discounting the Park Investment's counterclaim, the Bank contended that Statutory notices were issued according to law; that the Statutory notice was duly served on the Plaintiff in the Counterclaim on the last known address by registered post. Further that all approvals necessary for the transfer of the suit property to the 1<sup>st</sup> Defendant were obtained. According to the Bank, Park Investments was the registered proprietor of the suit property L.R. No. 209/13238 and as holder of the title, the Bank accepted the suit property as security for advancing Kshs. 40,000,000/= to Park Investments sometimes in the year 1997. It was the Bank's contention that it issued a Statutory Notice dated 5<sup>th</sup> October 2001 which showed the outstanding amount as **Ksh. 155,309,993.45/=**. Notices of demand dated 18<sup>th</sup> October 2001 were also issued to the directors advising them of the breach and demanding guarantor's payment. That despite the notices, Park Investments continued to renege on its contract obligations, necessitating the Bank to sell the suit property vide private treaty in the year 2003 to the 1<sup>st</sup> defendant for the value of Kshs. 28,000,000.00. The agreement for sale was duly executed and later on, a Transfer executed and lodged in favour of the 1<sup>st</sup> Defendant.

62. It is the case for the Bank that the market value of the property was Ksh. 33,500,000/= with a reserve value of Kshs. 28,500,000/=. The suit property was sold vide private treaty to the 2<sup>nd</sup> Defendant for the value of Kshs. 28,000,000/=. Adam Boru in his testimony confirmed that in selling the property, Trust Bank Limited (In Liquidation) exercised all due diligence not to sell the property at an under value. In denying claims of fraud by the plaintiff, the Bank asserted that there was no collusion between the Bank and the 1<sup>st</sup> defendant.

63. Regarding the deed of indemnity dated 13<sup>th</sup> December 2006 between the Bank and the 1<sup>st</sup> Defendant, the Bank averred that it was executed pursuant to the institution of the suit by the Plaintiff. The deed of indemnity specifies the obligations of the bank as follows:-

*“Irrevocably indemnify and hold the purchaser harmless against any order that may be made against the purchaser in the suit whose import or result would be to impeach the purchaser’s title to the property”*

*“at all times indemnify and keep indemnified the purchaser against any actions or losses arising out of or connected with the impeachment of the Bank’s powers of sale of the property to the purchaser”*

64. This, according to the Bank indicated that both the 1<sup>st</sup> Defendant and the Bank had taken all precautions in ensuring that the purchase was lawful. The parties did not participate in any fraudulent activities as alleged by the Plaintiff.

#### **DETERMINATION**

65. A list of 17 agreed issues signed by Counsels for the Plaintiff, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants was filed on 20<sup>th</sup> April 2010. The agreed issues are as follows:-

*a. Whether or not at all material times the Plaintiff was the registered land owner of L.R. No. 209/13238 (formerly 209/2397)*

*b. Whether the registration and issuance of the title in favour of the 5<sup>th</sup> Defendant, transfer to the 1<sup>st</sup> Defendant and charge by the 4<sup>th</sup> Defendant was wrongful, illegal and fraudulent*

*c. Whether Legal Notice No. 131 of 2001 conferred legal title and ownership of L.R. No. 209/13238 to the Plaintiff*

*d. Whether the vesting order under Legal Notice No. 133 of 1988 and 131 of 2001 renders the purported grant to subsequent sale to the 1<sup>st</sup> Defendant, charge to the 4<sup>th</sup> Defendant illegal, null and void ab initio*

*e. Whether the 1<sup>st</sup> and 4<sup>th</sup> Defendants’ alleged conduct has perpetuated the alleged fraud committed by the 2<sup>nd</sup> Defendant and 5<sup>th</sup> Defendants*

*f. Whether the 1<sup>st</sup> and 4<sup>th</sup> Defendants were parties to the alleged fraud committed by the 2<sup>nd</sup> and 5<sup>th</sup> Defendants*

*g. Whether all that piece of land situated in Nairobi L.R. No. 209/13238 was allocated to the 5<sup>th</sup> Defendant on 30<sup>th</sup> April 1996 by the 2<sup>nd</sup> Defendant*

*h. Whether the 1<sup>st</sup> Defendant was granted consent to charge Title Land Reference Number 209/13238*

*i. Whether Trust Bank Ltd was issued with consent to transfer Land Reference Number 209/13238 to the 1<sup>st</sup> Defendant*

*j. Whether the statutory power of sale was challenged by Trust Bank Ltd (In liquidation) was challenged by the 5<sup>th</sup> Defendant or the Plaintiff since 2003*

*k. Whether the Plaintiff has a cause of action against the 1<sup>st</sup> Defendant*

*l. Whether the 1<sup>st</sup> Defendant was a purchaser for value without notice*

*m. Whether the Plaintiff, its servants and/or agent forcefully entered into the suit premises L.R. No. 209/13238 and establish commercial businesses thereon*

*n. Whether the Plaintiff is still in possession of the suit premises and has collected due rent from the commercial premises. If yes, for how much*

*o. Whether the 1<sup>st</sup> Defendant is entitled to loss of revenue out of preparation and planning undertaken to convert the suit property into high rise apartments*

*p. Whether the 1<sup>st</sup> Defendant is entitled to vacant possession of the suit property*

*q. Whether the Plaintiff is entitled to the prayers sought in the Plaint*

80. The 5th defendant, Park Investments subsequently filed a separate list of issues on 9th July 2012, as follows:

i. Whether the statutory power of sale under the Charge had arisen

ii. Whether a valid Statutory Notice was issued or served by the 4th defendant (by way of counterclaim)

iii. Whether the defendants (by way of counterclaim) conducted a valid sale

iv. Whether the defendants acquired any title to the suit property

v. Whether the Plaintiff (by way of counterclaim) is entitled to the prayers sought in the Counterclaim

vi. Whether the 2nd defendant in the counterclaim colluded with the 4th defendant in the counterclaim to conduct an underlease, without notice to the Plaintiff in the counterclaim

vii. Whether the 4th defendant in the counterclaim acquired any valid title, if any, or at all

viii. Was there any lawful transfer of the subject property to the defendants in the counterclaim

ix. Who is the lawful owner of the subject property"

x. Who pays the costs of the counterclaim"

81. After considering the submissions and evidence presented by the parties to this suit, this Court is of the view that the case turns on the following **two** interrelated issues:

A. The validity of Vesting Orders made vide Gazette Notices of 1988 and 2001 conferring ownership of both movable and immovable property to Kenya Posts and Telecommunications Corporation and its successor, Telposta respectively.

B. The effect of the allotment of the suit property to Park Avenue Investments by the Commissioner of Lands vide the letter of allotment dated 30th April 1996, and subsequent registration on 23<sup>rd</sup> May 1996 by the Registrar.

I shall address in turn each of these two issues as herein below:

**A). The Validity and Effect of Vesting Orders- Legal Notices 183 of 1988 and 131 of 2001**

82. The basis of the plaintiff's case is the Legal Notices of 1988 and 2001 (hereafter '**the impugned notices**') that carried Vesting Orders of the said property. Owing to their importance to this matter, I will highlight the background to the impugned Gazette Notices.

83. The earlier vesting Order, that is, Legal Notice No 183 of 1988 (published in Kenya Gazette Supplement No. 11 of 11th March 1988 was made under then Kenya Posts and Telecommunications Corporation Act (Cap 411) ('**KPTC Act**'). Kenya Posts and Telecommunications was established under **Section 3** of the said KPTC Act, an Act that was repealed by **section 103** of the Kenya Communications Act, 1998. Section **116(12)** under which the 1988 Order was made provided thus:

***(12) The Minister may by order, from time to time, provide that any property, powers, liabilities, obligations, contracts or employees of, or proceedings by or against East African External Telecommunications Company Limited (a company incorporated in Kenya under the Companies Act (Cap 486) and limited by shares, the whole of which shares are held by the East African Posts and Telecommunications Corporation or persons on its behalf) as specified or described in the order, shall, on a day to be specified in the order, and by virtue of the order, become property, powers, liabilities, obligations, contracts or employees of, or proceedings by or against, the Corporation or any company or companies then incorporated in Kenya of which the Corporation is a member, upon such terms and conditions and subject to such adjustments and arrangements as may be prescribed in the order.***

84. The object of the KPTC Act was to provide for, ".... the establishment of a corporation to be known as the Kenya Posts and Telecommunications Corporation, or the transfer to the Corporation of the undertaking of the East African Posts and Telecommunication Corporation in Kenya, for the functions of the Corporation and for purposes connected therewith". As with the 2001 Vesting Order, it is the finding of this Court that this Order was issued pursuant to an Act of Parliament, a Statute established to specifically determine the transfer of the *the East African Posts and Telecommunication Corporation in Kenya* and related matters. The Notice cannot as such be said to have been made *ultra vires*, the jurisdiction and power having been bestowed to the Minister by the relevant Act of Parliament.

85. The 1988 Notice by the Minister for Transport and Communications, carried on in the Kenya Gazette Supplement of 11th March, 1988. **Paragraph 3(1)** of the said Notice read as follows:

***"All the movable and immovable property and assets which on the 3rd June 1982, were vested and possessed by the E.A. Extelcoms and were, under section 116(12)(b) of the Act, managed, operated, used and dealt with by the Kenya Extelcoms shall from that date by virtue of this Order be vested in the Corporation without further conveyance, transfer or assignment"***.

86. A finding that the suit property was among the listed properties in the Notice would mean that it was not available for allocation to Park Investments in the year 1996. This Court finds that the Act under which the 1988 Notice was made was still subsisting and the Notice made pursuant to it had not been revoked. Thus, until the repeal of the KPTC Act (vide **Section 103(1)** of the Kenya Communications Act), property vested in the former E.A. Extelcoms remained the property of its successor, the Kenya Posts and Telecommunications, Telposta's predecessor, and therefore was, unavailable for further allocation. But there is more.

87. The 2001 Gazette Notice, under the hand of Hon C.B. Okemo, then Minister of Finance is dated 24th August 2001, and reads in part as follows:

**“ LEGAL NOTICE NO. 131**

**THE KENYA COMMUNICATIONS ACT**

**(No. 2 of 1998)**

**TRANSFER OF ASSETS- TELEPOSTA PENSION SCHEME**

***IN EXERCISE of the powers conferred by paragraph 5(6) of the Third Schedule to the Kenya Communications Act, 1998, the Minister for Finance determines that with effect from 1st July, 1999-***

***a. The movable and immovable property and assets specified in the Schedule hereto, which on the 30th June, 1999 were vested in the Kenya Posts and Telecommunications Corporation shall, without further conveyance, transfer or assignment, be deemed to have been transferred and vested in the Trustees of the Telposta Pension Scheme for the purpose of discharging pension liability in respect for-***

***i. Any person who, on 30th June 1999, was entitled to the receipt of a pension from Kenya Posts and Telecommunications Corporation;***

***ii. The employees of the Communication Commission of Kenya, Postal Corporation of Kenya and Telkom Kenya Limited;***

***b. all references to the Kenya Posts and Telecommunications Corporation in any agreement or instrument relating to any property, assets, rights or obligations transferred under paragraph (a) and subsisting on the 30th June 1999 shall, unless the context otherwise requires, be read as reference to Telposta Pension Scheme.***

***c. any reference in an agreement or instrument referred to in paragraph (d) to a director, officer or employee of the Kenya Posts and Telecommunications Corporation shall, unless the context otherwise requires, be read as a reference to trustees of the Telposta Pension Scheme.***

This was followed by a schedule of various properties(land and buildings) which included the suit property described as follows:

L.R No	Location	Size in Acres	Description
209/2397	Mucai Drive off	1.930	Two compound each with a double

	Ngong Road	storey four bedroomed house and outbuilding: 2 main Houses- 4739 sq ft verndhs- 700s ft 2 S/Q-1239 sq ft 2 carports- 384 sq ft
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88. It is the Plaintiff's contention that following the Gazette Notice, the suit property vested in it and therefore, the same was not available for allocation to Park Investments. The defendants on the other hand counter that the Legal Notice could not confer legal title and that in any case, the same took effect in July 1999 after the suit property had already been allocated to Park Investments in April of 1996 .

89. The **Third Schedule** to the repealed **Kenya Communications Act, 1998** is one that deals with Transitional Provisions. **Paragraph 5(6)** under which the 2001 Legal Notice is made reads as follows:

**"5.( 1) The Minister for Finance may by notice in the Gazette, specify the date or dates and the manner in which the assets and liabilities of the former Corporation shall be transferred to and vested in –**

- (a) the Commission, in respect of assets and liabilities relating to regulatory services;**
- (b) the company, in respect of assets and liabilities relating to telecommunication services; and**
- (c) the Corporation, in respect of assets and liabilities relating to postal services.**

**(2) References in this Schedule to assets and liabilities of the former Corporation shall be references to all such assets and liabilities, whether or not capable of being transferred or assigned by the former Corporation.**

**(3) A notice under subsection (1) shall specify the assets and liabilities of the former Corporation which are to be transferred to the Commission, the Company, or the Corporation, as the case may be.**

**(4) If, on the vesting day, any suit, appeal, arbitration or other proceedings of whatever nature and wheresoever instituted in relation to the business of the former Corporation which is by virtue of this section, transferred to the Commission, Company, or, the Corporation, as the case may be, shall not abate, be discontinued or be in any way prejudicially affected by reason of such transfer of the business of the former Corporation or of anything contained in this Act, and any suit, appeal, arbitration or other proceedings shall be continued, by or against the Commission, Company or, the Corporation, as the case may be.**

**(5) In the case of assets and liabilities arising under any loans which vest in the Commission, the Company or the Corporation, as the case may be on the vesting day, the commission, the Company or the Corporation as the case may be, may enter into such arrangements or agreements over such rights and liabilities with the Government or any other third party.**

**(6) Any assets and liabilities of the former Corporation which are not to be vested either in the Commission, the Company or the Corporation as the case may be, shall be disposed of in such manner as the Minister for Finance shall determine.**

The term “former Corporation” is defined under the Notice to mean the Kenya Posts and Telecommunications Corporation.

90. According to its long title, the object of the repealed Kenya Communications Act (No 2 of 1998) (**“the repealed Act”**) was; *“...to provide for the establishment of the Communications Commission of Kenya, to provide for the transfer of the functions, powers, assets and liabilities of the Kenya Posts and Telecommunication Corporation to the Commission, the Telkom Kenya Limited and the Postal Corporation of Kenya, and for connected purposes.”*

91. It would appear to this Court that the 2001 Vesting Order also had its grounding squarely in an Act of Parliament, a statute established to specifically determine the disposal of assets and liabilities and related communication matters. It cannot as such be said to have been made *ultravires*, as stated by the 1st defendant, the jurisdiction and power having been expressly conferred on the Minister by the relevant Act of Parliament.

92. At this point, I must also reject the 1st defendant's contention that Telposta lacks the stand to sue and that it is Telkom Limited that is the proper party to sue in this suit. While it is uncontested that Telkom Limited is the successor to the KPTC, that does not take away the Telposta's rights incidental to the property. The Court declines to adopt a strict interpretation whose effect would be to deny the Plaintiff and its pensioners their right to access justice. Furthermore, **Paragraph 5(4) of the Third Schedule** to the **repealed Act** under which the Vesting Order was made anticipates the Plaintiff's cause of action if any:

***‘(4) If, on the vesting day, any suit, appeal, arbitration or other proceedings of whatever nature and wheresoever instituted in relation to the business of the former Corporation which is by virtue of this section, transferred to the Commission, Company, or, the Corporation, as the case may be, shall not abate, be discontinued or be in any way prejudicially affected by reason of such transfer of the business of the former Corporation or of anything contained in this Act, and any suit, appeal, arbitration or other proceedings shall be continued, by or against the Commission, Company or, the Corporation, as the case may be’.***

Even a closer reading of the **Interpretation of General Provisions Act (Chapter 2 of the Laws of Kenya)** supports this argument (See Section 23).

93. The next issue is whether the impugned Notice of 2001 had the effect of vesting the suit property on Telposta. **Section 103(2)** of the repealed Act is categorical that, ***“The provisions of the Third Schedule shall, upon the repeal of the Kenya Posts and Telecommunications Corporation Act, have effect with respect to the transfer of the functions, assets liabilities of the former corporation to the Company, the Corporation and the Commission, as the case may be, and to all matters incidental to such transfer”.***

94. It is important to note that the provisions of the repealed Act do not automatically vest the former assets and liabilities on the successor to the KPTC, rather, the provisions are only enabling and empower the Minister to make such an Order. In line with the provisions of the repealed Act, the Minister made such Order on 24th August 2001. Notably, this was about five years since the Commissioner of Lands had already issued a grant to Park Investments, way in 1996. It would appear that the suit property was not one of the assets available for transfer by the Minister, at the time the Vesting Order was made, having already been allocated to a private entity.

95. The **1st, 2nd and 3rd defendants** put up a spirited fight regarding the lack of registration documents

in Plaintiff's favour over the suit property. I will come to this issue later on. As already noted, both impugned notices were made pursuant to the relevant Acts of Parliament existing then, made to deal with specific matters. It was not drawn to this Court's attention that these provisions could be unconstitutional. It is not for this Court to make a finding on the same. The epitome of this Court's finding is that at time of allotment of the parcel of land to Park Investments in 1996, the same belonged to Kenya Posts and Telecommunications Corporation, Telposta's predecessor. The subsequent Notice of 2001 only further solidifies the ownership of the suit property by the plaintiff, Telposta. But there is more to the ownership issue beyond the impugned Notices. The suit property was subsequently registered to a private entity, the property had changed hands, it was subsequently used as collateral and sold to and registered under a third party's name. This now brings me to the second issue for determination:

**B). The effect of the allotment of the suit property to Park Avenue Investments by the Commissioner of Lands vide a letter of allotment**

96. So what becomes of the allotment and subsequent chain of transactions involving the suit property". Notably, and as admitted by the Plaintiff, no registration of the title to the suit property had been made in favour of Telposta or its predecessor. Park Investments, the 5th defendant, carried the first registration to the suit property.

97. The next issue regards the fate of the title already in the name of the 1st defendant, InterCountries Importers and Exporters Limited. It was the case for the 1st defendant that it was an innocent purchaser for value and conducted all due diligence on its part. It further denied claims of fraud alleged by the plaintiff.

98. **Section 23(1)** of the **Registration of Titles Act (Repealed)** now similar to **Section 26(1)** of the **Land Registration Act, Act No. 3 of 2012** provides as follows;

***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.***

**Section 26(1)** of the Land Registration Act states as follows;

*“the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as the proprietor of land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed on the certificate, and the title of that proprietor shall not be subject to challenge, except-*

*a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*b. Where the certificate has been acquired illegally, unprocedurally or through a corrupt scheme.”*

99. The 1st defendant relied on several authorities to support the position that a Certificate of Title was to be taken by the Courts as conclusive evidence that the person named therein was the absolute and indefeasible owner, and that that title was not subject to challenge except on the ground of fraud or

misrepresentation to which the purchaser was a party, including *Nairobi Permanent Market Society & Others v Salima Enterprises & Others [1995-1998]EA 232*, *Vekariya Investments Limited v Kenya Airports Authority & 2 others [2014]eKLR*, *Joseph N.K. Arap Ngok v Moijo Ole Keiwua & 4 others [1997]e KLR*, *Paul Mulira & another v Jane Kendi Ikinyua & 2 others [2014] eKLR* and *Wreck Motor Enterprise v Commissioner of Lands & 3 Others [1997] eKLR*.

100. It is trite law that whoever alleges fraud must prove. It was therefore incumbent upon the plaintiff to prove the fraud allegations against the defendants to the requisite standard. The standard of proof in fraud cases is higher than that in ordinary civil cases, it is higher than on a balance of probability. As was observed in *Njuwangu Holdings Ltd v Langata Kpa Nairobi & 5 others [2014] eKLR*:

**The standard of proving fraud in Civil cases, the courts have consistently held, is higher than on a balance of probability. An allegation of fraud is a serious indictment against a party to whom it is made and though the standard of proof is not beyond a reasonable doubt as in criminal cases it is no doubt near there but is certainly higher than on a balance of probability and thus when a party in a civil matter makes an allegation of fraud against a party he should be prepared to tender and adduce evidence to prove the allegation to the required standard. In the present case, I am afraid the fraud allegations against the plaintiff have been generalized and lack specificity and are generally unproved...**

**Thus, mere suspicion of fraud cannot suffice. It is this Court's finding that besides generalisations, the plaintiff has not proved that the 1st defendant acquired the title illegally or through a corrupt scheme. More particularly, there is no proof of the fraud allegations against the transferee, the 1st defendant as to warrant the cancellation of the title.**

102. It is not in contention that Park Investments held the first registration of the suit property way back in May 1996. Statutes and case law have since time immemorial, jealously guarded a registered title over land under the doctrines of 'indefeasibility' and 'sanctity of title'. Kenya's system of land ownership has long been based on the Torrens system. Under the system, the land register maintained by the Government authorities were to be taken as true representation of all registrable interests affecting a particular parcel of land. This would, '**save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity (See Gibbs v Messer [1891] AC 247 P.C.)**

103. The Court of Appeal in *Dr Joseph N K arap Ng'ok v Justice Moijo ole Keiuwa and Others Nairobi Civil Application No. NAI 60 of 1997(Unreported)* had this to say;

**Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title to such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.**

104. A similar holding in *Nairobi Permanent Market Society & Others -Vs- Salima Enterprises & Others [1995-1998]EA 232* wherein the Court of Appeal observed that;

**Under Section 23 of the Registration of Titles Act, a Certificate of Title issued by the Registrar to any purchaser of land was to be taken by the Courts as conclusive evidence that the person**

***named therein was the absolute and indefeasible owner thereof. That title was not subject to challenge except on the ground of fraud or misrepresentation to which the purchaser was a party. In this instance, it was not disputed that the first Respondent had purchased the land for valuable consideration and that the land had been duly registered in its favour. There was no allegation that the company was a party to any fraud or misrepresentation perpetrated on the Appellants. The order of 20<sup>th</sup> December 1995 was thus an interference in the first Respondent's rights and the Judge was justified in vacating it.***

104. There is a legal regime that specifically governs land ownership and disposal in Kenya, under the various land laws. Land registration has been central to private land ownership. It is not contested, and Telposta also admits that neither it nor its predecessors had through the years had a registered title to the suit property. Therefore, Park Investments, turns out to have been the first registered owner to the title property.

105. The repealed Government Lands Act (Chapter 280 of the Laws of Kenya) defined "unalienated Government land" as, '**land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment**'. Even going by this interpretation, it is correct to state that the suit property did not fall under 'unalienated government land'. Besides the Vesting Orders, there is no evidence of any lease or allotment to the predecessor.

106. With the evidence that is on record, and in line with the land legislation which is the regime that governs land administration in the country, the Court is left with no choice but to uphold the sancity of the title, registered in accordance with the legislative regime governing land registration and disposal in the country, in the absence of proven fraud or illegality in its acquisition.

107. **Section 75** of the former Contitution protected the right to property. Today the right to property is secured under **Article 40** of the present Constitution in the following terms:

***"40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—***

***(a) of any description; and***

***(b) in any part of Kenya.***

***(2) Parliament shall not enact a law that permits the State or any person—***

***(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or***

***(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).***

***(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—***

***(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or***

***(b) is for a public purpose or in the public interest and is carried out in accordance with this***

**Constitution and any Act of Parliament that—**

**(i) requires prompt payment in full, of just compensation to the person; and**

**(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.**

**(4) ....**

**(5) .....**

**(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”**

108. Thus, private property is protected and may not be taken arbitrarily without due process. This protection does not, however, extend to property that has been unlawfully acquired (See also **Isaac Gathungu Wanjohi & Another v Attorney General & 6 others Petition 154 of 2011 [2012]eKLR**). **Article 64** defines private property as, “(a) registered land held by any person under any freehold tenure, (b) land held by any person under leasehold tenure; and (c) any other land declared private land under an Act of Parliament.”

109. The plaintiff in challenging the validity of the registered title cited the case of **Henry Muthee Kathurima v Commissioner of Lands & Another [2015] eKLR** where it was stated at para 13, “...the concept of indefeasibility of title is subject to Article 40(6) of the Constitution. We hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired”. However, as it turns out, there is no proof that the parcel of land was unlawfully or fraudulently acquired by the 5th defendant or the present owner, the 1st defendant. The 1st defendant, cannot therefore be faulted.

110. The 1st defendant is a bonafide purchaser for value without notice. In this respect, I agree with the holding of Musinga J (as he then was) in the case of **Kuria Greens v The Registrar of Titles & Another [2011] eKLR** when the learned Judge stated as follows:

**“Under Section 23 of the Registration of Titles Act a Certificate of Title issued by the Registrar is to be taken as conclusive evidence that the person named therein as the proprietor of land is the absolute and indefeasible owner thereof....**

**Even assuming there was fraud or misrepresentation in alienating the suit land to the original registered proprietor, the petitioner was not party to such fraud or misrepresentation. The petitioner lawfully purchased the suit land from Riangi Estates Limited and obtained all the necessary consents and invested heavily on the suit land....’**

108. There was the challenge raised by the Bank, as well as the 2nd and 3rd defendants regarding the purchase made by the first defendant, in particular, that no purchase price was paid. In my view these are issues that go into validity of the contract which is not the core issue for determination in this suit, the contention here being the allocation of the suit property to the 5th defendant and current title in the name of the 1st defendant. Consequently, and in the absence of fraud, the 1st defendant must be taken as the proprietor of the suit property.

109. I must pause here to point out that from my analysis, it appears there is a lack of keenness and/or

coordination on the part of the Government authorities charged with the duties of allotment, registration of public land, and hence the present web of confusion in land allocation and registration. In my view, prior to any allotment of a parcel of Land, it would be prudent on the part of any body charged with the authority to allot or register to establish from its agents whether the land had been earmarked for ownership by its agents.

I now turn to the counterclaims raised by the various parties to the suit.

**1st Defendant's Counterclaim:**

108. In its Amended Counterclaim filed on 13<sup>th</sup> February 2013, the 1st defendant sought the following reliefs:

- a. The Plaintiff's suit be dismissed with costs.
- b. A declaration that the Plaintiff's servants and or agents are trespassers.
- c. A declaration that **Legal Notice No. 131 of 2001 dated 24<sup>th</sup> August 2001 is null and void.**
- d. A declaration that Gazette Notice No. 131 of 2001 dated 24<sup>th</sup> August 2001 is **ultra vires and in contravention to Section 75 of the Constitution of Kenya** and the Registration of Titles Act.
- e. A mandatory injunction be issued against the Plaintiff, its servants and/or agents from accessing, interfering or in any way disturbing the quiet possession of the property.
- f. General damages for trespass.
- g. An order for eviction be issued against the Plaintiff, its agents, servants, its tenants and/or representatives on the suit property.
- h. Mesne profits for rent charged and received on commercial basis by the Plaintiff through its agents, servants and assigns since November 2006 to February 2013 at **Kshs. 38,950,000/=.**
- i. Loss of income for the proposed residential apartments from January 2009 to February 2013 at **Kshs. 172,000,000/=.**
- j. Costs of the suit and of the Counterclaim.
- k. Interest on f), h) and i) or Court rates.
- l. Any other relief that this Honourable Court may deem fit.

109. Earlier in the Judgment, I already determined the legality of the impugned Legal Notices carrying the Vesting Orders. It follows that prayers (c) and (d) of the Counterclaim must fail. The issue that remains for determination is whether the 1st defendant is entitled to compensation in the terms pleaded and if so, what is the quantum"

110. I have already found that the 1st defendant is the lawful registered owner of the suit property. It is uncontested that despite the transfer of the property to it, the suit property has since been under the occupation by the plaintiff, Telposta. The 1st defendant pleads for mesne profits for rent charged as well

as projected loss of income for proposed residential apartments from January 2009 to February 2013.

111. What the 1st defendant seeks are special damages. It is trite law that special damages must be specifically pleaded and proven. The 1st defendant had engaged an architect to design high-end three bed roomed apartments, the drawings were completed, but the approval process was withheld by the City Council of Nairobi due to the dispute. I find that the claim for loss of on proposed residential apartments yet to be constructed is merely speculative and reject to award the **Kshs. 172,000,000** claimed under this head.

112. Even going by what is pleaded, the claimant refers to a valuation report by Messrs Lloyds Masika Limited to support the claim in damages and mesne profits. The same, however, were not specifically pleaded and proved. The defendant needed to do more than merely point to the valuation report. I do not need to add that there cannot be claim to the income arising out of the Commercial enterprises (other than residential) as this is contrary to Conditions of Title which restricted the use of the suit property solely for residential purposes. In the case of **Kenya Hotel Properties Limited v Willesden Investments Ltd [2009] KLR 126**, the Appellate Court sitting in Nairobi observed at page 134, paragraph 25, “*Our understanding of the above persuasive authorities is that once the learned Judge made the award under the subhead “mesne profits” there was no justification for him awarding a further Kshs 10 million under the subhead “trespass,” since both mean one and the same thing*”. Hence my finding that the 1st defendant is not entitled to general damages for trespass.

#### **Counterclaim by Park Investments**

113. In its counterclaim, Park Investments avers that it is the lawful owner of the suit property. It challenges the process of realisation of the security by the Bank claiming that it was unlawful as it failed to duly issue the statutory Notice. Park Investments sought the following Orders from this Court:

*a. Declaration that the sale and purported transfer of the subject property L.R. No. 209/13238 by the 4<sup>th</sup> Defendant (Trust Bank Limited, In Liquidation) to the 2<sup>nd</sup> Defendant (Intercountries Importers and Exporters Limited) is illegal, null and void.*

*b. Order directing the Commissioner and/or Registrar of Lands to cancel any purported registration of the 1<sup>st</sup> and/or 2<sup>nd</sup> Defendants as the owners of the subject property L.R No. 209/13238, reinstating the 5<sup>th</sup> Defendant's (Plaintiff in the Counterclaim) Park Avenue Investments Title.*

*c. Damages for fraud and trespass.*

*d. Such other relief as the Honourable Court may deem fit to grant.*

*e. Costs of the suit and Counterclaim.*

114. The sale of the suit property by the Bank to the 1st defendant was sealed vide sale agreement dated 6<sup>th</sup> February 2003 and a transfer registered on 23<sup>rd</sup> February 2004. Park Investments if aggrieved by the exercise of the statutory power of sale by the Bank ought to have duly challenged the process way then. It cannot purport to challenge the same in the present suit, by way of counterclaim. I therefore decline to entertain challenges regarding the manner in which the Bank realised its security over the suit property. In any case, even based on the evidence before me, I find that the 5th defendnat has failed to prove on a balance of probability that the statutory notice was not properly served upon it. The 5th defendant's claim appears to have been an afterthought.

115. The Court has already found that the suit property belongs to the 1st defendant unless and until claims of fraud can be proved against it. It therefore follows that the 5th defendant's Counterclaim must fail in its entirety.

## **CONCLUSION**

116. It is the finding of this Court that the 1st defendant is the lawful owner of the suit property. That fraud allegations have not been proved against it as to warrant this Court's intervention to cancel the title as impressed upon the Court by the Plaintiff in the Original Suit. Similarly, the fraud allegations against Jubilee were unsupported. The evidence on record depicts Jubilee as a chargee who carried out due diligence prior to charging the property. The plaintiff's case against Jubilee is therefore dismissed. In any event, the remedy sought against it is overtaken by events.

117. What are the appropriate remedies in this case" I note that some of the plaintiff's prayers, including orders for discharge of charge by Jubilee have since been overtaken by events. I considering the appropriate remedy in the circumstances, the Court also took note of the fact that the plaintiff has been enjoying occupation of and proceeds from the suit property including two commercial enterprises. Having found the 1st defendant to be lawful owner, it follows that an eviction Order against the current occupants is in order. In making the Order, the Court has also considered that the property is under occupation by other third parties. Justice would demand that reasonable notice be given to enable the parties vacate and make alternative arrangements.

118. The 1st defendant prayed for compensation being the sums of; a) the rent charged and received on commercial basis by the Plaintiff through its agents, servants and assigns since November 2006 to February 2013 at **Kshs. 38,950,000/=** and b) loss of income for the proposed residential apartments from January 2009 to February 2013 at **Kshs. 172,000,000/=**. I have already found that this was not specifically proved and the claim therefore fails.

119. The general Rule is that costs follow the event. In the circumstances of the present case, the plaintiff, even though it has lost, did not generate the present web of confusion surrounding the suit property. I therefore order that each party bears its own costs.

120. As I close, I wish to thank the Counsels for all the parties for their comprehensive arguments. I also apologise for the delay in delivering this Judgment, which was occasioned by the Court's workload.

121. The matter closes on the following final Orders:

- a. **A declaration that the 1st defendant is the lawfully owner of the suit property.**
- b. **The plaintiff and its agents/servants to vacate the suit premises within sixty(60) days from the date of judgment hereof.**
- c. **Each party to bear its own costs.**

**It is so ordered.**

Dated, signed and delivered this **27th** day of **July** 2016.

**R. E. OUGO**

**JUDGE**

In the presence of:

.....FO  
**THE PLAINTIFF**

.....FORHE  
**<sup>ST</sup> DEFENDANT**

..... FOR THE 2<sup>ND</sup> &  
**3RD DEFENDANTS**

.....FORIE  
**4TH DEFENDANT**

..... FOR THE 4TH DEFENDANT (IN THE  
**COUNTERCLAIM)**

.....FORBH  
**DEFENDANT**

Ms. Charity

Court Clerk



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