



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE 522 OF 2000

ALBERTA MAE GACIE.....PLAINTIFF

VERSUS

THE HON. THE ATTORNEY GENERAL

THE COMMISSIONER OF LANDS

DHANJAL INVESTMENTS LTD

PETER WAIHAKA GACII

REGISTRAR OF TITLES, COAST REGISTRY.....DEFENDANTS

J U D G M E N T

The plaintiff in this suit is one Alberta Mae Gacii who approached this court by a plaint dated 26/10/2000, drawn and filed in court on 31/10/2000, by her then advocates, M/s Mativo & Company. The suit is against five defendants: (1) The Attorney – General, (2) The Commissioner of Lands, (3) Dhanjal Investment Ltd, (4) Peter Waithaka Gacii and the (5) Registrar of Titles, Coast Lands Registry. The Attorney – General is shown as sued as the official government legal representative, who represents the Commissioner of Lands, the 2nd defendant, and the Registrar of Titles, Coast Lands Registry, the 5th defendant.

It is averred in the plaint that the 2nd defendant is charged with the responsibility of, inter alia, custody of all land title records in the Republic of Kenya, issuance of land title deeds, approval and allocation of public lands, collecting the relevant revenues to the government relating to land transactions and approval, processing and consenting to all registrable land transactions, including transfers of title, charges, leases, issuance of new grants, among many other functions.

The 3rd defendant is shown to be a limited company duly incorporated in Kenya in accordance with the provisions of the Companies Act and situated and carrying on business in Mombasa. The 4th defendant is said to be a male adult of sound mind, unknown and a stranger to the plaintiff.

The 5th defendant is the Registrar of Titles in charge of, inter alia, the registration of all registrable land transactions in the Coast Province.

The plaintiff is shown to be a female Kenyan adult of sound mind, residing in Nairobi and the

Administrix of the estate of the late Professor Peter Gacii who died on 27/4/1992.

The plaintiff sought a judgment to issue and be entered against the five defendants jointly and severally in:-

- a) An order restraining the 3rd defendant, the 2nd defendant and the 5th defendant or their agents or servants from selling, transferring, disposing, changing, leasing or in any manner dealing with the land parcel known as L.R. No. 12962 situated in the South Coast, in Kwale District, of measurement of 3.883 hectares and registered as C.R. 19864/1.
- b) A declaration that the transfer of L.R. 12962/1 by the 4th defendant, Peter Waithaka Gacii to the 3rd defendant, Dhanjal Investment Ltd. on 24/1/1996, was illegal and fraudulent and null and void for all intents and purposes.
- c) An order directing the 2nd defendant, the Commissioner of Lands, and the 5th defendant, the Registrar of Titles, Coast Province to delete and/or cancel the said transfer of 24/1/1996 to the 3rd defendant, Dhanjal Investment Ltd and to thus restore the title back to the name of Peter Gacii and/or transfer the same to the plaintiff.
- d) An order for costs of the suit in favour of the plaintiff.
- e) Any other relief that this court may deem appropriate.

The plaintiff's averments in the plaint are that on 15/3/1988 or thereabouts, the Commissioner of Lands vide his letter of allotment of the same date and referenced No. 122237/4, allocated to Professor Peter Gacii, deceased, the piece of land known as L.R. No. 12962 situated in Mombasa Municipality, South Coast. The land measured 3.883 hectares and was described in the survey plan No. 136836. It was later described as Grant No. CR 19864 when it was issued on 28/8/1989 and it got registered as NO. C.R. 19864/1 on 22/11/1989 in the name of Peter Gacii. That the said Peter Gacii, deceased, thereafter continued to hold the said piece of land as its lawful owner subject to the conditions and stipulations contained in the said grant until his death on 27/4/1992. That before his death, the said Peter Gacii, deceased never sold, alienated or in any manner transferred, charged or leased the said piece of land and that the original grant itself was kept by the plaintiff in her custody care and control throughout the life of the deceased and thereafter.

The plaintiff also averred that her late husband, Peter Gacii, was never at any time in his life-time known as Peter Waithaka Gacii and that all his identification documents, as well as all his other important documents including title deeds among which was this one in issue, were in his only known name, Peter Gacii. That at the said Peter Gacii's death, the plaintiff as his only lawful wife applied for and obtained a Grant of Letters of Administration under High Court Succession Cause NO. 778 of 1992 on 3/2/92. The Grant got confirmed on 11/8/1994 and in it the plot L.R. No. 12962, Mombasa, was described as part of the said Peter Gacii, deceased's estate. The plaintiff further averred that after obtaining the said Grant of Letters of Administration, she did not transfer the suit plot, into her own name or into any other person's name, nor did she enter into any negotiations with anyone to sell to him nor in any other way alienate the said property. That she was accordingly surprised in or about July 1995 to read a copy of a letter written by one M/S Arum & Company Advocates, to the 2nd defendant and copied to Peter Gacii at the plaintiff correct address, informing the 2nd defendant, that the writer, Arum & Company, were acting for Peter Gacii in a sale transaction in relation to the suit property.

The plaintiff averred further that she was baffled by the implication of the said letter since she had not instructed the said advocates or any other advocate to sell the suit property or to act for her for any purpose. That she accordingly instructed her family advocates M/S Mativo & Kitulu Company to write to the said Arum & Company Advocates and inform them that her husband Peter Gacii, deceased, could not be selling the suit premises from his grave and that since she herself was not selling the property, the purported sale was fraudulent and the seller going by the name, Peter Gacii should be a conman. That she

also reported the matter to the police and to the Registrar of Titles Mombasa to warn him of the impending fraud. The plaintiff averred that on receiving the plaintiff's report, the 5th defendant appeared to take the issue seriously and at the request of plaintiff imposed a caveat against the title of the suit property. That the 5th defendant then proceeded to demand outstanding rates and rents over the property, which the plaintiff paid, amounting to Kshs.306,600/=.

It is the plaintiff's further averments in the plaint that after entry of the caveat, that thereafter she felt secure until June 2000 when on becoming desirous of selling the suit property, she instructed her lawyers M/S Mativo & Company to get a buyer on her behalf. That her advocates instructed Gikandi & Company Advocates and Musinga & Co. Advocates to help get a buyer. That when Gikandi & Company got a buyer and decided to make the usual official search on the title at the Mombasa Land Registry, they discovered that the suit property had been sold and transferred by the 4th defendant, Peter Waithaka Gacii, to the 3rd defendant, Dhanjal Investments Ltd. at a price of Kshs. 8,500,000 but that the instruments of transfer were missing from the Land Office Registry at Mombasa.

The plaintiff also averred that the said sale and transfer of the suit property by the 4th defendant to the 3rd defendant was done fraudulently with the complicity of the 2nd and 5th defendants. As to the 4th defendant, the plaintiff averred the following fraud, that he:-

- a) Falsely and fraudulently presented himself as Peter Gacii, deceased.
- b) Introduced into the transaction the name Peter Waithaka Gacii thus possibly misleading the 2nd and 5th defendants.
- c) Forged the name and signature of the Peter Gacii, deceased.
- d) Presented false and fictitious documents and possibly mislead the land officers.
- e) Impersonated the deceased, Peter Gacii.
- f) Received money knowing that he was not lawfully entitled to do so.
- g) Caused the original transfer instruments to disappear from the Lands Office.
- h) Cheated that he was the lawful owner of the suit property when he had no legal capacity to sell or transfer the same.
- i) Colluded with the 2nd defendant and 5th defendant in effecting the said fraud.

The plaintiff further averred that 2nd defendant and the 5th defendant respectively acted fraudulently and/or negligently in respect to the sale and transfer of the suit property and that they each acted in total abuse of their offices and in breach of their duty of care to the plaintiff and that had they acted properly, the said illegal transfer would not have succeeded. She accordingly alleged the following fraud and breach of care as well as negligence, that is to say that the 2nd defendant:-

1. Allowed, approved and permitted and/or consented to the transfer of the suit property when they knew or ought to have known that the lawful owner was dead.
2. Ignored an earlier notification/warning to them from the plaintiff and the police that Peter Gacii was dead.
3. Transferred the suit property of deceased person without the prerequisite instruments of transfer.
4. Misled the Registrar of Titles in writing that the owner of the plot was Peter Waithaka Gacii

while failing to adhere to the title names as well as accepting a person with different names to effect the transfer.

5. Failed to properly identify the 4th defendant and failed to obtain an affidavit of identification or other documents of identification of 4th defendant i.e. deed poll before allowing the 4th defendant to effect the transfer.

6. Colluded with the 4th defendant to perform an illegal transfer.

7. Mislead the Registrar of Titles, Coast Province and failed to appreciate that without his letter the Registrar would not have effected the said illegal transfer.

8. Acted in abuse of his office and in a careless manner.

9. Failed to respect the sanctity of private property.

10. Purported to send copies of his letter of 12/9/2000 to all parties yet not sending it to the plaintiff.

And of the 5th defendant the plaintiff averred the following acts of fraud; that he:-

1. Acted on an illegal letter/directive from his superior.

2. Colluded with the 2nd defendant and the 4th defendant to effect an illegal transfer.

3. Failed to follow the laid down procedures in effecting the transfer.

4. Openly ignored previous records/warnings and information that the owner of the suit property was long dead.

5. Failed to exercise proper care to establish the authenticity of the documents presented to him for the purpose registration of the transfer of the suit property.

6. Accepted and approved false documents and abused his/her office.

7. Misused powers conferred upon her/him by virtue of her/his office.

And of the 3rd defendant the plaintiff averred the following acts of fraud; that 3rd defendant:

1. Failed to conduct a search at the Lands Office Registry to ascertain the lawfully registered proprietor of the suit property.

2. Failed to ascertain the identity of the other interested persons referred to in the letter of 12/9/95 from the 2nd defendant.

3. Agreed to buy the said plot, on the first row next to the beach front, with a nice sand sea frontage and of such large size at a mere Kshs.8,500,000/= when its actual value would be much more than double the said sum.

4. Ignored an earlier warning that the property belonged to a deceased person and that it was not up for sale.

5. Was part and parcel of the fraud and took no precaution to establish the authenticity of the documents of title held by 4th defendant.

The plaintiff accordingly averred further that due to fraud, carelessness and/or negligence, collusion,

connivance or conspiracy averred above in respect of the four defendants on the one part and the 4th defendant on the other, the alleged illegal transfer was effected and as a result, the plaintiff who still held the original grant of title was deprived of her said property. The plaintiff accordingly finally avers in the plaint aforementioned that the said transfer be annulled and the same be reverted to the estate of the deceased through the plaintiff.

It is noted that the 4th defendant failed to enter appearance or defence and an interlocutory judgement was entered against him on 28/3/01. In its statement of defence dated 22/11/2000, the 3rd defendant averred as follows:

- i. That the plaintiff had through her advocates asserted and confirmed in writing in letters exchanged with the defendant's advocate, M/S Sachdeva & Company, that plaintiff had no interest in the suit property and that she thereby so conducted herself in a manner that induced the 3rd defendant to believe that there was no dispute over the land that therefore belonged to 4th defendant.
- ii. That the plaintiff by her own conduct led the defendant to believe that no objection would ever be raised by her to the sale and the transfer of the suit property by the 4th defendant to the 3rd defendant.
- iii. That the plaintiff never disputed ownership of the 4th defendant's ownership of the said suit property despite all along being cognizant of her rights so that she could prevent the 3rd defendant from purchasing it thus prejudicing the 3rd defendant's rights.
- iv. That the plaintiff is barred by her assent, acquiescence and misrepresentation from bringing the suit herein in respect of the same suit land.
- v. That the 3rd defendant was not party to the alleged fraud at the time of purchase of the suit property at the agreed purchase price of Kshs. 8.5 million.
- vi. That the plaintiff's suit is statute-barred by limitation under Section 4 (2) of the limitation of Actions Act Cap 22, of the Laws of Kenya.

The 3rd defendant further averred in its defence:-

- i. That the 4th defendant was the true owner of the said suit property in respect of which a grant was issued to the 4th defendant.
- ii. That the said grant was never issued to the deceased, Peter Gacii and the plaintiff never held it.
- iii. That no other grant for suit property was issued to anybody else including the deceased except the 4th defendant.
- iv. That the 4th defendant as the true proprietor of the suit property was entitled to deal with it in any manner as well as execute the transfer thereof in favour of the 3rd defendant, which transfer was therefore lawful and proper.
- v. That the sale and transfer of the suit property by the 4th defendant, to the 3rd defendant was lawful and proper as it was duly approved and accepted by the relevant authorities including the plaintiff and all other defendants.

The Attorney-General entered defence for the 1st, 2nd and 5th defendants dated 9/12/2002. The main defences raised against the plaintiff's claim are:

- a) That the suit is incompetent and a non-starter by virtue of it being time-barred as per the provisions of the Public Authorities Limitation Act, Cap 39 and the Government Lands Act, Cap 280.
- b) That the suit is further incompetent and a non-starter by virtue of violating the mandatory provisions of Section 13 A of the Government Proceedings Act, Cap 40.
- c) That the orders sought cannot be granted by this court as against the 1st, 2nd and 5th defendants, as per the provisions of the Government Proceedings Act and Civil Procedure Act and Rules, Cap 21.
- d) That the plaint ought to be struck out by virtue of the verifying affidavit being incurably defective.
- e) That the plaint is further incurably defective by virtue of non compliance with Orders VI and VII, of the Civil Procedure Rules.
- f) That the 1st, 2nd and 5th defendants deny all the particulars of fraud, breach of duty of care and negligence as pleaded.

When the case came for hearing the following evidence was adduced: The plaintiff Alberta Mae Gacii gave evidence and called John Mativo her original advocate; Junius Mwalimu Ezekiel Njue, the Deputy Chief Land Registrar at Ardhi House, Nairobi; Julius Mbila Kiko, an auctioneer who was at the relevant time a junior officer in Mr John Mativo's office; and Brian Chege Gacii, plaintiff's son.

The 3rd defendant on the other hand, called one Rosemary Anyango Ngonga who was a Registrar at Mombasa, in the office of the Registrar of Titles Office, Coast Land Registry; Lahori Jethanand Manghnani; Francis Kiarie Kariuki; and Dillip Singh Dhanjal who all testified for and on behalf of the 3rd defendant Company.

The plaintiff testified that Prof. Peter Gacii was her husband whom he married in 1962. That he died on 27/4/1992 aged 57 years. She produced an original death certificate No. 45541 dated 8/5/1992 Exhibit 1. She testified that her husband's identify card was No.343004/66, dated 7/2/1979 and in it Prof. Peter Gacii's name was simply Peter Gacii. She further testified that "Waithaka" was not her husband's name and that he was never known by the name "Waithaka" nor did the name appear in any of his documents. Plaintiff produced her husband's abovementioned identity card as exhibit 2. She said that apart from Peter Gacii working in the government where he served in many ministries, and also rose to the position of Permanent Secretary, he also later became a Managing Director of Thika Synthetic Fibres and later served at Kenya Technical Teachers College as Chairman and Kenyatta University as Vice Chancellor. Plaintiff also testified that she filed this suit as the Administratrix of Peter Gacii's estate whose confirmed Grant of Letters of Administration dated 3/2/1995 was granted to her upon his death, under Nairobi Succession Cause No. 778 of 1992. The unconfirmed Grant of Letters was produced as , exhibit 3. The Grant, she testified, showed all the 23 properties of Peter Gacii, deceased and included one property called L.R. No. 12962, Mombasa which is the suit property herein. She produced the confirmed Grant of letters obtained by her as aforesaid as exhibit 4.

The plaintiff also testified that she was aware and knew all her late husband's properties contained in the Grant of Letters of Administration aforesaid, and in particular knew about the property aforementioned called L.R. No. 12962 – Mombasa contained in Grant No. C.R. 19864. She testified that the land was granted to her late husband, Peter Gacii, of P O Box 21586, Nairobi on 28/8/88, as a leasehold for 99 years from 1/4/1988 at an Annual Rent of Kshs.30,000/= . The allotment letter of the plot which measures 3.883 hectares, was dated 28/8/1988 and was signed by the Commissioner of Lands, the 2nd defendant. The plaintiff further testified that the grant was sent to Coast Land Registry, Mombasa, where it was registered on 22/11/1989 as C.R. No. 19864/1 which was properly signed by the Registrar of Titles who registered it. That to the said grant was attached a Deed Plan No.136836 dated 25/11/1988. Plaintiff

produced the above complete Grant as Exhibit 5. She also testified that her husband, deceased, had first and earlier applied for the allocation of the plot which was a beach plot situated at Tiwi, South Coast. That the then Commissioner of Lands, J.N. Njenga responded to Prof. Gacii's request by recommending him by his letter (Exhibit 6) for an allocation of a beach plot. Then the Commissioner of Lands wrote another letter dated 25/11/83 approving an allocation of the plot (Exhibit 7) subject to approval of the Chief Secretary. That the Chief Secretary by his letter dated 25/5/1984 to the Commissioner of Lands, Exhibit 8 approved the allocation to Prof. Peter Gacii. That a Letter of Allotment dated 15/3/1988 in the name of Prof. P. Gacii of Box 21586, Nairobi was then issued allotting plot L.R. No. 12962 to him for hotel purposes. The plaintiff also testified that the said Letter of Allotment set out terms and conditions the Allottee would comply with. They included payment of Kshs.179,500/= as Stand Premium, Rent, Conveyancing fees, Registration fees and Stamp Duty. Plaintiff produced the Letter of Allotment as Exhibit 9. That plaintiff's husband paid the sum of Kshs. 179,500/= by a Bankers cheque No. 283,186 under a covering letter dated 9/4/1988 to the Commissioner of Lands – Exhibit 10 and was given a receipt No. B392527 dated 11/4/1988 Exhibit 11 and that her husband separately paid Kshs.200/= as Registration and Conveyancing fee on 16/5/1989 – Exhibit 12.

It was plaintiff's further evidence that later Peter Gacii received copy of a letter dated 27/9/89, Exhibit 13 directed to his Box No.21586 which was forwarding to the Land Registrar Mombasa for execution and registration, all copies of the Title C.R. No. 19864, Exhibit 5 aforementioned. Plaintiff further testified, that her husband later received the original Grant aforementioned. That he gave all the abovementioned documents to her for filing and safe keeping in their home facilities. She further testified that she never parted with the documents since her husband did not ask for them back. She also stated that her husband Peter Gacii did not, sell or attempt to sell this particular property until he died in 1995.

Plaintiff further testified that in July 1995 she received copy of a letter addressed to the Commissioner of Lands and copied to Peter Gacii of P O Box 21586 Nairobi which was and is their postal address. The letter was also copied to Sachdeva & Company advocates. It was signed by one Robinson Malombo of Arum & Company Advocates of Mombasa produced as Exhibit 14. The heading in the letter was "Transfer of L.R. No.12962 – Diani/Tiwi leasehold." That Arum & Company indicated in the said letter that they were acting on behalf of Peter Gacii and wished to know if the property was within the Land Control Board Act. It was plaintiff's further evidence that the letter and what it implied shocked her since it meant that the land LR No. 12962, the subject of this suit was in the process of being sold purportedly by her husband who died three years before and being so done through Arum & Company Advocates who the plaintiff had not heard of. She further testified that she immediately contacted their family advocate John Mativo and explained the case. That Mr Mativo telephoned the Robinson Malombo of Arum & Company Advocates, Mombasa in plaintiff's presence and informed him that the suit land indeed belonged to Peter Gacii who had died three years before and that the land was and has never been on sale. That whoever was purporting to sell the land is an imposter and a fraud and should be arrested. She further testified that Mativo followed the telephone conversation with a letter Exhibit 15 to Arum & Company advocates dated 31/7/1995 sent by speed-post. That the letter confirmed that the land belonged to Peter Gacii who died in 1992 leaving the plaintiff as the Administratrix of his estate and that the land was not for sale or transfer and that Arum & Company Advocates should immediately confirm who they were acting for. The letter Exhibit 15, was copied to the plaintiff and other relevant parties, including the 2nd defendant, the Commissioner of Lands, the Registrar of Lands, Coast Province, and the police. That on 1/8/95 John Mativo of Mativo, Kitulu & Co. Advocates, plaintiff's advocates, wrote another letter to Arum Company Advocates on the same subject, this time warning them not to get involved in fraud by attempting to proceed with the sale. They also requested that Arum and Company Advocates do refer the matter to the police without delay. The letter – Exh.16, which was also copied to the plaintiff and the other relevant parties, requested Arum and Company Advocates to confirm that:

- a) No transaction, dealing or disposition had at the time taken place in relation to the wrongful sale of the said property and that the property was intact.
- b) That Arum and Company Advocates will have ceased to act in the transaction which was clearly fraudulent.

c) That Arum and Company Advocates should give source of their instruction to facilitate Police and other investigations to establish who was committing the fraud.

The Plaintiff testified that to the best of her recollections and knowledge, Arum & Company never responded to any of the above letters. She and her son Brian Gacii, P.W.5, reported the matter to CID Headquarters, Nairobi for investigations. Plaintiff further testified that the CID wrote to the 2nd defendant, Commissioner of Lands, with copies to the Land Registrar Mombasa, District Commissioner, Kwale, DCIO Mombasa, District Land Registrar Kwale, Mativo & Kitulu & Co. Advocates, Arum & Company Advocates, and Sachdeva and Company Advocates. That the letter warned of a possible fraud being perpetrated and sought the sale transaction to be stopped. The letter was produced as Exhibit 17. The copies thereof were each delivered by PW5, Brian Chege Gacii, who, it is testified, also saw the Land Registrar, Mombasa whom he explained about the possible fraud and requested for protection. It is her testimony that to the best of her information the Land Registrar at the request of Brian Chege Gacii, entered a caveat against the title to protect it from the alleged threat.

Plaintiff also further testified that thereafter things went quiet knowing that a caveat had been entered, government and police investigations started and that she then believed that she had acted adequately to protect her property. That Arum & Company Advocates did not reply to the letters addressed to them by her advocates and by the police. That in May 1998 she received a Land Rent notice dated 25/5/1998, and that she had earlier received the notices for rents on 2/11/92 and 18/9/95 – all the notices are Exhibit 18. That the total amount for all these earlier notices amounted to Kshs.306,600/= which she settled vide receipt No.516189 dated 25/9/1995 – Exhibit 19. That she felt secure under those circumstances.

Plaintiff further testified that sometimes in August 2000, the family decided to sell the suit property and sought the help of their advocate John Mativo to get a buyer. That Mativo contacted the firms of Musinga & Company Advocates, and Gikandi & Company Advocates, both of Mombasa, to get a buyer. The letters instructing the two firms were produced as Exhibit 20. She testified that it was when Gikandi & Company made an official search at the Mombasa Land Registry that they found that the suit property had been transferred to one Dhanjal Investment Limited, the 3rd defendant. The official search certificate dated 9/8/02 was produced as Exhibit 21. Plaintiff also testified that Gikandi & Company sent to Mativo Kitulu & Company, copies of Rent Clearance Certificate dated 22/1/1996, Exhibit 22 and a similar earlier one dated 25/1/1995 – Exhibit 23, both paid by one Peter Waithaka Gacii a stranger to the family.

Plaintiff further testified that she was soon thereafter in August 2000, asked to go to Mativo, Kitulu & Company advocate's office. That she did so and was shown the following documents received by them.

a) A letter dated 12/9/1995 being an alleged consent letter from the 2nd Defendant, Commissioner of Lands, to the Registrar of Titles, Mombasa to transfer the suit property L.R. No. 12962 and showing that the transferor, Peter Waithaka Gacii had a National Identity Card No. 316400/66. The letter also stated that the suit property belonged to Peter Waithaka Gacii not Prof. Peter Gacii. It also authorized the Land Registrar Mombasa to remove the caveat on the title and proceed to complete the transfer to 3rd defendant, Dhanjal Investment Limited. The letter was copied to District Land Registrar Kwale, Sachdeva & Co. Advocates of Dhanjal Investment Co. Ltd, Mativo, Kitulu & Co. Advocates, and Peter Waithaka Gacii of Box 21586. The plaintiff testified that although the letter, copy of Exhibit 24, sent to Peter Waithaka Gacii was seemingly sent to her postal address, Box Number 21586, Nairobi received by them raising the probability that it was deliberately not sent lest it raised awareness to her family, of the transfer then taking place.

b) Receipt for payment of consent letter fees dated 12/9/1995, No. D. 383653 for Kshs. 170,000/= Exhibit 25.

c) Copy of receipt No. 344875 dated 15/6/1996 for Kshs.250/= being registration of Transfer fees by Sachdeva & Co. Advocates – Exhibit 26.

The plaintiff also testified that he then instructed Mativo, Kitulu & Co. Advocates to write to the 2nd

defendant, which he did, dated 21/8/2000 and copied to Registrar, Kwale District. The letter was informing them that someone, not her husband had transferred the suit property without her knowledge and that the Registrar of Titles Mombasa had removed the caveat which had been entered against such eventuality without informing her. That Peter Gacii, the registered owner, had died in 1992 and could not possibly have signed the sale and transfer instruments in 1996. The letter was produced as Exhibit 27. That in a response to her advocate's letter above, the Chief Land Registrar, Nairobi wrote immediately to the Land Registrar Mombasa, Exhibit 28 and to plaintiff's Advocates – Exhibit 29 seeking several documents to assist him to investigate and confirm the true ownership of the suit premises. That with plaintiff's authority, Mativo, Kitulu & Co. Advocates released to the Chief Land Registrar Nairobi several documents related to L.R. No. 12962, Mombasa for investigations, under cover of their letter of 6/10/2000, Exhibit 30.

Plaintiff further testified that the Commissioner of Lands, the 2nd defendant, also responded by his letter dated 3/11/2000 – Exhibit 31- stating among others that, the suit property according to his records was – (a) registered in the name of Peter Gacii of P O Box 21586 Nairobi, (b) the letter dated 12/9/1995 Exhibit 24 purportedly written and signed by the Commissioner of Lands W Gaacanja, did not appear in the official records in his custody, and (c) that he concluded that the transfer based on it was fraudulently obtained and plaintiff should inform the relevant government machinery to correct the anomaly.

Plaintiff testified further that when she sought correction of the anomaly and none came, she instructed her advocates to send to those concerned Notice of Intent to institute court proceedings to correct the anomaly, which the advocates did by the demand notice dated 18/8/2000 to the Attorney General – Exhibit 32.

Plaintiff in her further testimony, stated that she never at any material time wrote to the 2nd defendant, the Commissioner of Lands withdrawing her complaint concerning the fraudulent attempt and finally, the fraudulent transfer of the suit property as alleged by the 3rd defendant; nor had she at any time lost interest in the suit land which was after all, belonging to her family. She also stated that neither the sale agreement nor the Transfer of the suit property, Exhibit 34, was executed by her husband, Peter Gacii in 1996 since he had been long dead. She further testified that the signature on the documents is that of her husband, which she knew well. She also testified that the identity card shown on the documents as No.3154300/66 is definitely not her husband's, as the latter was always in her custody and as the latter's number was 3430044/66, which was different. She also confirmed that the records show that the Transfer was drawn by Sachdeva & Co. who presented it for registration on 24/1/1996 after execution thereof was witnessed by Robinson Malombo. That it was on the face of it executed by Peter Gacii of her family's postal address which again could not be possible since Peter Gacii of the said postal address died in 1992.

The plaintiff also testified that after she had raised alarm in 1995 and had sought the intervention of the Commissioner of Lands, the Land registrar, Mombasa and the Criminal Investigations Office and others, and despite the fact that she had through her son PW5 entered a caveat against the title to protect it, none of those relevant authorities who were requested to investigate the possible fraud resorted to her before the transfer was registered. Even the caveat asserted the plaintiff was unilaterally ordered removed by the 2nd defendant and was actually removed by the 5th defendant.

The 2nd witness called by the plaintiff was John Mativo who then practiced as Mativo, Kitulu & Company Advocates. He testified that he met Prof. Peter Gacii in 1986 when the latter was a Vice-Chancellor of Kenyatta University. He did some legal work for him including conveyancing. He stated that this made the two to be closely acquainted as the job was a big brief-involving subdividing a big piece of land. He further stated that Prof. Peter Gacii unfortunately died on 27/4/1992. Since there were several matters still pending in court at the time of his death, his wife Alberta Mae Gacii the plaintiff herein, entered her husband's shoes and she began dealing with the witness. That they together completed the several pending cases in court. Mr Mativo, further testified that on 31/7/1995 the plaintiff went to see him in company of Brian Chege Gacii, with a letter dated 20/7/1995 from the legal firm of Arum & Company Advocates. The letter Exhibit 14, he said, was addressed to the Commissioner of Lands, Nairobi and that it referred to a Transfer of L.R. No. 12962 – Diani. It was a leasehold comprising of

3.883 Hectares. That Arum & Co. appeared as acting for a Peter Gacii, the owner of the above property, and the letter sought to know whether the above piece of land was within the Land Control Act. That it was signed by one Robinson Malombo and was copied to Peter Gacii at box 21586 Nairobi which is the address of his clients. The witness further testified that the plaintiff and her son appeared surprised because the piece of land in question was theirs, the Box number was theirs and yet they had not instructed Arum & Company Advocates to sell or transfer the same to anybody. The witness testified further that he in the presence of the plaintiff and his son telephoned the firm of Arum & Company Advocates but found Mr Robinson Malombo absent. That the witness then immediately wrote a letter to Arum & Company on instruction of the plaintiff, informing them that Peter Gacii, the registered proprietor of the piece of land L.R. No.12962 – Diani, Mombasa, died in April 1992 and his wife, who is the Administratrix, was not aware of the intended sale. That Arum & Company were accordingly dealing with a fraudster. That he also informed them that Mrs Alberta Peter Gacii still holds the original title document and wondered how the sale would be possible. That this letter, Exhibit 15, the witness testified, was copied to the Commissioner of Lands, whom they requested not to entertain any further dealing with the piece of land, now the suit property. The letter was also, he further said, copied to Sachdeva & Company Advocates who was representing the 3rd defendant. That the letter was sent by E.M.S. because such method would make sure the letter would be handed over personally to the addressee. The witness also testified that a decision was there-and-then made that Brian Chege Gacii, PW5, would travel to Mombasa Land Registry to make a search on the title and to seek the corporation of the Land Registrar there to enter a caveat to stop any further dealing with the title. He was also to find out who the person who was fraudulently dealing with the title was and report to the police to have him arrested.

Mr Mativo, further testified that he again telephoned Arum & Company Advocates the next day on 1/8/1995 and this time, got Mr Robinson Malombo. That he gave him full information about the piece of land now in dispute as also described in the letter to Arum & Co. That the witness warned Mr Malombo that what was going on was fraudulent and that Mr Malombo should not participate in it but should cancel the transaction and help to have the man dealing with the title, arrested. Mr Mativo, further testified that Mr Malombo admitted that he was indeed handling the transaction but that he had not received the letter (Exhibit 16), sent to him the day before, and that since his client was expected later in the same day, he would raise the matter with him. Mr Mativo also testified that he again telephoned Malombo in the afternoon of the same day and that Mr Malombo told him that when the man calling himself Peter Gacii went to his office the same morning, he somehow got to know that he might be arrested for over the sale of the land and that he accordingly vanished from the office before he could talk to him. In the meantime, Mr Mativo further testified, Brian Chege Gacii had arrived in Mombasa, seen the Land Registrar to whom he explained the situation and convinced him register a caveat against L.R. No. 12962, Mombasa. That Brian had not carried the original Grant with him and that the caveat endorsement was therefore done on the Registry copy only, a photocopy of which Brian carried and passed to Mr Mativo –Exhibit 38. Mr Mativo at this point in his testimony stated that he was satisfied that with the caveat on and all investigations going on, the title appeared safe.

Mr Mativo's further evidence is that nothing strange about the title occurred thereafter until the year 2000 June when the plaintiff instructed his firm to find a buyer for the suit property. He testified that he contacted M/S Musunga & Co. Advocates and M/S Gikandi & Co. Advocates both of Mombasa by letters, Exhibits 20 (a) and 20 (b), and instructed them to seek a buyer for negotiations. In the meantime, he said, no exchange of telephone communication or correspondence had taken place between his firm and Arum & Company of Mombasa since late 1995 to June 2000. That he did not know what had happened to Arum & Company's client because had he been arrested they and the plaintiff would have been contacted. Mr Mativo further testified, that he soon got communication from M/S Gikandi & Co. that on searching the title at the Lands Registry at Mombasa for the purpose of preparing a sale, they had discovered that the suit property had been transferred to one Dhanjal Investment Limited, the 3rd defendant herein. That Gikandi & Co. then sent to them copies of Exhibits 21 (search certificate), Exh. 22 (Rent Clearance Certificate), Exh. 24 (Letter of Consent to transfer), Exh. 23 (another Rent Clearance Certificate) Exh. 25, (consent fees receipt) and Exhibit 26 (Registration of Transfer Fees Receipt). Mr Mativo also testified that he discussed about these documents with his client and her family, after which his firm wrote to the Commissioner of Lands (2nd defendant) complaining about what the Commissioner had allowed to happen – Exhibit 27. That the commissioner of Lands then responded by a letter dated 25/9/2000 –

Exhibit 29 asking for the original Grant of L.R. No. 12962, Mombasa, plus the evidence to show that Mr Mativo's client, Peter Gacii, deceased, had paid the required fee stated in the original allotment letter, plus regular rents and rates after being registered as the owner. It was Mativo's further testimony that he on 6/10/2000 replied the Commissioner of Lands – Exhibit 30, enclosing the documents abovementioned. That he then received a copy of a response from the Chief Land Registrar, Nairobi to the Registrar of Titles, Coast Registry with copy to Mativo – Exhibit 28 – instructing him to investigate the matter and make a report to the Chief Land Registrar. That he, Mr Mativo, then later received a letter dated 3/11/2000 – Exhibit 31, from the Commissioner of Lands confirming that his records showed that the Title No.12962 was registered in the name of Peter Gacii of Box 21586, Nairobi and that the purported letter of consent dated 12/9/95 – Exhibit 24 was not in his records which made him the Commissioner of Lands, concluded that the transaction transferring the property was fraudulently obtained. That the Commissioner of Lands had then concluded his letter by advising Mr Mativo to request the relevant authorities to correct the situation. That the letter was copied to the Permanent Secretary, Ministry of Lands & Settlement. Mr Mativo, further stated that this is what prompted him to start the process of filing this suit. That he then sent a demand notice dated 18/8/2000 to the Attorney-General on behalf of the 2nd defendant and the Registrar of Titles, Coast Registry, the 5th defendant. Mr Mativo testified further that he filed this suit on 31/10/2000 which was within a period of three months after discovering the fraud.

Mr Mativo, in his testimony, denied that a letter, Exhibit 36, from Sachdeva & Co. Advocates, dated 17/11/95 and purportedly addressed to his firm and signed by Mr L. J. Manghnan, was ever delivered to his firm. He also testified that the reference in it purporting to be that of his firm i.e. MRO/CON/31/95 was not theirs as their office reference to this matter was CIV/8/95 and that for the year 2000 his office was using reference No. J.25700. CIV. Mr Mativo, also testified that another letter purported to originate from his office to Sachdeva & Co. Advocates dated 1/12/95 – Exhibit 33 – was a forgery as it was not written by his firm, despite being in what appeared to be his firm's letterhead. Mr Mativo then scrutinized more carefully the letter Exhibit 36. He noticed that the reference in this letter i.e. MRO/CON/31/95 was Arum & Company's office reference that had also appeared in the earliest letter dated 20/7/95 which had been addressed to the Commissioner of Lands and copied to Peter Gacii – Exhibit 14. That Exhibit 14 was also the letter which letter that had made the plaintiff and Mr Mativo realize that someone was trying to sell or transfer the suit property. Examining Exhibit 33, Mr Mativo noted the following features on the letter-head that disqualified it being their letter-head.

- a) That Exhibit 33 does not have “&” between the words “Oaths” and “Notaries” while the genuine letter-head had it.
- b) That the word “Dip” after “Hons” has a full-stop in the forged one while the genuine one does not have it.
- c) That at the end of the words “floor”, “Avenue,” “Nairobi”, “Home” “Machakos” and “20239”, there is a comma in the forged letter-head while there is none in the genuine one.
- d) That the forged letter-head has a colon: on the date line while the genuine one does not have.
- e) That the forged one has used a much smaller font on the words “please reply to our” while in the genuine one the font is much larger.
- f) That the date line in the forged one measures much smaller (4.7 cm) while on the genuine one it is larger (5.3 cm).
- g) That the reference line is shorter in the forged one (3.3.cm) while it is longer in the genuine one (4.3 cm).
- h) That the forged one has in respect of the name “Mativo-Kitulu & Co” much larger font.
- i) That the signature in the forged letter is not that of the witness.

Mr Mativo then produced two copies of his genuine letter-heads – exhibit 37 (a) (b) for comparison.

Mr Mativo also referred to the document of Transfer of L.R. No. 12962 purported to have been signed by Peter Gacii, deceased and dated 10/1/96 and witnessed by Malombo Robinson – Exhibit 34. He testified that it surprised the plaintiff when he showed it to her, because by that date Peter Gacii had been dead for over four years. He also testified about a Sale Agreement dated 18/7/1995 supposed to have been executed by the said Peter Gacii, deceased, before an advocate known as L.G. Maughnani of Mombasa and drawn by Sachdeva & Company Advocates. He observed that the purchase price was Kshs. 8.5 million. He also noticed that several of the crucial parts of the Agreement were filled in ink by hand and observed also that it was not usual for practitioners to use handwritten documents in transactions of such magnitude or at all. Referring to a letter dated 6/9/95 from Commissioner of Lands to Director of Criminal Investigations, Mr Mativo stated that he had not seen the letter until when he saw it annexed to a replying affidavit during an application for an interim injunction, in 2000. He stated further that the identity card number quoted therein as that of Peter Gacii i.e. ID No. 3154300/66 was not that of the deceased, the latter's being ID No. 3430044/66.

Mr John Mativo further testified that he noticed that the Commissioner of Lands was in the said letter dated 6/9/1995, referring to the proprietor of the land in dispute as Peter Waithaka Gacii while the instrument of Transfer was still recognizing him as Peter Gacii. He thought that with this difference in the name, the document of transfer should not have been registrable and should have been out-rightly rejected. Mr Mativo denied that his firm received the letter exhibit 24 being the consent to transfer the disputed property, and purporting to clear the controversy about the ownership thereof and also directing the Registrar of Titles to remove the caveat and proceed to register the transfer to Peter Waithaka Gacii. The letter carried a rubber stamp depicting that it was written and signed by W. Gacanja. It was Mr Mativo's view that in the state the letter was, it was most likely forged. Indeed according to Mr Mativo, the Commissioner of Lands later disowned Exhibit 24 through his letter dated 3/11/2000, Exhibit 31.

Another document annexed to the Replying affidavit of the 3rd defendant, Mr Mativo testified, was a Grant No. CR 19864 dated 28/8/1989 which related to L.R. No. 12962. Mr Mativo said that on examining this document which was Exhibit 35 he noticed that it was different from a copy the plaintiff's son had earlier obtained from the Registrar of Titles on registering a caveat Exhibit 38 and was also a little different from the original Grant Exhibit 5, always kept by the plaintiff. The differences he noticed were:-

- a) Exhibit 38 upon which the caveat was endorsed in July 1995, was written in liquid ink while the Grant held by the 3rd defendant exh. 35 was written with a red biro pen with entry number (2) looking different in the two titles.
- b) The caveat entry of July 1995 in the Grant in the Registry Exh. 38 was not signed while a similar caveat entry in Grant in the hands of the 3rd defendant exh. 35 is duly signed for but both were not dated.
- c) The third entry in the Grant carried by the 3rd defendant was a withdrawal of the caveat which was also not signed for.
- d) The transfer of Title found only in the custody of 3rd defendant but missing in the Deed File of the Registry, was signed, dated and given a number of presentation dated 24/1/96.

Mr Mativo testified that to the best of his information, the original grant given to the plaintiff's deceased husband exh. 5, did not at any relevant time leave the custody of the plaintiff. For that reason it did not carry the caveat and the entries of the other transactions abovementioned.

Mr Mativo also had noticed that:

- e) The conditions of allotment in the original Grant Exh. 5 in the custody of the plaintiff, found on page two, while they are in the copy with 3rd defendant Exh. 35, found on page three (conditions

14, 15 & 16).

f) The conditions on the 3rd defendant's copy of Grant are typed while in the plaintiff's copy, condition 15 is written by hand and there is no condition 16.

g) The revenues stamps on the two Grants are differently laid and arranged. The stamp duty assessments also do not tally. Rubber stamps face different directions. The ribbons are of slightly different colours.

h) The Deed Plans details are not exactly similar.

From the above observations, Mr Mativo came to the conclusion that the two Grants Exhibits 5 and 35, and Deed File copy exh. 38, are not exactly similar, were not issued at the same time and one is not a replica of the other two as it ought to be in practice. These circumstances led Mr Mativo, as he testified, to get instructions to file this suit on 31/10/2000, three days before he received a letter from the Commissioner of Lands, 2nd defendant, advising the plaintiff to seek rectification of what, to the Commissioner of Lands, appeared to be fraud. He later had to transfer the conduct of the suit to M/S Musinga & Co. Advocates as he realized that he was a potential witness in the case. Mr Mativo also testified that despite reporting the case to the Police, the Commissioner of Lands, the Registrar of Titles and others, he was never called upon to record any statement nor was he aware of any goings on of investigations as he waited for results. Nor to his knowledge, was the plaintiff requested to record any statement anywhere although detailed facts and documents had been passed to defendants. He confirmed that, in his view, only one title deed was issuable under the Registration of Titles Act under which the subject dispute property was allotted. He testified that a caveat stops all dealing in the subject title and must carry an entry showing details of presentation including the date and the signature of the officer entering it or removing it. He said a caveat is effective so long as it is endorsed on the Registry copy even if it did not appear on the original copy held by the proprietor. He said that the plaintiff and his firm did not know when or why the caveat was removed, nor did they know that the original copy kept by the plaintiff, was a little different from the copy now kept at the Registry of Titles Mombasa. That the differences were discovered only when they learnt that the property in dispute had been purportedly transferred to the 3rd defendant and also later when this suit had been filed and an application for temporary injunction was being agitated.

On the notice of intended prosecution dated 18/8/2000, Mr Mativo, testified that it was his office that served the original signed copy on the Attorney-General although the office copy thereof produced in evidence was not signed. Mr Mativo testified also that the Registry Grant Exh. 38 happened to carry the caveat prompted to be registered by the plaintiff's son, PW5, a copy of which PW5 carried after registration of the caveat at Mombasa Land Registry. He observed that when the plaintiff, through his firm, made a complaint to the relevant authorities about a possible fraud going on touching the title in dispute, the CID Police wrote a letter Exhibit 17 warning various parties and institutions about the fraud. He also said that after the caveat was entered, he did not think any party or authority would proceed with any transaction in relation to the title without warning all the relevant parties, especially the plaintiff who had filed a complaint and entered a caveat, delivered documents for investigations and generally and concernedly alerted all parties concerned.

Mr Mativo's view in his testimony is that the police joined in the fraud. He was of the view that Sadcheva & Co. Advocates did not proceed with proper and any or sufficient caution as they ought, in registering the transfer in dispute. He strongly asserted that they should have contacted the plaintiff's advocate to confirm that the dispute over proprietorship had been legally resolved. He further believed that there were many issues accompanying the transaction which had been deliberately raised and which ought to have raised legal and factual curiosity but which were deliberately and conveniently ignored by 3rd defendant. He testified that no meaningful investigations were carried out by both the CID Department nor the Commissioner of Lands as well as the Registrar of Titles Mombasa and Nairobi and that had they done so, they would have discovered and stopped the fraud before the transfer was registered. Serious investigation, he testified could not have meaningfully taken place without involving the plaintiff and members of his family.

Going back to the Notice of intended prosecution, Mr Mativo testified that it was served through their office delivery book which need not have been office-stamped.

Referring again to the Grant of Title, Mr Mativo testified that the Registry copy and the proprietor's copy must under Registration of Titles Act, be completely similar in entries and physical appearance. That he had no reason to think the Registry copy upon which the caveat was endorsed was different from the copy held by the plaintiff. He further testified that the caveat can be entered in the Registry copy without appearing on the proprietor's copy because the person entering may not necessarily be carrying the proprietor's copy.

Mr Mativo also testified that after they realized that the fraud had been committed, he, his client the plaintiff and her son, PW5 met the Commissioner of Lands in his office and examined the Registry Deed file concerning the title in dispute. The Commissioner aforesaid confirmed that the consent to transfer the title did not originate from his office. He also believed that Exhibit 31, (a letter denouncing exh. 24), which originated the same office was authentic. Mr Mativo was of the view that there is no specific or laid down procedure for receiving mail by the Attorney-General and many times no one signs for such letters delivered there. He also believed and knew from personal experience that the Attorney-General rarely acknowledged receipt of demand notices and that there was no law that required the plaintiff to plead service of demand notice.

Mr Mativo further testified that the letter Exhibit 36 written by Mr Sachdeva & Co. Advocate was fraudulent in the sense that it was purported to be sent to Mativo's firm when as he believed, no such attempt was made. Nor, according to him, did Sachdeva & Co, who had an important reason to do so, telephone him on such a crucial letter to ascertain that the crucial letter actually left their office or arrived safely. Mativo stated that Sachdeva & Co. knew of the laid complaint concerning possible fraud relating to such a valuable property and that they ought to have appreciated that abandoning of the interest on such property would not have easily taken place. That it would have been a reasonable course of action to have properly consulted the plaintiff's advocate who was at a telephone's distance to clear the issue.

Mr Mativo also testified that the CID Officer involved in the so called investigations, had at some stage summoned the 3rd defendant to their office and demanded to know why the 3rd defendant had paid only part of the purchase price and had delayed to complete the transaction. Mr Mativo observed that the CID Officer did not as well summon him and the plaintiff to inform them that the investigations were complete and to ascertain whether the property indeed belonged to the 4th defendant, Peter Waithaka Gacii whether the plaintiff no longer claimed the property. Mativo testified in conclusion of his evidence that the police, the 2nd defendant and the 5th defendant simply ignored the plaintiff's complaint by shutting her out of the whole process of investigations. He believed they acted in collusion.

Mr Junius Mwalimu Ezekiel Njue, testified next as PW3. He was the Deputy Chief Land Registrar in Ardhi House Nairobi. He had worked for 32 years in various land offices thereby acquiring immense knowledge and experience. He had administered the various land Acts and is familiar with all the relevant procedures under the Registration of Titles Act under which the disputed title is registered. That their Registry in Nairobi keeps a file in relation to every title allocated by the Commissioner of Lands whether in Nairobi or in Mombasa or districts. Such a file, Mr Njue stated, is called the correspondence file. In it are kept all Correspondences relating to the allocation which formed the root of title. These included: Application for allocation of a plot; Letter by Commissioner of Lands or Permanent Secretary acknowledging; A Letter of Allotment to the applicant demanding payment of certain various fees; Acceptance Letter by the applicant; Payment of required fees by Allottee; Requisition for the survey of the land from the Director of Survey; Instructions by the Commissioner of Lands for the preparation of the title documents copy of Grant or title, transfers and other related minor ones.

The witnesses testified that every file is safely secured in Records office. By examining it at anytime, it will be easy to know who the owner of any plot is. There was such a file for Title No.C.R.19864 which related to L.R. No. 12962. Mr Njue then stated that the plot is situated at Diani Beach, South Coast. In the file Mr Njue confirmed presence of the following documents:

- a) Survey Plan to which an internal memo dated 29/1/88, addressed to the Senior Assistant Commissioner of Lands by the Commissioner of Lands informing the former to issue a letter of allotment to Professor Peter Gacii of P O Box 21586 Nairobi. The letter indicated that the land size was 3.883 Hectares. Accordingly the letter of allotment was issued on 18/3/88 referenced No.122237/4 for L.R. No. 12962 for a hotel site at Diani beach to Prof. P Gacii of Box 21586 Nairobi – Exhibit 9.
- b) A letter of acknowledgement and acceptance of the allocation from Prof. P. Gacii, dated 17/3/1988.
- c) A letter dated 9/4/88 from Prof. Peter Gacii to Commissioner of Lands under cover of which was a cheque No.NQ/BP 283186 for Kshs.179,500/= Exhibit 10.
- d) Receipt for Kshs.179,500/= above dated 11/4/88 Exhibit 11.
- e) A letter by Commissioner of Lands dated 2/8/88 to the Director of Surveys asking him to issue a Deed Plan.
- f) Letter of Commissioner of Lands dated 27/9/89 to Land Registrar, Mombasa enclosing a Grant – Copy Exhibit 13.

Mr Njue further testified that Prof. Peter Gacii was soon thereafter requested to visit the Land Registry at Mombasa to collect his land title. Njue also said that the Grant was accompanied by receipt numbers for payments done in Nairobi. That the Registrar was to register the Grant in Mombasa Registry, photocopy the same and retain a copy thereof since the original copy was to be released to the registered proprietor. Mr Njue said Exhibit 5 is the original Grant and that only a replica photocopy of it should be found in the Mombasa Land Registry. He also testified that the original proprietor should be one who paid for the same and who must be holding payment receipt No.392527 of 11.4.1988 and receipt No. 674467 of 16.5.1989. He also testified further that the original allottee should be holding all the original documents mentioned above among which will be the letter of Allotment. He added that if two people turned up with the claimed to be original Grants, he would hold the one with original correspondences with the letter of allotment and original receipts to be the genuine proprietor.

Mr.Njue also said in his testimony that the genuine proprietor must produce his proper national identify card or passport to be allowed to sign for and collect the title documents. The identity card or the passport number must as well tally with the number the proprietor will have given to the Commissioner of Lands as his identification early in the process of allotment. A fee receipt for the original Stamp Duty must be in the custody of the proprietor too.

Mr.Njue referring to a letter by Mativo & Company dated 21/8/2000-exhibit 27 stated that it had attached to it the following documents:-

- i) Certificate of death of Peter Gacii –Certificate No. 3827 of 1972,
- ii) Grant of Letters of Administration of the Estate of Peter Gacii in Succession Cause No.778 of 1992 dated 3.2.1995,
- iii) Certificate of Confirmation of the above Grant as rectified,
- iv) An application for a beach plot by Professor Peter Gacii addressed to Minister for Lands
- v) A letter dated 25.11.83 from Commissioner of Lands, approving an allocation to Professor Peter Gacii – Exh. 7
- vi) A letter dated 25.5.84 from Chief Secretary to Commissioner of Lands by the Permanent Secretary communicating the President’s approval of the allocation to Professor Peter Gacii, - Exh.

8.

vii) A letter of Allotment of beach plot to Professor Peter Gacii dated 18.3.88 Exh. 9.

viii) A letter dated 20.7.95 from Arum & Company Advocates to Commissioner of Lands enquiring whether L.R. No. 12962 Diani/Tiwi/ Lease – hold required a Land Control Consent with Arum& Company acting for Peter Gacii of P.O. Box 21586 Nairobi and Sachdeva & Company for Dhanjal Investments Ltd of Mombasa,

ix) A letter by Mativo & Company to Arum & Company dated 1.8.95 disputing that the plot is for sale or that Arum & Company have instructions to sell it Exh. 16.

x) Copy of Grant exhibit 5 – C.R. 19864/1 in the name of Peter Gacii,

xi) Copy of the official receipt No BC/16189 dated 25.9.95 for Kshs. 306, 600/= in favour of Peter Gacii – payment of land rent Exh. 19.

xii) A letter from Nairobi D.C.I.O to Commissioner of Lands, Arum & Company and Mativo & Company and others,

xiii) A letter to Gikandi Ngubuini &Mativo & Company dated 16.6.2000.

Mr.Njue further testified that the above documents were attached to a letter of complaint written by Mativo & Company. The latter was seeking investigations to be done concerning what they knew was a fraud being committed in relation to the title L.R. No. 12962. Mr.Njue also testified that in the file there is the Chief Land Registrar's letter to Mativo & Company responding to the latter's complaint. The Chief Land Registrar sought some more documents specified in his letter to enable his office to start investigations. He sent copy of his letter to the Registrar of Titles, Mombasa instructing him to write a report in response to Mativo & Company's letter –exhibit 28. Mr. Njue also stated in his testimony that he was soon visited by Mr.Matavo in company of the plaintiff and PW5, her son Brian. That the plaintiff carried for Mr. Njue's inspection the original Title to C.R 19864 – exhibit 5 which he saw and examined. Mr.Njue referred to he letter exhibit 24 and he confirmed to this court that the letter did not originate from their office and that the letter's reference i.e. Ref.105156/C/11/374 did not exist in any of their office files, despite holding Commissioner of Lands rubber stamp.

Mr. Njue then referred to the letter exhibit 31, dated 3/11/2000, written by Commissioner of Lands to Mativo & Co. It was signed by one Ochieng and was disowning the earlier letter –exhibit 24, reference No.105156/C/1/374 which was the purported Commissioner of Land's consent to transfer the land in dispute herein. Njue added that the copy of consent (and all others) should as an office standard rule be in the office file but Exh. 31 together with the covering letter, were not there. Njue also said that a transfer like the one in dispute, required a consent of the Commissioner of Lands and that he could not have given one without retaining copy thereof in the file, its existence being crucial.

Mr. Njue in his further testimony then commented on the plaintiff's original copy of the Grant –exhibit 5. He said that the Grant related to title No Cr. 19864, related to L.R. No. 12962. That the copy of the Grant in Mombasa Land Titles Registry should be a replica of exhibit 5. Then making a reference to Exh. 35 which was another Grant relating to L.R.No. 12962 aforesaid, he said it is different from exhibit 5.

Njue went back to exhibit 30 which he said was a letter written by Mativo &Co. dated 6.10.2000 and annexing several documents to the Chief Land Registrar to enable him start investigations earlier alluded to.

In the office file, Mr.Njue noticed another letter written by Mombasa Registrar of Titles dated 8.9.2000 and referenced No. 885619 to the Principal Registrar of Titles. The important points in the letter, Njue said, were:-

a) that the original Grant was prepared and registered in the name of Peter Gacii and not Peter Waithaka Gacii

b) that there arose a dispute as to ownership and previous Commissioner of Lands appears to have resolved it by making a finding that the land belonged to Peter Waithaka Gacii and not Peter Gacii

c) that attached to the Grant in (a) above was a consent letter Exh. 24 dated 12.9.1995 and a letter also of the same date forwarding the consent to the Registrar of Titles Mombasa and copied to the Criminal Investigations Department.

d) That the Registrar of Titles Mombasa relied on the consent in (c) above to transfer the suit property L.R. No.12962, to the 3rd Defendant – Dhanjal Investments Ltd, as directed by the Commissioner of Lands.

e) That the transfer instrument in favour of Dhanjal Investments Ltd, Exh. 34 was missing from the Deed File.

f) That the Registrar of Titles in the process of transferring the disputed title to Dhanjal Investment Ltd, relied on Grant Exh.35 and not exhibit 5.

Mr.Njue expressed surprise that the transfer documents were missing in the Deed File as pointed out by the Mombasa's Registrar of Titles. He also noted that the transfer of the title in dispute should not have been authorised and allowed because condition No. 2 of the Grant required that no such transfer would take place unless the land has been developed which condition had not been complied with by the time the disputed transfer took place. Special authority to override such condition was required which Njue said, was complicated as it required a tripartite transfer making the President of Kenya a party and that this is the only way to do it. He confirmed that this tripartite transfer was not applied. Mr. Njue examined exhibit 34 – the transfer instrument the property in dispute, and declared that it was not a tripartite transfer which alone could have the legal capacity to effect the transfer.

Mr.Njue examined office copy of the Grant of CR. 19864 sent to him earlier by the Mombasa Registrar of Titles which was introduced in evidence as Exh. 38. He confirmed to court that its entries in various aspects, differed from the Grant copy held by 3rd Defendant exhibit – 35 in terms of some entries which were also not signed. Date and number of presentation were not similar or were missing, inclusive of the date of entry of the caveat. Some dates and signatures were missing. Mr.Njue asserted.

Mr.Njue stated in his further evidence that having examined all the documents contained in the Deed File sent to him by the Mombasa Registrar of Titles, he made the following conclusions;-

i) that the Commissioner of Lands defence to this case lay on the issue whether or not the land in dispute was originally allotted to Professor Peter Gacii or to one Peter Waithaka Gacii,

ii) that finding based on the study of those documents was that the land in dispute belonged to Professor Peter Gacii of P.O. Box 21586 Nairobi, upon the ground that all original documents including the application for allocation, the letter of allotment, the original Grant, receipts e.t.c. belonged and were in the name and possession of Peter Gacii otherwise called Professor Peter Gacii and not Peter Waithaka Gacii in whose name none of the initial documents mentioned, appears.

Mr.Njue under cross-examination admitted that he is not a registrar of titles since he is not an advocate. But that by long experience he found himself dealing with the process of registration under Registration of Titles Act. That the Grant exhibit MFI 35 was registered on 22.11.1989 but was signed by the Registrar of Titles Mombasa on 22.8.89. That the signature of the Registrar of Titles who witnessed the signing of the Commissioner of Lands appears different from the signature of the Registrar of Titles who registered the Grant, 2 months later. That the signature of the person who registered Grant Exh. 35 is similar to the signature of the signatory of the caveat. That the Commissioner of Lands is the Registrar-General under Section 5 of R.T.A.

Mr. Njue also recorded that under Registration of Titles Act, only one title is issuable and that he was surprised to see two or even three Grants issued in this case. Exhibit 5, Exh. 35 and exhibit 38. One of them, he said, was a fraud.

The next witness to testify was PW4, Julius Mbila Kiko. He said that he was currently an auctioneer who in the year 2000 was a court clerk of Mativo & Company Advocates. He said that as such court clerk he was instructed by his employer to serve a Notice of Intended Proceedings upon the Attorney-General at Sheria House. He went to the 4th Floor, Sheria House, at the Main Registry of the Attorney-General and delivered the Notice in form of a letter in an envelope. The Notice had been entered in Mativo & Company's Delivery Book which he carried as well as the envelope carrying the Notice. The letter had been entered in the Delivery Book as No. 222 and Mr. Kiko testified that he delivered it to a lady worker who appeared in charge in the said office and who signed receipt of the delivery in Mativo & Company's Delivery Book. He produced the Delivery Book and indicated the relevant page – exhibit 42. Mr. Kiko in reference to a copy of the Notice for intended proceedings that he delivered, said that the original copy which he delivered was properly signed. He said that the same was put in the delivery envelope for delivery by himself, and he was sure that it was the notice he delivered. Nor could Mr. Kiko confirm that the lady who received the delivery at the Attorney - General's office had or had no authority to receive such document. Mr. Kiko was firm that the Attorney – General's Mail Registry was on the 4th Floor where he delivered the letter in the year 2000, and not on the 7th Floor.

The 5th and final witness called for the plaintiff in this case, was Brian Chege Gacii. He testified that he is the 3rd son of the late Professor Peter Gacii and Alberta May Gacii, plaintiff herein. That his father died in April, 1992. That a Grant of Letters of Administration for his father, Professor Peter Gacii, was issued and confirmed to his mother Alberta May Gacii. He further testified that among his deceased's father's estate was a piece of land known as L.R. No.12962 at Tiwi-Ukunda, in Mombasa South Coast. That the family's postal address in Nairobi was Box 21586 Nairobi. Referring to the letter exhibit -14 written by Arum & Company Advocates and dated 20.7.1995, Brian testified that he collected the letter from their Postal Box No. 21586 Nairobi and gave it to their mother the plaintiff. When she read it in his presence and gave it to him to read, they were both shocked to note that the Firm of Arum & Company advocates, who were not their family advocates and whom the family had not instructed at any time, was in the process of selling and transferring the mentioned property. The letter was written by Arum & Company to the Commissioner of Lands and copied to one Sachdeva & Company Advocates and to Peter Gacii of Box 21586 Nairobi. He thought that the letter exhibit 14 reached them because it was copied to their deceased father and because their family postal number was used. That the letter's purpose was to know whether the land was within the Land Control Board Act. Brian stated further that the family had not requested for change of user of the land either. The witness further testified that they had not sought to sell or deal with this land in anyway. They immediately visited the family lawyer, Mativo Kitulu & Company for advice. Mr. John Mativo (PW 2) immediately in their presence, placed a call to Arum & Company Mombasa, but did not get the writer of the letter. He then had wrote a letter to Arum & Company (exhibit 16), informing them that the land L.R. No.12962, was not for sale as the owner, Peter Gacii, died in 1992 and the administrator of the estate, is not aware of the transaction. The letter had also sought to know the source of Arum & Company's instructions to sell the land. That the letter warned Arum & Company of likely fraud being committed and the grave consequences that would arise if Arum & Company did not at once terminate the transaction. Arum & Company was also to reveal all other relevant information including the fact whether the property was still safe and still in the ownership of the deceased Peter Gacii. That Arum & Company were requested to reply urgently.

Mr. Brian Gacii also testified that he thereafter went to Criminal Investigations Department Headquarters and reported the matter after which Mativo & Company were instructed to write letter exhibit 17 to Commissioner of Lands copied to Registrar of Titles Mombasa, District Commissioners Mombasa and Kwale, Provincial Criminal Investigations Department- Mombasa and Arum & Company, Mombasa. That on 4.8.95, in company of two local CID officers, he visited the Registrar of Titles Mombasa by the name of Lilian Mutimo and explained the issue and in particular that a person was impersonating Professor Peter Gacii who died three years before and is in the process of trying to sell L.R. No. 12962, Mombasa. That Mrs Mutimo revealed that she knew Professor Peter Gacii, deceased, well because

the two had worked together before. That Mrs Mutimo agreed to enter a caveat against the title to prevent any dealing with it and immediately registered one against the title.

Mr. Brian Chege Gacii then proceeded to visit the other people addressed by the letter exhibit 17 whom he personally served with the letter before visiting the land at South Coast where he constructed a large caution notice purportedly aimed to warn those who would be visiting it for the purpose of purchasing it. That on 4.8.95 the family received a land rent and rates notice, exhibit 18 which the family cleared by paying Kshs.306,600/= receipt exhibit 19. From then, testified this witness, the family believed they had thwarted an attempt to defraud them. There was therefore no activity in relation thereto until June, 2000 when the family decided to sell the land through their advocates, Mativo Kitulu & Company. That is when the family discovered that the land in dispute had been transferred to the 3rd defendant, Dhanjal Investment Ltd, by an instrument of Transfer-DSDIO (also exh. 34). The witness testified that the signature on Exh.34 looks like that of his father but is different, apart from the fact that Professor Peter Gacii died in 1992 while the Transfer was being only signed on 10.1.1996. Mr. Brian Gacii also testified that at no time did his mother, the plaintiff try to sell the land, nor did she receive the purchase money shown to be Kshs. 8,500,000/=. He also testified that all the documents relating to L.R. No. 12962, were properly kept by his parents including the titles, the correspondence and the payment receipts. He further testified that at Mombasa, the caveat was entered as he waited, by Mrs Mutimo and he was given a photocopy of the title on which the caveat was entered. When shown the Grant exhibit 38 Brian Gacii thought that it generally resembles that one held by the 3rd defendant, Dhanjal Investment Ltd, Exh.35, who had purchased the property in dispute. He said that he did not know that these two differed from exhibit 5 which was the Grant in the plaintiff's custody since they all three, on their face looked similar. Brian agreed that the copy obtained from Mombasa to which the caveat was annexed, looked similar to the one held by 3rd defendant Exh. 35 and the Registry copy exhibit 38. He also said that, which of these three titles was original and genuine would be left on who the court would trust or believe. Brian said further that he never met the person who sold the disputed land who went by the name Peter Waithaka Gacii. He however saw that his father's identity card number 3430044/66 was different from the one of Peter Waithaka Gacii No.3154300/66.

Brian never met Robinson Malombo of Arum & Company who was involved in the sale and transfer. He also saw that the photographs on the two identity cards were clearly different. He testified that his search on the said Peter Waithaka Gacii's identity card led to the conclusion that it was not a genuine identity card.

In reference to the transfer that was registered on 24th January, 1996, Brian stated that even if there could be two title deeds then, only one in the plaintiff's custody could be genuine and only plaintiff as administrator of Prof. Peter Gacii's estate had authority to sign a valid transfer.

At this stage the plaintiff closed her case. The Defence called four witnesses. The first witness was Rosemary Anyango Ngonga who said she was the Registrar of Titles in the Mombasa Land Registry. She is an advocate of the High Court of Kenya and was appointed as such registrar in 1988. She had served in Bungoma and Kisumu before she was transferred to Mombasa in 1994. While at Mombasa she became aware of title No. CR.19864 – L.R. No.12962, an office copy of which, Exhibit 38, she was looking at as she gave this evidence. According to her, the Grant was registered in Mombasa Registry on 22/11/1989, and had been signed by Miss Ojiambo who was the former Registrar of Titles. It had also been signed by the Commissioner of Lands, then Mr Gachanja as witnessed by Registrar of Titles, Nairobi. The office copy Exhibit 38 tallied with the registered proprietors; Dhanjal Investment Ltd is copy – Exh. 35. Referring to the caveat which was entry (2) on the office copy, she said that it was a Registrar – entered caveat. It was intended to block any dealing with the title and the witness noticed that it was not signed for as it ought. Surprisingly, the caveat on the 3rd defendant's, was not signed for, as well. Rosemary then referred to entry 3 in the Grant Exh.38. It was a withdrawal of the caveat, she testified. Withdrawal was in compliance to the Commissioner of Land's instructions in a letter (Exhibit 24) dated 12/9/1995. She also referred to the Commissioner of Lands letter dated 6/9/95 addressed to the principal Registrar of Titles, A copy was given to the Director of CID, informing them that the land in dispute belonged to Peter Waithaka Gacii and not Prof. Peter Gacii. This witness then recalled the time when the documents came

to her table and she signed off the caveat entry. The documents to be registered which included a Transfer instrument dated 10/1/96, were passed to her after the relevant entries had been entered on them in the relevant registers by clerks. She testified that she did not find any difficulty in signing the entries and completing the transfer transaction. She testified further that the office copy of the transfer was taken by the police for investigations and had not been returned, but copies of it and of the originals kept by the transferee were before the court. The witness also testified that the consent and the Clearance Certificate to transfer the plot to the 3rd defendant dated 12/9/1995 was given by the Commissioner of Lands. She saw nothing that could have prevented the transfer being registered. She also testified that she was aware of only one title – Exhibit 35 whose copy the registered owner, the 3rd defendant, was presently holding. She believed that the Chief Land Registrar, a Mr Ngatia, did not wish to produce Exhibit 35 but she produced it because she claimed that she had been cleared by the Commissioner of Lands to do so. That because she had produced Exhibit 38 against the wish of the Chief Land Registrar, she was interdicted from her job and was giving her testimony while under suspension. The witness then turned her attention to the office file also called Deed File No.8856. She went ahead to admit that she had no authority from Chief Land Registrar to give evidence she was giving. She testified further that the documents in the Deed File No. 8856 are the only ones in lawful existence. She also said that what she was giving in evidence despite being on suspension was what was the truth as the disputed registration of the disputed transfer occurred when she was on duty and in charge of the exercise.

In her further testimony, Rose Mary Anyango Ng'ong'a stated that she was the Registrar of Titles in Mombasa up to April 2000 from 1994. She confirmed the withdrawal of the caveat earlier entered by the Registrar upon the complaint of PW5. But she said she did so upon instructions from the Chief Land Registrar, Nairobi who according to her later turned against her and interdicted her in relation thereto. There were other officers who also handled the transaction at the same time, particularly another Registrar, Mrs Mutimo. That she and Mutimo oversaw the registration of the title in question.

Mrs Rosemary Anyango Ngonga, further testified that it was Mrs Mutimo who received all correspondence in the Deed File aforementioned and that she forwarded the documents to the Principal Registrar of Titles in 1996 when the disputed transfer had been registered.

In reference to Exhibit 38 – the Grant held by the Registry, Mrs Ongonga pointed out that the caveat entry No. 2 was entered by Mrs Mutimo who she admitted, did not date the entry. Mr Ongonga said that what she did in relation to the disputed transaction was in accordance with the instructions of the Commissioner of Lands. She said that Exhibit 31 was a letter written by the Commissioner of Lands but signed on his behalf by one Ochieng G.O, a Land Officer. She however, denied ever seeing the letter before. She confirmed that the letter maintained that the land in dispute was allotted to Prof. Peter Gacii and that the title was issued in the name of Peter Gacii. Referring to letter Exhibit 24, the letter of consent and two others dated 6/9/95 and 11/9/95, Mr Ong'ong'a said that they were all written by the Commissioner of Lands and were effectively stating that the land in dispute belonged to Peter Waithaka Gacii. That she followed the recommendation in the letter dated 11/9/95 to register the disputed transfer. According to her the dispute about ownership of the plot was cleared by the Commissioner of Land's letter Exhibit 24. This also meant that the person who was due to receive a letter of consent was Peter Waithaka Gacii, not Peter Gacii. That there was such letter indeed in favour of Peter Waithaka Gacii for the transfer. That the applicant for such consent must be the registered proprietor and that Peter Waithaka Gacii was such registered owner. The witness was then at this point in her evidence shown Grant Exh. 38 in the hands of 3rd defendant. She asserted that the registered owner who should have applied for consent was the Peter Waithaka Gacii but not Peter Gacii. She however admitted that it was Peter Gacii who purported to apply and who obtained consent. Mrs Ong'ong'a now changed and said that in September 12/9/95 when the consent was given, there was no title in the name of Peter Waithaka Gacii. Mrs Ng'ong'a went further to admit that in so far as there was no title in the name of Peter Waithaka Gacii and that the consent granted was granted to Peter Waithaka Gacii who was not the registered owner there was accordingly no actual legal consent to transfer a title existing in the name of Peter Gacii.

According to Mrs Ng'ong'a, even if the names in the consent differed from that in the title, she in her day to day, practice, had ignored the differences and proceeded to register transactions but a consent, she asserted, had a meaning and a validity. She then testified that if the transfer agreed with the title but not

with the consent, she could ignore it if it was a small difference and proceed to register the transfer.

Mrs Ong'ong'a then appeared to confound the court when she went ahead to confirm that in this case, the presence in the consent of the name "Waithaka" was a remarkable difference that could not be ignored. She claimed further that she was not aware of the controversy then existing about the ownership nor was she aware that Peter Gacii was long dead.

Mr Ngonga went further to admit that treating Peter Gacii as the same person as Peter Waithaka Gacii was a serious oversight although she was not at the material time conscious of the oversight, nor was she given a chance to rectify the oversight. She realized the oversight after she was interdicted. Looking back at the transfer now, she was now of the view that the oversight and the transaction (transfer) should not be allowed to stand since it was done by a crook. She asserted also that she was instructed to handle a property belonging to Peter Waithaka Gacii and she did so.

Examining the receipt that was issued for stamp duty, she saw only a photocopy of it and that the receipt did not quote the title number being transferred and in respect of which stamp duty was collected. She could not say why this omission was not raised during earlier investigation. She however admitted that police asked questions when the transfer had been registered but none of these points came up, since she and other officers only answered questions that were put to them. She also testified that the letter of her interdiction stated the reason of her interdiction as her illegal removal of the caveat in 1996 that gave way to the registration of the transfer. She also asserted that she gave evidence before another judge a year or so before this hearing and that she there, produced the Deed File which she was keeping, with all its documents. She agreed that she kept the file without the knowledge or permission of her employer. She admitted that keeping the file in her private possession in the last 1 ½ years was illegal since any official search by any person would not materialize. But she also agreed that the counterpart file in Chief Land Registrar's Office Nairobi, would carry all the relevant documents relating to all transactions which will have taken place.

Mrs Ng'ong'a also testified, that she had never before seen the Grant, Exhibit 5 whose stamp duty stamp had been cancelled. She agreed that cancellation where the stamp is incorrect is normal. Asked whether if Peter Waithaka Gacii on the one hand and Peter Gacii on the other went to her in the office claiming to be the disputed title's owner whom she would settle for, she said, she would settle for whoever of the two who produces the (a) Letter of Allotment, (b) receipts of payment of Land Rents & Rates in the original form.

Mrs Ng'ong'a was then shown Grants Exhibit 5 and Exh. 38: had she noticed that the signatures of the Commissioner of Lands had differences? She answered in the affirmative. She then noticed that there was no further entry in Exhibit 5 while in Exh. 38, there were four entries including entry and removal of caveat and thereafter the Transfer. The caveat entry and removal were not countersigned. She was the one who removed the entry but she did not sign for it. She proceeded to register the Transfer before the removal of caveat was signed for hoping that her senior Mrs Mutimo would go ahead and sign for the entries. She admitted that what was proper to do was to have the removal of the caveat first countersigned by Mrs Mutimo before she could embark to register the transfer and that not following such procedure was "inadvertence" on her part, although finally the Grant Exh.35 was issued without the caveat entry being counter signed.

Mrs Ng'ong'a agreed that while she held that Grant Exh. 35 is the correct title, her superior, the Chief Land Registrar held that Grant Exhibit 5 was the correct title. She also testified that if the letter Exhibit 24 purportedly from the Commissioner of Lands, was not genuine, then she was misled to transfer the title in which she had no personal interest. She was not sure whether or not the office file went to Mrs Mutimo to countersign the caveat removal. She consulted neither the State Counsel handling this case on the government behalf nor her superiors before coming to give this evidence, she testified.

Mrs Ng'ong'a then concluded here evidence by saying said that she had not given evidence in this case as earlier stated by her, but she had attended court more than once although she did not testify.

Mr Lahori J. Manghnani was the 2nd witness to testify for the 3rd defendant. An advocate of the High Court of Kenya, practicing as Sachdeva & Company, he had been in practice for almost 50 years. He was shown a bundle of documents relating to title No. L.R. 12962 – Mombasa Lands Registry. He testified that he prepared the Agreement of Sale for the Vendor Peter Gacii and the purchaser, Dhanjal Investment Ltd, the latter being represented by its Director, Dillip Singh. Mr Manghnani testified that he received almost 38 documents most important of them already produced in evidence in this case.

The Transfer Exhibit 34 (DSDIO), he testified, was prepared by his firm under Registration of Titles Act and was witnessed by one Malombo Robinson of Arum & Co. Advocates. That his firm sought for the presidential consent to transfer L.R. No. 12962. That the firm took the Transfer for stamping and later registration. That the witness did not personally know the Vendor, who was represented by Arum & Company and later by Kiarie & Company.

Looking at the Sale Agreement-exhibit DSD 1 dated 18.7.95, Mr. Manghnani said, the Vendor came and personally signed the same before him as witnessed BY the vendor's signature. However, Mr. Manghnani did not identify the vendor as the latter did not carry any identification in the form of National identity card or any passport or even a driving licence. Mr. Manghnani nevertheless allowed the vendor to sign and then to carry away the sale Agreement and the title document, promising to produce the identification later.

A day after the signing of the Sale Agreement, testified Mr. Manghnani,, he drew and sent the letter dated 19.7.1995-exhibit **D.S.D 3** enclosing a photocopy of Grant exhibit 35, a copy of identity card No.3154300/66 belonging to the vendor Peter Gacii, a certificate of Incorporation of Dhanjal Investment Ltd and copies of identity cards of the directors of Dhanjal Investment Ltd – 3rd defendant herein. Mr. Manghnani further testified that by a letter dated 9.4.96, Arum & Company sent him a copy of Vendor's identity card for his office file as he had none after sending the only copy he had to Commissioner of Lands on 19.7.95-9 months earlier. He then changed and said that the copy of identity card No. 3154300/66 which he sent to Commissioner of Lands, belonged not to Peter Gacii as earlier testified but to Peter Waithaka Gacii, despite the fact that the Title was registered in the name of Peter Gacii.

Mr. Manghnani then looked the letters dated 6.9.95, 11.9.95 and 12.9.95. They included a letter clearing the ownership of the title and one enclosing the Consent of transfer. The letters clarified that the property L.R. No. 12962 belonged to Peter Waithaka Gacii, not Professor Peter Gacii. In drawing the Sale Agreement Mr. Manghnani said, he had used the name Peter Gacii not Peter Waithaka Gacii as the title was in the name of the former. But the consent was in the name of Peter Waithaka Gacii. Of the letter exhibit 31 from the Commissioner of Lands disowning the letters related to the consent above, he said he had never seen it before. He noticed as well that the stamp duty receipt did not carry the reference number of the property in relation to which the money was paid. Nor was the caveat countersigned by the Registrar of Titles, he noted. Manghnani concluded his evidence by stating that he used Peter Waithaka Gacii's identity card to transfer the property which was actually registered in the name of Peter Gacii.

The 3rd defendant called a third witness in the name of Francis Kiarie Kariuki, an advocate of the High Court who represented the vendor Peter Waithaka Gacii, after Arum & Company had done so. On May, 21.1997, he forwarded a payment cheque and corresponded with Arum & Company as well as Sachdeva & Co. That Peter Waithaka Gacii's signatures on the transfer were quite different from those he became familiar with when he and another man, collected part of purchase money from him.

The 4th and last witness called by the 3rd defendant was Dillip Singh Dhanjal who also was the Managing Director of the 3rd defendant, Dhanjal Investment Ltd. Mr Dhanjal referred the court to an affidavit he had earlier sworn in defence to the plaintiff's application for a temporary injunction in this case, sworn on 10.11.2000. He adopted the evidence in the said affidavit as his evidence in this case. He asked the court to examine and adopt any annexures thereto, to this hearing. He agreed with Mr. Manghnani evidence and supported it. He however contrary to what Mr Manghani had testified, said that on the signing of the Sale Agreement, Mr. Manghnani had demanded the vendor's national identity card and that the Vendor

had produced it there and then. The seller, Mr. Manghnani testified, was Peter Gacii who as well signed the Sale Agreement. Then he, under cross-examination, changed and said that he could not remember whether the Vendor really produced the I.D. there and then. That the Vendor had been introduced to him by a broker one Joseph Peter Onyango. He later knew both the Vendor and the broker.

Asked whether Kshs. 8,500,000/- was a lot of money, Mr. Dhanjal said it was and for that reason it was important for his advocate to be extra careful in making searches and making sure the sale and transfer transactions were proper in establishing that the title being passed, was genuine . That Mr. Manghanani who took and kept the ID did not share with him the fact that it was in the name of Peter Waithaka Gacii instead of Peter Gacii. Later, Mr. Manghnani summoned him and showed him the letter exh. 15 from Mativo Kitulu & Co. complaining that the Vendor was a fraud, as the genuine proprietor was long dead. But much later Mr. Manghanani showed him a consent to transfer the property in his favour although the consent was in the name of Peter Waithaka Gacii. He testified that Mr. Manghnani did not inform him when he applied or received the consent as he did so, with his full authority to act in the transaction.

When the transaction was over, he collected the title Exh. 35 from Mr. Manghnani. The witness was then shown the Commissioner of Lands letter dated 12.9.1995 Exh. 24 and the consent dated the same day confirming that the property belonged to Peter Waithaka Gacii. He noted that Clearance Certificate dated 22.1.1996, and an Identity Card No. 3154300/66 also belonged to Peter Waithaka Gacii. Letters dated 12.5.1997 and 14.5.1997 from Arum and Company to Sachdeva and Company referred to Peter Waithaka Gacii as the registered proprietor, Mr. Dhanjal testified Mr. Dhanjal also referred to other letters i.e. of 21.5.1997, 4.6.97, 13.6.97; 16.7.97; 5.8.97; 14.8.97, 15.8.97; 19.8.97; 26.8.97 and 5.9.97 – which referred to Peter Waithaka Gacii as the registered proprietor.

Asked to comment at this stage Mr. Dhanjal agreed that he now was aware that the purchase money was indeed paid not to Peter Gacii but to Peter Waithaka Gacii. He was surprised by the turn of events because the investigations carried out by the Commissioner of Lands, according to him, had established that Peter Waithaka Gacii was one and the same person as Peter Gacii. He was even more surprised that his lawyer had not established the correct identity of the person who was purporting to and did sell the property in dispute to him. Mr. Dhanjal concluded his evidence by stressing the fact that his lawyer had assured him that the issue of identity of the proprietor of the land in dispute had been cleared by establishing that Peter Waithaka Gacii was one and the same person as Peter Gacii whom he personally saw sign both the Sale Agreement and the Transfer. He also had met the broker at Mr. Manghnani's office.

The above then is the totality of the evidence upon which the court is to resolve the following issues filed jointly by the plaintiff's and defendants' advocates and sent to Meru High Court where the presiding Judge operated from. They were placed before the Judge on 20.9.2005:-

1. Did the Commissioner of Lands, the 2nd defendant, issue Grant No. C.R. 19864 for the parcel of land known as L.R. 12962 therein prescribed to Peter Gacii?
2. Who, according to the Commissioner of Lands, was Peter Gacii therein named; was he Professor Peter Gacii or Mr Peter Waithaka Gacii, the 4th defendant?
3. Did the 3rd defendant, Dhanjal Investments Ltd. purchase the said parcel of land from the 4th defendant for a lawful consideration?
4. Was the transaction between the 3rd defendant and 4th defendant valid so as to transfer a good title to the 3rd defendant?
5. Did the 3rd defendant upon registration of the transfer of the said parcel of land by the fourth defendant as its proprietor, acquire absolute and indefeasible ownership as the proprietor thereof under Section 23 (1) of the Registration of Titles Act, Cap 281?

6. Was the sale of the said parcel of land by the fourth defendant effected fraudulently, and if so, whether the 3rd defendant was party to the said fraud.
7. Whether the 5th defendant, the Registrar of Titles, Coast Land Registry, acted fraudulently contrary to the provisions of the Registration of Titles Act, Cap 281 in registering the Transfer of the said parcel of land by the 4th defendant to the 3rd defendant on 24/1/1996?
8. Whether the 2nd defendant, Commissioner of Lands and the 5th defendant, the Registrar of Titles-Coast Land Registry, were guilty of fraud, breach of duty of care and negligence as alleged in paragraph 17 of the plaint and the particulars thereof.
9. Was the 3rd defendant a party to the alleged fraud on the part of the 2nd and 5th defendants, averred in paragraphs 16 and 17 of the plaint, and, was the 3rd defendant guilty of the fraud alleged in paragraph 19 of the plaint and the particulars thereof?
10. Was the registration of the Transfer of the said parcel of land by the 4th defendant to the 3rd defendant effected by the 5th defendant illegal and is the said transfer liable to be annulled as sought in paragraph 21 of the plaint?
11. Was a proper and valid notice for prosecution of this suit given to the 1st defendant in accordance with Section 13 A of the Government Proceedings Act as read with Section 13 of the Act, along with Orders V Rule 9A and Order 47 Rule 2 of the Civil Procedure Rules?
12. As between the Title held by the 3rd Exh. 35 defendant and plaintiff Exh. 5 which is the valid Title and why?
13. Were the 2nd, 3rd and 5th defendants properly notified that Peter Gacii was deceased and that any transaction dealing with the suit plot was invalid, null and void?
14. Is the plaintiff's suit barred under Section 4 (2) of the Limitations of Actions Act Cap 22, and the provisions of both the Public Authorities Limitations Act Cap 39 and Government Lands Act Cap 280?
15. Is the plaintiff entitled to orders sought in her prayer for judgment and costs?
16. Who pays costs of the suit?

It will be observed that among the jointly filed issues are two issue of preliminary importance, which were probably intended to be argued as preliminary points of law but which were not probably for good reason, argued.. They include those herein carried as issues Nos. 11 and 14.

Issue No.11 also states: – Was a proper and valid notice for the prosecution of this suit given to the first defendant in accordance with Section 13 A of the Government Proceedings Act as read with Section 13 of the Act, along with Orders V Rule 9A and Order 47 Rule 2 of the Civil Procedure Rules?

Issue No.14 also states - Is the plaintiff suit barred under Section 4 (2) of the Limitations of Actions Act, Cap 22 of the Laws of Kenya, and the provisions of both the Public Authorities Act Cap 39 and Government Lands Act Cap. 280?

It appears convenient to the court to deal with the above two issues first. I will start with the issue No. 11 which is whether the notice of intended proceedings against the 1st defendant, the Attorney-General, on behalf of the 2nd and 5th defendants was validly served. By virtue of Section 13 and 13 A of the Government Proceedings Act, Cap 40, all documents required to be served on the Government for the purpose of or in connexion with any civil proceedings by or against the Government in accordance with

the provisions of the Act, shall be served on the Attorney-General. Proceedings can only lie or be instituted after the expiry of thirty days after the notice in writing has been so served.

In the case before me the only relevant evidence about the relevant notice came from John Mativo, P.W.2 and Julius Mbila Kiko, P.W.4. John Mativo is an advocate whose firm of advocates, drew and served the notice dated 18.8.2000. He said that he signed the original copy which was then delivered at the Attorney-General's office. He admitted that the typewriter copy produced in evidence was not itself signed but argued that it need not be signed if the original was signed. Julius Mbila Kiko on the other hand testified that as a junior court clerk in Mr. John Mativo's office he was instructed to deliver the notice. He put the original signed notice in an envelope, sealed it and after entering the details thereof in an office delivery book of Mativo, Kitulu Company, as No. 222, he delivered the same in the Attorney-General Office, on the 4th Floor of Sheria House, which was Main Mail office. He said that he delivered the letter to a lady officer who appeared in charge of the office and the lady signed the delivery book against entry number 222 therein. The Delivery Book and copy of the notice were produced in evidence as exhibits 42 and 32, respectively. Examination of the delivery book confirms entry number 222 on 23.8.2000, to the Attorney-General. It is in the middle of other deliveries in the delivery book and appears normal or ordinary delivery. In the absence of any contrary evidence from the Attorney-General, the plaintiff's evidence remains uncontradicted. I have no difficulty in accepting it and conclude therefore that the notice, whose form or content was not disputed, was properly served as required under Section 13 A of the Government Proceedings Act.

The court was, referred by defendants to Order 9A of the Civil Procedure Rules which sets out the mode of service on the Government. Sub rule (2) provides that service of a document in accordance with Section 13 of Government Proceedings Act shall, inter alia, be satisfied by leaving the document within the prescribed hours at the office of the Attorney-General or of any agent who he has nominated for the purpose, but in either case, with a person belonging to the office where the document is left. Taking into account the plaintiff's evidence on the delivery of the notice just examined above, and in the absence of any evidence by the defence to challenge or controvert it, I am satisfied that the notice of intended proceedings was properly served and in accordance with the relevant law.

The second preliminary point is whether or not this suit is time barred in relation to the 3rd and 4th defendants on the one part and the 1st, 2nd and 5th defendants on the second part. To resolve this issue there are several issues of fact that must first be decided. Accordingly I do put the answer to this issue little later.

Did the Commissioner of Lands, the 2nd defendant, issue Grant No. C.R. No. 19864 for the parcel of land known as L.R. No. 12962 therein prescribed, to Peter Gacii? The relevant evidence to resolve this issue came mainly from the plaintiff, Albarta Mae Gacii. She said she is the widow of one Prof. Peter Gacii who married her in 1962 and lived with her as husband until 27.4.1992 when he died aged 57 years old. She produced his death certificate No. 45541 dated 8.5.1992 as Exh.1. She also produced his national identity card No. 3430044/66 dated 7.2.1979 and bearing his name, the same being Peter Gacii – Exh.2. She said that her husband had not only served as a Principal of Kenya Technical Teachers College and Vice-Chancellor of Kenyatta University, but also served as a Permanent Secretary in several Ministries of the Kenya Government, before he passed on. She further testified that when Prof. Peter Gacii died, she plaintiff was, under Nairobi Succession Cause No. 778 of 1992 appointed the Administratrix of his estate, under a confirmed Grant of Letters of Administration – Exh.4. Forming part of her husband's estate, she testified, was property known as L.R. No. 12962 whose Grant was C.R. 19864, situated at Tiwi on Mombasa South Coast. The property was registered at Coast Land Registry, at Mombasa. She then in detail described how her late husband got the land.

While serving as a Permanent Secretary in the office of the President, she testified, Prof. Peter Gacii applied to the Commissioner of Lands by letter dated 22.5.1984. By another letter Exh.6, the Commissioner of Lands recommended Prof. Peter Gacii to the Minister of Lands and Settlement, to be allocated the beach plot he had earlier applied for. Thereafter by another letter dated 25.11.1983 Exh.7, the Commissioner of Lands wrote to Prof. Peter Gacii informing him that his application had been approved subject to the approval of the Chief Secretary. That the Chief Secretary and the President had

approved the application and had given acceptance Prof. Peter Gacii, to be allocated the plot by a letter dated 25.5.1984 Exh.8. That thereafter a Letter of Allotment dated 15.3.1988 in the name of Prof. Peter Gacii, Exh.9, was issued and forwarded to his family Postal address Box No. 21586, Nairobi. That the said Letter of Allotment set out terms of acceptance, which included payment of Stand Premium, Rent and Rates, Stamp Duty and Registration fees amounting to kshs. 179,500/=.

It was the plaintiff's further evidence that her husband accepted the allotment of the plot by his letter dated 9.4.1988 – Exh.10 under cover of which he also paid the above mentioned sum by Banker's cheque No. 283186. He was given receipt No. E 392527 – Exh.11. He also separately paid registration and conveyance fee of Shs. 200/- on 16.5.1989, exh.13. The Plaintiff also testified that a Grant was prepared by the Commissioner of Lands and forwarded to the Mombasa Registry for registration after being stamped. And that when the Grant exh.5 had been properly registered at the Mombasa Land Registry, it was forwarded to Prof. Peter Gacii at his Nairobi postal address Box Number 21586. She concluded this part of evidence by stating that the Grant – exh.5, was issued in the original name of her husband, Peter Gacii, leaving out his professorial title. That the Grant was then given to her and she kept it among other titles and valuable documents in the safe in their home. She herself produced in court the Grant Exh. 5 together with all the related documents concerning the allotment aforementioned.

Plaintiff's evidence about the process of allotment of the suit property was more than sufficiently supported by that of her son Brian Chege Gacii, P.W.5 and of their family lawyer, John Mativo, P.W.2. The two confirmed in detailed particulars that the title documents relating to L.R. No. 12962, Grant C.R. 19864 Tiwi Mombasa, was one of the properties forming the estate of the plaintiff's husband. I have examined the Grant of Letters of Administration exh.4 and indeed, the suit property is recorded as a number 12 in the properties' list.

It is my observation also that more than the fact that Prof. Peter Gacii was the husband of the plaintiff, as testified by her, P.W.3, Junius Mwalimu Ezekiel Njue, who is the Deputy Chief Land Registrar in Ardhi House, and in whose custody the above-mentioned title and related documents were kept, confirmed that the disputed property was indeed allocated. The evidence as well confirms that the Grant of title was issued to Prof. Peter Gacii, the plaintiff's husband who died in 1992. There was no evidence from the 4th defendant or any other defendant to contradict or challenge the plaintiff's evidence above. This court therefore, found the evidence, as backed by documents, unassailable.

In resolving issue number one aforementioned, I have already due to the interconnection of facts, partly answered issue number two. The latter requires to know, who, according to the Commissioner of Lands, was Peter Gacii, to whom allotment of the plot L.R. No. 12962, was made? Was it Prof. Peter Gacii or the 4th defendant, Peter Waithaka Gacii?

The plaintiff's claim that the plot was applied for by her husband Prof. Peter Gacii and allotted to him in his name Peter Gacii without his professorial title, has just been examined under issue No.1 above and need not be repeated, except probably for emphasis. The plaintiff stressed that she was given the title documents by her late husband to keep in the safe and did so until he died in April 1992. She also confirmed that the title expressly featured within the confirmed Grant of Letters of Administration - exh.4. The original documents of title first and foremost came from the plaintiff's custody and she explained that the original copies of documents relating to the process of allotment of the plot until her husband obtained the Grant exh.5 were later kept by her until this dispute arose when she found it necessary to bring them out from the safe for initial fraud investigations. Such documents were not denied by the 4th defendant who claimed alternative title nor by the Commissioner of Lands and the Registrar of Titles who had custody of counter or photo copies of actual copies in their capacity as custodians of land title documents. The only difference in evidence that arose from the defence up to the stage when the Grant of title was originally issued by the Commissioner of Lands and registered by the Registrar of Titles at Mombasa registry, was the one vaguely and impliedly suggested to the effect that the proper and original Grant registered and supplied to the person allotted the plot, was not exh.5 produced by the plaintiff but Exh. 35 in the possession of the 4th defendant and used by the Registrar of Titles to transfer the plot to the 3rd defendant, Dhanjal Investment Limited.

There is no doubt therefore, that it was incumbent upon the Plaintiff on behalf of her late husband, Prof. Pete Gacii on the one hand and the 4th defendant Peter Waithaka Gacii, on the other hand, to produce evidence to prove that each or either, was indeed the person who applied for the plot and who was allotted the plot and who was finally given the Grant of title. Plaintiff produced her evidence already examined above and in the absence of comparable and better evidence from the defendants jointly and severally, this court has no alternative but conclude that Prof. Peter Gacii applied and finally was allotted the plot in dispute.

While considering this issue, I found it necessary to examine the available evidence as to who the 4th Defendant was. Peter Waithaka Gacii, was in my view and conclusion, a ghost figure. Evidence on record from P.W.2 John Mativo, indicates that in 1995 Peter Waithaka Gacii was to appear before Malombo Robinson, his advocate of the firm of Arum and Company. That when he got wind that his real identity was being questioned, he failed even to appear before Mr. Malombo, even after being seen in Malombo's outer office. The second person who would tell us who the 4th defendant really was Mr. Lahori J. Manghnani who was a witness of the 3rd defendant as defence witness number two. Mr. Manghnani told the court that Mr. Peter Waithaka Gacii signed the Sale Agreement and later the instrument of Transfer Exhs DSDI and DSD10 respectively in favour of Dhanjal Investment Limited. But Mr. Manghnani was unable to identify, let alone describe the 4th defendant. Infact, Mr. Manghnani was not even sure whether the 4th defendant produced his national identity card before signing the sale instrument or whether he got it later.

Mr. Francis Kiarie Kariuki, advocate who acted for him in this sale transaction after Arum and Company advocate opted out, could only say that he instructed him and he paid him part of the purchase money and he also confirmed that Mr Peter Waithaka's Gacii's signatures on the sale and Transfer were different from those he used to collect purchase funds from him.

Apart from the above state of affairs, the 4th Defendant disappeared from the scene of the sale and transfer transaction after he received the last bit of the purchase money. He failed to respond to inquiries about the transactions. He failed to enter appearance or defence in this suit in which his function and appearance, would be vital. The effect of all this in so far as his identity concerned is that he remains a ghost figure in relation to the transfer in dispute. It is a fact also that he failed to offer evidence of any kind to the effect that the plot known as L.R. No.12962, was originally allotted to him either at his own request or by the request of any other person and if so how and when he obtained the Grant of title.

I now turn to the decision of the Commissioner of Lands contained in his letters to the Registrar of Titles at Mombasa and others dated 6/9/1995, 11/12/1995 and 12/9/1995 otherwise referred to as exhs. 24, in particular. In this letter the Commissioner of Lands is said to have decided as to who of the two-Peter Waithaka Gacii and Prof. Peter Gacii, genuinely owned the plot No. L.R. 12862. He concluded that he had established that the plot belonged to Peter Waithaka Gacii and not Prof. Peter Gacii. He therefore authorized the Registrar of Titles to remove any existing caveat or caution against the title and proceed to effect intended the transfer from Peter Waithaka Gacii, 4th defendant, to the 3rd defendant, Dhanjal Investment Ltd. The Commissioner of Lands also enclosed a letter of consent to transfer the plot dated the same date – 12/9/1995 but the consent to transfer being granted to Peter Waithaka Gacii.

Which evidence or facts then, had enabled the Commissioner of Lands to establish that the land in dispute belonged to Peter Waithaka Gacii? In his letter exh. 24 aforementioned, he did not attempt, and he failed to explain the source of the facts he relied on. Reflecting on the issue, this court, to say the least, is baffled by said conclusion reached by the Commissioner of Lands. This is because he could only rely on the documents in the Deed File or Office file, or relevant information or evidence thereto, to come to any such conclusion. As per the evidence before the court, the documents in the Deed File pointed to and confirmed the fact that it was Prof. Peter Gacii and not Peter Waithaka Gacii, who applied for and later got the allotment letter and Grant of title of the said plot. Those documents further confirmed that it was only at the point when the Grant, exh 5, was being issued, that the professorial title, "Professor or Prof." was omitted and his original name Peter Gacii, was registered as the proprietor. Not even the copy of Grant exh. 38 later found in the Deed File, was registered in the name of Peter Waithaka Gacii. And yet in

his deliberations, the Commissioner of Lands or whoever wrote exh. 24, was in the court's opinion, so bent to alienate the suit premises to the Peter Waithaka Gacii, that he issued the consent to transfer to Peter Waithaka Gacii's name even when the title was in Peter Gacii's name. It is not surprising therefore, that the Deputy Chief Land Registrar, PW3, testified that exh. 24 did not originate at the Commissioner of Land's Office. Indeed he testified that even the reference number of the letter i.e. Ref. 105156/C/11/374, did not tally with their office file references. In his further evidence, the fact that exh. 24 aforementioned had the Commissioner of Land's rubber-stamp, did not make it a genuine letter.

This court understood the witness to be saying that the letter exh. 24 was a forgery and that the facts or contents in it were not only false but that they are not reliable. Mr Njue in his further testimony on record, in that respect, referred to the letter Exh. 31 written later by the Commissioner of Lands and signed on his behalf. This letter disowned and seriously doubted the authenticity of exhibit 24. Mr Njue indeed concluded that exh. 31 was a genuine letter from the Commissioner of Land's office and that its contents to the effect that exhibit 24 was a forgery, were correct.

The court's view and conclusion is that the Commissioner of Land's letter exhibit 24, was not based on the documents in the Deed File, which were the most relevant documents and most probably the only documents to be considered in order to determine who, between Peter Waithaka Gacii and Prof. Peter Gacii, was the genuine original allottee of the plot and who therefore must have received the original Grant.

Having come to this conclusion, I also must logically conclude and hold that the Commissioner of Lands, for reasons not articulated by him in exh. 24 aforementioned and not advanced by the defendants herein, deliberately and without reasonable or lawful grounds, decided to deny the late Prof. Peter Gacii or his estate then being administered by the plaintiff, the allotted interest in the plot of land in dispute herein. In my view and decision therefore, the Commissioner of Lands had no legal authority or power to so deprive the plaintiff of his property and his purported action cannot be reasonably seen as anything but a deliberate fraudulent and unlawful act done to assist the 4th defendant deprive the estate of the late Prof. Peter Gacii and his wife, the plaintiff herein the interest in the title in dispute.

The court's conclusion and decision, which is also the answer to issue number 2, is that Prof. Peter Gacii was one and the same person as Peter Gacii registered in the Grant. C.R. 19864, otherwise referred to as L.R. No. 12962, Mombasa. The further relevant conclusion on the issue is that the original title in the court's decision, was never at any time lawfully and/or genuinely allotted to or registered in the name of Peter Waithaka Gacii, the 4th defendant.

The 3rd issue to resolve is whether or not the 3rd defendant Dhanjal Investment Ltd. purchased the suit property from the 4th defendant, Peter Waithaka Gacii and whether also, he paid a lawful purchase consideration.

In my opinion there is adequate evidence that the 3rd defendant paid a large sum of money, Kshs.8.5 million, to the 4th defendant, as the purchase price of the suit property. There is sufficient evidence also that a sale agreement between the two was drawn by and signed before the 3rd defendant's advocate, Lahori J. Manghnani on 18/7/1995. The Sale Agreement was dated 18/7/1995 and was produced in evidence by Mr Lahori Manghani advocate as exh. DSD3.

From the evidence on record which I have carefully perused and considered, Prof. Peter Gacii, who had been registered as the proprietor of L.R. No. 12962 in 1988 -9 in the name, Peter Gacii and had been given the Grant of title No. C.R. 19864, Exh. 5, gave the documents thereto to his wife the plaintiff to keep in their home safe. He died in April 1992 and the plaintiff herein became the Administratrix of her husband's estate. In the list of the estate was the suit property and there is no doubt in my mind that these facts at this point in time, are true. Nor did I gather any impression during the hearing of this case, that the defendants severally or jointly, disputed that position.

Further evidence before me shows that the plaintiff thereafter, received a letter dated 20/7/1995 written by

Arum & Company, Advocates and addressed to Peter Gacii's of postal address, Box No.21586, Nairobi. From it the plaintiff's family realized that someone going by the name of Peter Gacii was in the process of trying to sell the suit property (which they knew was their property) without their knowledge, consent or participation. Plaintiff's lawyer Mr John Mativo on the plaintiff's instructions is shown to have written to Arum & Co. warning them to stop the transaction. Mativo pointed out that the owner of the property was long dead, that the administrator of his estate was not aware of the sale, that the property had never been for sale, and that the purporting seller must be a fraud. The plaintiff through his son the PW5, Brian Chege Gacii, rushed to Mombasa Land Registry, explained the situation and sought immediate protection. The plaintiff's evidence shows that the Registrar of Titles, who claimed to know the deceased Prof. Peter Gacii, found need to and registered a caveat against the title. She gave the plaintiff copy of the Grant carrying the caveat and the plaintiff, believing and satisfied that she had done everything possible to prevent any dealing or alienation of the property, went back home. In the meantime the Commissioner of Lands, the Registrar of Titles and the police promised to take up the investigation of the possible fraud reported by the plaintiff as the plaintiff handed over copies of documents which would help them in the investigation. Further more the plaintiff who testified that she all along was keeping the title documents of the property found no reason to feel insecure since the caveat was now also in place. She did not foresee any possible adverse transaction occurring against the title without her knowledge and direct participation. The plaintiff urged the court to believe and accept that version of facts. I have considered the same with care. I note it was not challenged as well. I accept it as true.

The evidence on the record however, shows goings-on at the defence camp.. Arum & Company, who had been warned to stop the transaction and identify the seller to the police, did not apparently, stop. They neither communicated with the plaintiff's lawyers in writing nor contacted the police. The CID police also did little to follow up on the plaintiff's complaint although they had taken copies of the relevant documents to assist them to find out who the purported seller of the plot was. The Commissioner of Lands on the other hand is shown to purport to investigate, after the plaintiff and his lawyers showed up in their office and produced the original Grant of the title Exhibit 5 and all other relevant documents showing how Prof. Peter Gacii had obtained the property allotment and the issuance of Grant of title, Exhibit 5. It is the plaintiff's case in this aspect, which in my view, is not really challenged, that despite all her effort to get involved in the investigations, she was kept out of it by the defendants jointly and/or severally. It is only when she decided to sell the plot five years down the line, that she discovered that the suit property actually sold in July 18/1995 had effectively been transferred to Dhanjal Investment Ltd on 24/1/1996. There is evidence also that Mr Francis Kiarie Kariuki, while representing the 4th defendant in the sale process aforementioned, received the purchase money or part thereof, from the 3rd defendant's advocate and paid it to the 4th defendant. Whether the said payment was a lawful consideration or not will be answered as other relevant issues, particularly issue No. 4, are answered hereafter.

I accordingly now turn to issue No. 4, which is whether or not the transaction of sale and transfer of the suit property by the 4th defendant to the 3rd defendant was valid so as to transfer a good title to the 3rd defendant.

I have already concluded herein above that there is sufficient evidence on the record upon which to decide that the plaintiff's husband Prof. Peter Gacii, is the person who between him and the 4th defendant, Peter Waithaka Gacii, applied for the suit property and later obtained a Grant of Title Exhibit 5. The evidence on record, from both sides, establish the position that the sale and transfer of the land in dispute, did not involve the Grant Exhibit 5 which always remained in the custody and control of the plaintiff. The transfer however involved a Grant of Title Exhibit 35 which was said to have been in the custody of the 4th defendant who claimed to be the registered proprietor of the title C.R. 19864 referred to as LR No. 12962.

PW3 Julius Mwalimu Ezekiel Njue's evidence as the Deputy Chief Registrar of Titles in Ardhi House Nairobi, went through the list of documents that were found in the Deed File. While he confirmed that the documents in the Deed File proved that Prof. Peter Gacii was the person allotted the suit property in 1988-89, he was also categorical that a photocopy of Grant exh. 5 was not found in the Deed File while on the other hand, photocopy Grant exh. 38 was found there. He however baffled the court when he

confirmed that photocopy exh. 38, was itself not a genuine photocopy of Grant Exh. 35 in the hands of Peter Waithaka Gacii, 4th defendant. He further testified that under the Registration of Titles Act under which the title was issued, only one title is issued and given to the proprietor while a photocopy of the same is retained in the office file. It was his further testimony after he examined the Grant Exh. 5, that the latter was the original Grant of title of the plot in dispute. He then firmly asserted that the photocopy or counterpart kept in the Deed File or office file, should have been the exact replica of exh. 5. He also testified that the person who should be holding the original Grant of this title must be the person who got the Letter of Allotment and paid to the Commissioner of Lands, the Stand Premium the Conveyance fee, the Rent and Rates receipts and the registration of the original Grant fees, and therefore should be carrying the payment receipts, particularly receipts numbers 392527 of 11/4/1988 and Number 674467 of 16/5/89. Mr Njue also testified that the national identity card was always entered in the title, a copy of which would be found in the Office File. He said that for that reason only the holder of identity card recorded would be allowed to collect the Grant of title. Since all these factors were fulfilled by the plaintiff, he said, Prof. Peter Gacii plaintiff's husband was the proprietor of the land in dispute.

On the same issue, the evidence of DW1, Rosemary Anyango Ngonga was very telling. While she, with great gusto, asserted that Grant exh. 35 was the correct Grant of Title, she conceded that the person, between the plaintiff, and the 4th Defendant, who will have in his/her custody the Letter of Allotment, the fees payment receipts for Stand Premium, the original registration and other related documents, should be the genuine proprietor. She thus fully supported the evidence of her senior Mr Njue, despite the fact that she clearly originally wanted to support the version that the 4th defendant who held Grant of Title exh. 35 was the genuine proprietor.

Based on the above evidence of PW3, Junius Mwalimu Ezekiel Njue the Deputy Registrar and DW1, Rosemary Anyango Ngonga, and appreciating the fact that similar was the plaintiff case, I came to the considered conclusion and finding that the correct, and the legal Grant of Title, was Exh. 5 and not exhibit 35. This finding clearly negatives the Commissioner of Land's finding in the contents of his purported letter, exh. 24.

In my view the above conclusion opens up a tin of worms in that this court will now need to answer the following related issues: Who is the 4th Defendant, Peter Waithaka Gacii; Was he issued with a Grant exh. 35. When and by whom? What was the legal effect upon Grant exh. 5 of the issuance of Grant exh. 35? Is Grant exh. 35 valid? If not, was the transfer of the suit property by Peter Waithaka Gacii valid? Other related questions that may arise herein will be tackled as they arise.

As earlier stated, the proper identity of Peter Waithaka Gacii is little known or recorded. He failed to file his appearance and defence to this case wherein he played the major role. Being the vendor who sold the suit property and who needed to effectively defend the transaction as well he failed to appear, to give his evidence which, undoubtedly, would have been crucial. It would be critical for the court to know how and when he obtained Grant exh. 35, and how he convinced the Commissioner of Lands to write exh. 24 or even how the letter exh. 33 was created and delivered to the 3rd defendant's advocate's office. The reality is that he did not come to testify and the court is left to make its conclusions. The effect of Peter Waithaka Gacii's failure to file defence and attend court to defend the suit is that plaintiff's evidence to the effect that her late husband applied for and was allotted the plot; and also that Grant exh. 5 was the one validly issued to him as Peter Gacii, stands not only unchallenged but unassailably fortified. That Peter Gacii was one and the same person as Prof. Peter Gacii whose national identity card also appeared among the original documents of allotment of the land, the identity number being No.3430044/66. And finally that Prof. Peter Gacii died in April 1992 and that his Postal Box address was No. 21586, Nairobi. There was no evidence even from the other defendants that the 4th defendant at any time in his lifetime, applied for allocation of the suit property or that he was allotted the land in 1988 when the suit land was allotted to Prof. Peter Gacii, or that the basic root of title documents in the Deed File, supported 4th defendant's ownership. There was no evidence to prove that Peter Waithaka Gacii at any time paid Stand Premium, Rates and Rents or Registration fees before the Grant was issued in 1989, nor was there evidence that he paid Rates thereafter. Rents from year to year to service valid ownership of the plot, except once when he wanted to clear the title to enable him manage to achieve this particular transfer, were shone to have been

paid by Peter Gacii (Prof.) or his estate.

Finally, there is no evidence from the 4th defendant or the other defendants that the 4th defendant he obtained the title C.R. 19864 Exh. 35, before the plaintiff's husband obtained the same title. In my view and finding therefore, Peter Waithaka Gacii obtained a certificate of title – exh. 35, most probably after 1988 when Prof. Peter Gacii had received his. In the absence of evidence as to how he got the said Grant exh. 35, and in view of the fact that none of the other defendants – the Commissioner of Lands (2), the Registrar of Titles (5) or the Attorney – General (1) themselves attempted to explain this lacuna, this court will do its best to come to reasonable conclusions based on the evidence on the record as guided by the provision of Registration of Titles Act, Cap 281 of the Laws of Kenya under which the title was issued.

Section 20 of the Act states thus “

“..... All land which is comprised in any grant issued after the commencement of this Act shall be subject to this Act and shall not be capable of being transferred, transmitted, mortgaged, charged or otherwise dealt with except in accordance with the provisions of this Act, and an attempt to transfer, transmit, mortgage, charge or otherwise deal with it, except as so provided, shall be void and of no effect.”

And Section 22 (2) of the same Act provides:-

“(2) when a certificate of title is issued under subsection (1), all previous certificates of title shall be delivered up to the registrar and cancelled by him.”

I have underlined parts of the quoted provisions for the purpose of stressing the meanings thereof.

As earlier concluded, the plaintiff's husband applied for and got the letter of Allotment and later the Certificate of Title in form of the Grant exh. 5. I also came to the logical conclusion, that the 4th defendant was not officially and lawfully issued with Grant exh. 35. And yet somewhere along the line he got a Grant of Title in form of the said exh. 35. There is admittedly, no evidence as to how he got it. The plaintiff and his witnesses claimed that the Grant Exh. 35, was a forgery created with the help and collusion of officers in the Mombasa Registrar of Titles Office and the office of the Commissioner of Lands, Nairobi. The Deputy Chief Land Registrar, Mr Njue, PW3 confirmed that the plaintiff's husband Prof. Peter Gacii's Grant of title exh. 5, was the valid and legal title. DW1, Rosemary Anyango Ngonga's position was in the final analysis similar to that of PW3, Njue, that Prof. Peter Gacii's title was the valid title.

Accepting their evidence and the position taken by PW3, Njue and DW1 Ngong'a, I have come to the conclusion that exh. 35 is a forgery created by the 5th defendant who must obviously have been acting at the instigation and behest and to the benefit of the 4th Defendant, Peter Waithaka Gacii. I come to the further conclusion that the Grant Exh. 35 could not have been possibly issued unless the 2nd defendant, the Commissioner of Lands personally or through his delegated officers with or without his knowledge, deliberately and actively participated in the fraudulent making of it. It is also my view and finding that the follow-up replacement of photocopy of Grant exh. 5 at the Registrar of Titles registry, Mombasa, by Grant Exh. 38 could not be feasible without the participation of the Registrar of Titles, Mombasa, whether personally or through agents.

The next question is whether the said forged certificate of Title exh. 35 was substantive and carried the full interest otherwise carried and held in by Prof. Peter Gacii in certificate of Title, exh. 5? The answer I come to is that a registered interest such as the one exemplified in the Grant of Title, exh. 5, could only validly change hands from Prof. Peter Gacii, (otherwise registered as Peter Gacii) to Peter Waithaka Gacii by or through a legal instrument of transfer or transmission. Much more, the instrument of transfer would be valid only if it was executed according to law, by Peter Gacii or the administrator of his estate who happens to be the plaintiff. It is not in dispute that such process did not take place in this case before Peter

Waithaka Gacii was issued with Grant exh. 35. It follows, in my opinion and decision, that the process of attempting to pass the title in the suit property originally from Prof. Peter Gacii to Peter Waithaka Gacii, which yielded Grant Exh. 35 aforesaid was so fatally defective that it failed to comply and satisfy the requirement of Section 20 of the Registration of Titles Act aforementioned. That is to say, that the process of transmission of the title from Peter Gacii to Peter Waithaka Gacii undertaken most likely by 2nd and 3rd defendants amounted to nothing more than an incapable and incompetent attempt that was mandatorily void and of no effect. I accordingly reach the conclusion that the interest in the title in C.R. 19864, originally registered in Peter Gacii (Prof.) and purported to be re-issued to Peter Waithaka Gacii, failed to pass to the said Peter Waithaka Gacii.

Necessarily flowing from the above conclusion, is my further opinion and decision: that Peter Waithaka Gacii, had no good or valid title that he could offer for sale or transfer to the 3rd defendant, Dhanjal Investment Ltd, at the time he did so.

I however do appreciate the fact that Peter Waithaka Gacii at one time or other, found himself carrying or holding a Grant of Title Exh. 35 issued by the Commissioner of Lands through the Registrar of Titles, Mombasa Did such certificate give him protection under Section 23 of the Registration of Titles Act aforementioned which states that such certificate **“shall be taken by all courts as a conclusive evidence that the person named therein as the proprietor of the land, is the absolute and indefeasible owner thereofand 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.”** Does this provision come to the rescue of the 4th defendant as of the time when he was issued with the purported Grant of title exh. 35? My answer is ‘No’. My understanding of the said section is that the person who is protected is the **“purchaser of land upon a transfer or transmission by the proprietor thereof.....”** In this case, the 4th defendant, at the time when he obtained a certificate of title, exh. 35, cannot in my view be considered to be a purchaser of land upon a transfer or transmission by the proprietor. This is because he did not buy the land from Prof. Peter Gacii or his wife, the administratrix of his estate, who alone had the legal power to sell and transfer it to him. Secondly, by its origin the certificate of Title the 4th defendant held, was one I have concluded, he obtained through fraud and forgery. Thirdly, the Grant issued to and held by Peter Waithaka Gacii, was not, in my opinion, worth more than the paper it was written on. Peter Waithaka Gacii could not surely have magically become the proprietor of the land already registered in the ownership of Peter Gacii (Prof.) whose title was absolute and indefeasible by provisions of Section 23 (1) of the relevant Act. If such were to occur, what would happen to or remain of “the sanctity of a title”? Where would the security of a title have flown to? Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legally registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come.

In this case the 4th defendant who went by the name Peter Waithaka Gacii, and whose national identity card No. 3154300/66 was itself highly suspect, was capable of securing in his name the Grant of title CR 19864/1 – Exh. 35, relating to the land known as L.R. No. 12962. As concluded by the court, he did so despite the fact that a valid Grant of title, exh. 5, had been issued to and was being held by the plaintiff’s husband, now deceased, Prof. Peter Gacii. How Peter Waithaka Gacii managed to secure the issuance of Exh. 35 was not explained since he did not file defence or give evidence. In view of the evidence on the record from the plaintiff that Grant No. CR19864 which originally was not registered, was surveyed and created on the application of Prof. Peter Gacii and originally registered in his name, I find no other explanation as to how exh. 35 came into existence except through fraud and forgery, down the line after Prof. Gacii had obtained it. Since also under the provisions of the Registration of Titles Act Cap 281, no two valid titles can be created and be issued to two independent proprietors at the same period, I find that, either Grant exh. 5 or Grant exh. 35, was in the absence of evidence invalidly issued.

I have considered the evidence from PW3, Njue and DW1 Rosemary Anyango Ngonga, as well as that

from the plaintiff. I am satisfied that it is grant Exh. 35 that was issued subsequently, although the date of such issuance, is unknown as no evidence thereon was led. Accordingly it is exh. 35 that cannot stand under Section 20 of R.T.A.

There are several reasons why exh. 35 would be invalid. The first one has already been referred to earlier in this judgement –that a person is only capable of holding a title under the Registration of Title’s Act aforementioned, either through a direct allotment or transmission, or by a transfer, effected in accordance with the provisions of the above Act. Peter Waithaka Gacii as already demonstrated did not get exh. 35 through direct allotment. Secondly, he did not get the title through any transfer or transmission as earlier found. The circumstances and evidence in this case strongly suggest that he obtained it by some obscure method which he was afraid to explain in a written or oral defence. That may explain his failure to defend this case. Thirdly, Grant Exh. 35 was from the evidence and circumstances of this case, issued after and while Grant exh. 5 had been issued to Prof. Peter Gacii and was in existence and had validity. Since only one title is validly issuable and has validity during a given period, no other or further valid title could be issued to co-exist with exh. 5 registered in the name of Peter Gacii (Prof.).

It is however established from the evidence before the court, that two Grants exh.5 and 35, existed simultaneously subsequent to issuance of Grant Exh. 5. There was even a suggestion that exh. 38 in so far as it did not represent either Grant exh. 5 or Grant exh. 35 might represent a possible third Grant whose details are yet to be revealed. However, the Grants as we should refer to them for the purpose before this court, are concerned only with one title – L.R. No. 12962 which is the property which is the subject of dispute in this suit. There is no doubt in my mind therefore that when exhibit 35 was created and given to Peter Waithaka Gacii who is not one and the same person as (Prof) Peter Gacii, a conflict of interest relating to the title was created.

The law regarding two conflicting titles was set out among others, in the case of Dr. Joseph N.K. Ngok vs Justice Moiwo Ole Keiwua & Others, C.A. No 60 of 1997 (unreported). The court, inter alia, stated-

“ 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 the 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. Infact 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”.

This passage to me means that the first title issued to (Prof) Peter Gacii, assumed or took precedence over the second one issued afterwards to Peter Waithaka Gacii. It is at the same time appreciated that Professor Peter Gacii fulfilled the relevant conditions of being a purchaser from the Commissioner of Lands who represented the Government. He paid as borne out in evidence, the required Stand Premium, the Conveyancing and Registration fees and later the yearly Rates and Rents. His title under Section 23(1) aforesaid therefore acquired the sanctity of title which is absolute and indefeasible. The title took priority over all others issued afterwards, more so those issued while tainted with fraud or deceit. As stated in the case of Wreck Motors Enterprises vs Commissioner of Lands; C.A.No. 71 of 1997 (unreported), the land contained in the grant, in this case, C.R. No. 19864, not only **takes priority**, (but) **is alienated** already. This legal principle is also clearly in agreement with equity which provides that the first in time prevails. In the event such as occurred in this case then, it is not difficult to hold that whether it is due to fraud or mistake the grant or certificate of title issued to Peter Waithaka Gacii after the first was issued to Professor Peter Gacii, must and is hereby declared null and void.

It is however to be observed that unlike in the case of Dr. Joseph N.K. Ngok, where two competing but otherwise regular titles were issued, in this case before me, the second title issued to Peter Waithaka Gacii was for the reasons already articulated, tainted with fraud, deceit and forgery. A similar situation as in Dr. Joseph N. K. Ngok case occurred in the case of Gitwany Investment Limited vs Tajmal Limited & 4 Others, Nairobi HCCC No. 1114 of 2002 recently decided by my brother Lenaola, J in which he held as void a title regularly but mistakenly issued to a second holder after the same had earlier been properly and

lawful issued to Gitwany Investment Limited. He then proceeded to cancel the subsequent title.

In answer to issue No. 4 therefore, I come to the conclusion that the title issued to the 4th defendant, Peter Waithaka Gacii, was invalid, void and of no effect for the several reasons discussed herein above. The process of issuing him with a certificate of title or grant exhibit 35, was not only clouded with uncertainty and obscurity but was also totally mysterious. It involved no known or regular or legal process of transferring or transmitting a title under the Registration of Titles Act aforementioned. The process was not defended in this court even by the self same person who was purported to have been issued with the title. In my view and finding Peter Waithaka Gacii received no substantive interest in the title L.R. No. 12862, Mombasa, other or more than the paper referred to as Grant exh. 35. He had therefore nothing to pass to or transfer to the 3rd defendant, Dhanjal Investment Limited since the Grant issued to him carried nothing in it.

I now turn to issue No. 5. This requires an answer as to whether the 3rd defendant, upon the registration of the transfer of the parcel of land in dispute by the 4th defendant as its proprietor, acquired an absolute and indefeasible ownership thereof under Section 23(1) of the Registration of Titles Act, Cap 281.

In several ways the issue has already been answered. For the several reasons discussed hereinabove, the 4th defendant has been shown to have been a mysterious person whose background is little known. The way or process through which he purported to get the title in question is uncertain and obscure. The title or grant that got issued to him was a second title on the disputed piece of land which under Section 23(1) aforementioned and under the spirit and purport of the Registration of Titles Act aforesaid, is void. It follows therefore that the 4th defendant had in exhibit 35 no proprietorship of any nature, let alone one which is indefeasible. Indeed as already earlier concluded, he had nothing except the official Grant paper appearing as a certificate of title but which carried nothing in it. It therefore further follows that what he had (which was nothing) is what he purported to transfer or is what he transferred to the 3rd defendant, Dhanjal Investment Limited. It therefore also logically follows, that Dhanjal Investment Limited acquired no absolute or indefeasible ownership under Section 23(1) of the relevant Act.

Issue No.6 is whether the parcel in dispute was fraudulently sold by the 4th defendant to the 3rd defendant and if the 3rd defendant was party to the fraud.

The evidence on the record which this court accepted and believed show that the plaintiff, his son Brian Chege Gacii and their advocate, Mr. Mativo, alerted the Registrar of Titles Nairobi and Mombasa and the Commissioner of Lands, as well as the Provincial Criminal Investigations officer Nairobi, of the possible fraud which was about to take place. They provided the relevant documents to all the above authorities to enable a proper investigation. They even visited the Mombasa Land Registry and persuaded the Registrar to enter a caveat. They also visited and met the Deputy Chief Land Registrar-Nairobi to whom they gave their original certificate of Titles, exhibit 5, for scrutiny. The advocates of the 3rd and 4th defendants were as well properly notified by the plaintiffs that the 4th defendant, Peter Waithaka Gacii, was an imposter who did not have a genuine interest in the disputed land which he could pass to any intended purchaser.

The material evidence of the notice described above was contained in the evidence of the plaintiff, her son PW5, and John Mativo their advocate. John Mativo through his legal firm wrote a letter exhibit 15 to Arum & Company advocates and copied it to the Commissioner of Lands, the Registrar of Titles, Mombasa, the Nairobi D.C.I.O and the District Commissioner –Mombasa and Kwale where the disputed land is situated. Evidence which the court accepts, shows that the letter in point was drawn and served upon the parties mentioned above in late July, 1995. It is on record also that to prevent any transactions taking place, the plaintiff through his son Brian, alerted the Registrar of Titles at Mombasa Land Registry who entered a caveat on 2.8.1995. In that respect I refer to the evidence of the 3rd Defendant as given by Dillip Singh Dhanjal, the company's managing director. He testified that he at the relevant time became aware of the allegation from the plaintiff that the 4th defendant was not the genuine proprietor of the plot of land his company was about to purchase. That he had discussed his concern with his advocate Mr. Lahori J.Manghnani of Sachdeva & Company Advocates who had earlier prepared the Sale Agreement of

the suit property. Mr. Dhanjal also testified that when the sale agreement aforesaid was signed by him and by the 4th defendant, the latter produced his national identity card no. 3154300/66 but that his advocate did not inform him that the name in the ID was a little different from the one in the title document. That the identity card had an additional name “Waithaka” which did not appear in the certificate of title. He however said that his advocate Mr. Manghnani had shown and discussed with him Mr John Mativo’s letter of complaint, exhibit 15, alleging that the seller, was a fraud. Mr Dhanjal also said that Mr. Manghnani later informed him that the issue had been resolved in favour of the seller, after thorough investigations by the Commissioner of Lands. It was Mr. Dhanjal’s further evidence as contained in his affidavit sworn by him on 10.11.2000, that he was not interested to buy the suit property from the 4th defendant unless it had a clear title and that he had told his advocate, Mr. Manghnani that much. Mr Dhanjal also testified that when Mr. Manghnani in November, 1995 showed him the Commissioner of Land’s clearing letter Exh. 24, which was copied to other relevant parties inclusive of the plaintiff, he saw no impediment to concluding the deal. Mr. Dhanjal in that respect also pointed to a letter dated 17.11.1995 by Sachdeva & Company Advocates to M/S Mativo, Kitulu & Company Advocates Exh. 36-DSD 8 clearly stating that Sachdeva & Company and therefore their client the 3rd defendant, had kept the transaction in abeyance until Mativo & Kitulu & Company had confirmed that the latter had no more interest or had sorted out the conflict with the sellers advocates. Mr. Dhanjal’s affidavit and evidence, also shows that on 15.11.1995 Mr. Manghnani informed him that M/S Mativo –Kitulu & Company had replied to their earlier letter exhibit 36 and had confirmed that they had no more interest in the matter as per their letter exhibit 33 (DSD 9). That it was only then that the instrument of Transfer exhibit DSD 10 was drawn and was signed later by the 4th defendant on 10.1.1996. Upon these facts the 3rd defendant testified that he was an innocent purchaser for a fair and lawful consideration and that he is protected by Section 23(1) of the Registration of Titles Act aforesaid. He further asserted that the 3rd defendant did not participate in any fraud, deceit or unlawful act, if any, committed by the 4th defendant.

The plaintiff’s response to this was that the 3rd defendant was party to the fraud committed by the 4th defendant with collusion of the 2nd and 5th defendants and that the evidence on the record confirms that position.

I have carefully, perused the evidence adduced by witnesses and also as supported by documentary evidence from both sides. Mr. John Mativo denied that the letter exhibit 36 (DSD 8) dated 17.11.95 was received by his firm and that the proper undertaking by Sachdeva & Company Advocates that the latter would not, on the face of the alleged fraud, proceed with the transaction, was not known to them at the material time. He also denied that the reply letter exhibit 33 dated 1.12.95 appearing to be a response to exhibit 36 and declaring that Mativo & Company’s client no longer had interest in the suit property, was at all written by his firm. Mr Mativo termed the letter exh.33, a forgery and went to great lengths to show that exhibit 33 was such forgery. He asserted that the letter – head on which the letter was written did not itself belong to his firm. He pointed out eight differences between his firm’s proper letter-head and the letter-head forming the said exhibit 33. He tried to demonstrate I think successfully, that the reference number on the letter i.e. MRO/CON/31/95 was different from the one his office was using at the time which was CIV/8/95 and had changed to J.257.00.CIV in the year 2000. He further pointed out that even the signature on exhibit 33, was a forgery as it was not his signature. He particularly pointed out one interesting characteristic on exhibit 36 – that the reference on it i.e MRO/CON/31/95 was exactly the same as in the earlier letter exhibit 14 which was written by Arum & Company to the Commissioner of Lands dated 20.7.1995 and which was the one that blew this whole saga open. It is noted that it was signed by one Robinson Malombo, who as the record would confirm, was later to witness the execution of the Transfer instrument dated 10.1.996 - exhibit 34.

I have carefully considered the above pieces of evidence. I am persuaded to believe and accept the version of evidence coming from Mr. John Mativo, PW2 upon the following reasons. First, the letter exhibit 14, which reached the plaintiff through the family Postal Box No. 21586, Nairobi, appears to have been posted by Arum & Company by inadvertence. Probably Malombo Robinson Advocate who wrote and signed it did not at that early stage of the sale transaction, know that his client, the Vendor, Peter Waithaka Gacii, then going by the simple name Peter Gacii, was not the genuine owner of the suit property. There is no good reason for thinking that Malombo would have deliberately brought to light a

fraudulent sale transaction especially to the plaintiff who clearly would take steps to stop it. Secondly, it is noted that Malombo Robinson of Arum & Company totally failed to respond to the contents of Mativo-Kitulu & Company's letter which also sought a clarification as to the identity of their client, the vendor. Failing to respond to the serious warning about the consequences which could arise from the continued process of the sale can only suggest that Malombo Robinson, having now become aware of the fraud being perpetrated by his client, the 4th defendant, decided to be either reckless about it or decided to aid and abet the acts of 4th defendant. It is on record for example, that although he went silent immediately after he got Mativo's warning, he nevertheless, continued acting for 4th defendant and was present and witnessed the instruments of Transfer even as late as January, 1996. Sadly, however, he was not called to testify. Clearly he represented the 4th defendant at the crucial stages of the transaction and as shown, worked closely with Mr. Manghnani of Sachdeva & Company to effect the transaction. He even sent to Mr. Manghnani the identity card of the 4th defendant and must have noted that his client's name was not Peter Gacii but Peter Waithaka Gacii, the latter name clearly, being different from the name of the proprietor in the Grant of title. It would therefore appear logical and reasonable to think that the 3rd defendant in the absence of the 4th defendant, would find it necessary to call Robinson Malombo, to testify on their behalf. More so since Mr. Manghnani in his evidence, admitted that he himself was all along aware that the name of the purported seller in the identity card was different from the name of the registered proprietor as earlier pointed out. That both the advocate for the seller and the advocate for the purchaser had deliberately decided to ignore the remarkable difference in the name which was an issue of a critical importance in the field of conveyancing, is quite interesting, intriguing and will be a subject of further comment hereinafter.

Thirdly, I observed that the Commissioner of Lands decision that the suit property belonged to Peter Waithaka Gacii, the 4th defendant and not Professor Peter Gacii, was conveyed to the Registrar of Titles in a letter dated 12.9.1995 and copied to the other concerned parties, inclusive of M/S Sachdeva & Company advocates. For reasons not explained, the relevant copy of the letter was shown in evidence as not received by Sachdeva & Company until 9.11.1995, two months later. The intriguing part however, is that a week later, Sachdeva & Company, decided to write to Mativo, Kitulu & Company a letter exh. 36 (DSD 8) dated 17.11.1995. In the letter Sachdeva & Company assured Mativo, Kitulu & Company for the plaintiff that:- **“ we are keeping this matter in abeyance until you confirm that your client has no more interest or until you sort out this matter with the Advocates for Peter Gacii, M/S Arum & Company. Our client has no interest in proceeding with this matter until we clearly know who the owner is”**.

The letter which was signed by Mr. Manghnani himself was written two days after Mr. Manghnani conferred with his client, Mr. Dhanjal over the contents of the Commissioner of Lands' letter abovementioned. Indeed it was after such consultation that Mr. Manghnani decided to deliberately appear to inform Mativo-Kitulu & Co. for the plaintiff, that the investigations by the Commissioner of Lands, the chief Registrar of Titles and probably the C.I.D. at Nairobi were still ongoing and that they (Sachdeva & Co.) would wait for the final results. This was interesting and intriguing because by then – indeed two months before, the Commissioner of Lands had written to confirm that the investigations were complete and that the plot belonged to the 4th defendant. The question that arises is this – what more did Sachdeva & Co. know about this letter at the time? Since on the Commissioner of Lands letter it was indicated that a copy had been dispatched to Mativo – Kitulu & co. why should Sachdeva & Co. write to Mativo after receiving the Commissioner's letter and yet pretend that such a letter did not exist or that investigations were still going on? Did Sachdeva & Co. know that Mativo Kitulu & Co. had not received their copy? In my view common sense and logic would suggest so. Otherwise Sachdeva & Company's letter under discussion would make little sense or meaning. In my opinion, the letter was deliberately written to lead the plaintiff and his counsel into believing that investigations which the latter had instigated were continuing and that the sale and transfer of the suit would not proceed yet and as long as the plaintiff would continue believing so, the chances of her discovering that the process was going ahead to transfer the suit premises would be eliminated. In the meantime the land transfer would be registered and the 3rd defendant would proceed to claim protection under Section 23 (1) of the Registration of Titles Act aforementioned.

In a way the above plan succeeded. The 3rd defendant is right now claiming protection under Section 23 (1) aforesaid. He is waving a copy of the said letter and claiming innocence. It is telling the whole world that it is innocent of any fraud committed in this matter, in which it claims to have undertaken not to proceed with unless the plaintiff confirmed that she had no more interest in the matter or until the plaintiff sorted out the conflict.

The court observed the occurrence of some events which are of great bearing in respect to this matter. Two weeks after the above letter was purportedly sent to Mativo-Kitulu & Co, Advocates, another letter purportedly written by the Mativo-Kitulu & Co. and now appearing to resolve the whole conflict over the ownership of the suit property, was "received" by Sachdeva & Company. It was dated 1/12/1995 and is Exh. 33 (DSD9). It will be observed that this letter fulfilled the undertaking purportedly given by Sachdeva & Co. in their letter of 17/11/1995 Exh.36 afore discussed, that the latter would not proceed with the transaction of the transfer until Mativo, Kitulu & Company have declared that their client the plaintiff, no longer has interest in the suit-property. Not only did this appear to provide professional protection against Sachdeva & Co, but also now allowed them to proceed with speed to register the transfer and seal the plaintiff's fate over the ownership.

M/S Mativo-Kitulu & Company's evidence is that they neither received the letter of 17/11/1995 Exh. 36 nor replied to it in the form of Exh. 33. They have in the evidence earlier described and considered, demonstrated that the letter Exh. 33 was forged on a letter-head that purported to belong to them, but which did not originate from their office. They gave evidence of the differences between their genuine letter-head and the forged one.

I have carefully considered that piece of evidence which in any case was not directly challenged. I came to the conclusion that the letterhead used and the contents of exh. 33, were deliberately constructed to fit into the grand scheme to transfer the suit property from the 4th defendant to the 3rd defendant. I saw no motive on the part of those concerned for taking such a risk except making money, by the 4th defendant and most probably some officers in the office of the Commissioner of Lands and Chief Registrar of Titles offices in Nairobi and at Mombasa. I have further come to the conclusion that Exh. 33 aforesaid, apart from being forged both in content and material used, was most probably created in the offices of Arum & Co. Advocates. I was persuaded to come to this conclusion because the reference number it carried i.e. MRO/CON/31/95 is the same reference in the letter exh. 14 undeniably originating from the office of Arum & Co. Advocates.

The 8 ½ million shillings question that arises is however, this: How did Arum & Co. Advocates know that Sachdeva & Co. had written the undertaking letter dated 17/11/1995 Exh. 36 to Mativo, Kitulu & Co., noting that the same was not even copied to Arum & Co? My view based on reason and logic is that Sachdeva & Co.'s letter Exh. 36 must have been written in consultation with Arum & Co. Advocates and that both Mr Manghani and Mr Robinson Malombo had the relevant knowledge of the fraud that was being perpetrated. They therefore from the circumstances prevailing, knew that exh. 36 was not sent to Mativo-Kitulu & Co. and that exh.33 did not originate from the same advocates. Put another way, both Sachdeva & Co. and Arum & Company most likely with the full knowledge and participation of their clients brought about the existence of exh. 36 and exh. 33 which helped them achieve the registration of the transfer under dispute. Without the two exhibits, (and the contents thereof would clearly so indicate) the transaction had, in my opinion, become paralyzed. I have come to the conclusion that Sachdeva & Co. found a need to write exh. 36 most probably to protect themselves from a professional misconduct charge in the future. I have also observed that they must have done so with knowledge that Mativo, Kitulu & Co. had not and would never receive the Commissioner of Land's letter, exh. 24 confirming that the land belonged to the 4th defendant. I also point out that it would in my view only be in that context that the said letter would make sense, to be written to Mativo-Kitulu & Co, two months after the Commissioner of Land's letter, exh. 24 had presumably been received by them. I finally had also earlier reached the conclusion that exh. 33 purportedly written by Mativo-Kitulu & Co. had actually been written by Arum & Co. in consultation with Sachdeva & Co. to fulfil the requirement of and be an answer to the letter, exh. 36. The answer to issue No. 6, therefore is that the 4th defendant, Peter Waithaka Gacii, fraudulently sold the suit property to the 3rd defendant, Dhanjal Investment Limited. I also hold that the 3rd defendant was

party to the fraud and indeed fully participated in it. In particular, the letter exh. 36 dated 17/11/1995, made little common sense coming up as it did, eight days after the Commissioner of Lands letter exh. 24 had been received by and explained to the 3rd defendant.

Moving to issue No. 7, the question there is whether the Registrar of Titles, Coast Land Registrar, acted fraudulently and thus contrary to the provisions of the Registration of Titles Act, Cap 281, in registering the Transfer of the suit property by the 4th defendant to the 3rd defendant?

It is in evidence, which was not challenged, that the plaintiff through her advocate Mr Mativo gave the Registrar of Titles, Mombasa sufficient notice that the suit land was being sold by a stranger who had no right to do so. She had successfully persuaded the Registrar of Titles at Mombasa to enter a caveat against any transaction that might alienate the suit property. Despite the instructions coming from the Commissioner of Lands in Exh. 24 of 12/9/1995, there were other legal reasons why the transfer in favour of 3rd defendant should not have been registered. First the documents in the Deed File or Office file both in Mombasa and Nairobi indicated clearly that the suit property had been allotted to Prof. Peter Gacii who was registered as Peter Gacii. The postal address belonged to Prof. Peter Gacii as adduced in the evidence. The identity card recorded against the title was that of Peter Gacii not Peter Waithaka Gacii whose identity card and photograph in it were different. The name Peter Waithaka Gacii of the 4th defendant did not appear in the certificate of Title nor was the Sale Agreement or the Transfer drawn in the name of the 4th defendant, Peter Waithaka Gacii. The consent to transfer was granted in the name of the 4th defendant Peter Waithaka Gacii and not in the name of Peter Gacii belonging to the plaintiff's husband and appearing on the Grant of Title. The transfer instrument which was allowed by the Registrar of Titles Mombasa to transfer the title was not the correct form, as the correct form should have been signed by the President or an authorized agent jointly with the registered proprietor as testified by PW3, the Deputy Chief Land Registrar and DW1, the Mombasa Registrar of Titles, the reason being that the land had not been developed. All these handicaps were known to the Registrar of Titles who deliberately ignored them and went ahead to effect the transfer and thereby assist the 4th defendant in committing fraud.

The 1st defence witness Mrs Rosemary Anyango Ngonga against her original stand and will, admitted all the above faults and admitted further that she was aware of these defects as she registered the transfer in dispute. She admitted that she noticed but ignored the fact that the seller's name was Peter Waithaka Gacii although the land in dispute was registered in the name of Peter Gacii. She then admitted that this on her part, was a serious inadvertence which was major and that she should not have committed it. She admitted further that she had ignored the fact that the consent to transfer was granted to a party who was not the registered proprietor. She also agreed that she was suspended from her job because she had removed the caveat that had been entered to protect the suit property and did so without signing for it. But most important of all she admitted that although she was the one who carried out the process of the registration of the transfer of the title from the 4th defendant to 3rd defendant, the transfer was defective and carried no validity in so far as there existed no title in the name of Peter Waithaka Gacii to which the consent in the same name would be applicable. She in other words admitted that the consent to transfer which was in the name of Peter Waithaka Gacii, could not lawfully authorize a transfer of a title in the name of Peter Gacii, which was the case here. She admitted finally that the transfer she registered in favour of the 3rd defendant from the 4th defendant, considering the above factors, should not be left to stand as it was not done according to the provisions of the law.

Mrs Ngonga admitted other relevant important defects in relation to the transfer. She agreed that the receipts for payment of stamp duty and registration fees for the transfer, did not conclusively relate to the suit title since they did carry the title number to which they related. I understood her to be saying that these receipts might have been forged and that therefore no stamp duty or registration fees may have been paid for this transfer. She also admitted that as between Prof. Peter Gacii and Peter Waithaka Gacii, it would be one of them who held the original letter of allotment, the stand premium and conveyance fees receipts and Rates and Rents receipts, who is the genuine proprietor of the suit property. She acknowledged that Prof. Peter Gacii was such a person.

In respect to the same issues, PW3, Junius Mwalimu Ezekiel Njue, Deputy Chief Land Registrar at Ardhi House Nairobi, and therefore the Senior Officer to Rosemary Anyango Ngonga aforementioned, confirmed that the person allotted the suit property was not Peter Waithaka Gacii but Prof. Peter Waithaka. He testified and was categorical that the letter exh.24 that purported to give the suit property to Peter Waithaka Gacii was a forgery and did not exist in the Deed File. He said that its contents were not supported by the original documents of title in the Deed File.

The answer to issue No. 7 therefore is that the Registrar of Titles, Coast Land Registry acted fraudulently and contrary to the provisions of the registration of Titles Act Cap 281 in registering the transfer from the 4th defendant to the 3rd defendant. She breached several provisions, particularly Section 20 (1) of the Act aforesaid. She also breached substantive procedural rules during the registration of the transfer. Such breaches in my view, went to the root of the substantive procedure laid down by the R.T.A.

The 8th issue is whether the 2nd defendant, the Commissioner of Lands and the 5th defendant, the Registrar of Titles, Coast Land Registry, were guilty of fraud, breach of duty of care and negligence as alleged in para 17 of the plaint. In so far as the 5th defendant is concerned much of the question of fraud has already been dealt with under issue number 7. But where necessary, I will touch on it again.

The core evidence relating to the role played by the Commissioner of Lands came from PW3 Junius Mwalimu Ezekiel Njue, the Deputy Chief Land Registrar in Ardhi House, Nairobi. He confirmed that every title has a Deed File which contained every relevant document concerning it. A replica of such file is also kept at the regional or district offices where the land is situated. In relation to the title relating to the suit property, the Deed File was in Mombasa Land Registry and its replica in Nairobi. When the plaintiff reported that possible fraud was being committed by someone calling himself Peter Gacii, the 2nd defendant undertook and indeed was under obligation to investigate. The issue that arose was whether Title Certificate No. CR. 19864 belonged to Prof. Peter Gacii (also registered as Peter Gacii) or Peter Waithaka Gacii, the 4th defendant who was in the process of selling the suit property. To enable the 2nd defendant properly investigate, the matter the plaintiff and his advocate visited the Commissioner of Lands and allowed him to examine the original Grant Exh. 5. PW3 testified that he found exh. 5 which was registered in the name Peter Gacii, to be the genuine Grant as contrasted with Grant Exh. 35 which also was registered in the same name. The reasons why PW3 came to this conclusion were that he found in the Deed File the letter from Prof. Peter Gacii applying originally for the unsurveyed plot. He also found the letters approving his application, a Letter of allotment to Prof. Peter Gacii, payment by him Stand Premium, Conveyancing and Registration Rates and Rents receipts. There were no similar documents in the name of Peter Waithaka Gacii. This raised questions as to how Peter Waithaka Gacii, in the first place, obtained the Grant Exh. 35. It also raised the question as to how Grant exh. 5 issued to Prof. Peter Gacii originally and a copy of which should be in the Deed file in Nairobi and a replica of which should be in Mombasa Land Registry, disappeared from both registries and got replaced by Grant Exh. 35 or 38 as the case may be. As already resolved by the court any original Grant such as the one in dispute is issuable only by the Commissioner of Lands who has a special procedure of doing so. And to my understanding, when a Grant is issued to a party, it remains in the form it was issued unless it is officially replaced. In this case before me, Grant exh. 5 was issued to Prof. Peter Gacii in 1988. A photocopy of it remained in the Deed File as the law provided. If the proper copies were removed and replaced it can only be concluded that it was replaced by Commissioner of Lands himself or by his officers who had access and machinery to do so. Evidence on record confirms that Grant exh. 35 was prepared by the Commissioner of Lands. In my view such preparation and proper execution thereof, is sufficient evidence that the act of issuing Grant Exh. 35, thus effectively, replacing Grant exh. 5, was not only deliberate and methodical but also clearly intended by whoever did it. This places a specific burden upon the 2nd defendant to explain why a valid certificate of title originally lawfully issued to Prof. Peter Gacii, as admitted by Mr Njue PW3, and even DW1, Rosemary Anyango Ngonga, should be replaced and should have been replaced, except to fulfill an unlawful purpose. In my understanding and finding, Grant exh. 35 which is a product of such illegality in tandem with the provisions of Section 23 (1) of the Registration of Titles Act aforementioned, should not be allowed to stand.

As no adequate or satisfactory explanation came forth in the evidence, of the 2nd defendant, as to how the

replacement of Grant Exh. 5 aforementioned came about to the detriment of and threat to the sanctity of a title this court had no difficulty in presuming that it was done for the purpose which was unlawful and fraudulent as against the plaintiff.

The second act of the 2nd defendant to be considered is in relation to the investigation purportedly conducted by the Commissioner of Lands to determine the genuine proprietor of the suit property. As we earlier noted the Commissioner of Lands by his letter dated 12/9/1995, exh. 24, declared that

“It has been established that the said parcel of land belongs to one Peter Waithaka Gacii ID No. 3154300/66 and not Professor Peter Gacii as had been thought earlier. I am therefore authorizing you to remove any existing caveat or caution that has been filed against the document of the above title. You may go ahead and receive the transfer documents for your execution. A copy of the consent letter dated September has already been sent to the District Land Officer.”

This letter as per evidence of Njue was not found in the Deed File in Ardhi House Nairobi. Secondly, its contents quoted above have been shown to be false in so far as they contradict the true state of things as demonstrated by documents found in the Deed File and produced by PW3, Njue, as already pointed out earlier. They confirmed the ownership of the title to Prof. Peter Gacii, and not Peter Waithaka Gacii. They included Prof. Peter Gacii's original application for a plot, its approval, issuance of Allotment Letter, payment by him of Stand Premium, Conveyance, Registration, Rates and Rents, and presence of Prof. Peter Gacii's ID No. 3430044/66. The Commissioner of Lands letter, exh. 24's contents was therefore not only opposite of the true position, but also false, deceitful and deliberately misleading. In so far as it was intended to be acted upon by the Registrar of Titles Mombasa, it was in my view, capable of and created a fraudulent situation. That is to say, the letter led to a state under which the plaintiff was deprived of her husband's property. In that respect the Commissioner of Land's letter dated 3/11/2000, exh. 31 is of great interest because it exposes the fraud in exh. 24. Indeed it will also be recalled that copy of the letter could not be found in the Deed File thus, suggesting that whoever had drawn it, had done so secretly and with an intention not to be discovered. In my opinion therefore, in the face of the caveat entered against the title of the suit property at the instigation of the plaintiff's son, no further transaction adverse to the title was possible without the facilitation thereto provided by the Commissioner of Land's letter exh. 24 aforesaid. The answer to issue No. 8 therefore is that the 2nd defendant played a fraudulent role as described above and deliberately assisted the 4th defendant on the face of it, to transfer the title to the 3rd defendant. He as well involved the 5th defendant to participate in the fraud. It is my view however, that even in the absence of the letter exh. 24, the 5th defendant had many reasons which could have made or pushed her to avoid participating in the fraud by declining to register the transfer of the title. But because she probably also had her reasons to register the transfer, she proceeded to do so, most likely for gain.

The 9th issue is whether the 3rd defendant was a party to the fraud committed by the 2nd and 5th defendants and whether the 3rd defendant was guilty of the fraud averred in paragraph 17 to 19 of the plaint.

As earlier concluded, the 3rd defendant's advocate Sachdeva & Co, authored the letter dated 17/11/1995 exh. 36, purportedly written to Mativo, Kitulu & Co. The letter was written two months after the Commissioner of Lands had resolved the issue of ownership and after Sachdeva & Co. had received it and discussed it with the 3rd defendant. Having earlier concluded that it was intended to mislead Mativo – Kitulu & Co. and their client the plaintiff, I also decided that Sachdeva & Co. must have known that Mativo-Kitulu & Co. had not and would most likely not receive the Commissioner of Land's letter exh. 24. I therefore also concluded that Sachdeva & Co. and Arum & Co. acted in concert and in collusion to write and receive exh. 36 and exh. 33 respectively. Since they represented and were authorized agents of the 3rd and 4th defendants, and since there is evidence on the record that they consulted their clients from time to time over these letters, I am of the view and it is my finding that Sachdeva & Co's knowledge and participation in the fraud are imputed to the 3rd and 4th defendants.

The 3rd defendant in my view was in a position to disassociate itself from this sale transaction. There was sufficient warning from the plaintiff and his advocates that the 4th defendant was an impostor. The plaintiff went as far as pushing the Registrar of Titles at Mombasa to file a caveat. Mr Dhanjal the Managing Director of the 3rd defendant even became aware that the 4th defendant's name differed from that in the suit property title. The identity card of the 4th defendant which was in the hands of its lawyer's custody confirmed the difference in names. Indeed the fact that Mr Manghnani advocate drew the Sale Agreement and the transfer in the names in the certificate of title and not that of the 4th defendant, confirms that the lawyer was all along aware of the importance of the difference in names. But like the Registrar of Titles Rosemary Anyango Ngonga, Sachdeva & Co. ignored these anomalies which they in evidence admitted were critical in the process of conveyancing. Sachdeva & Co. therefore did not only fail to take precautions to establish the authenticity of the documents of title held by the 4th defendant, but in fact positively took steps to cover up the differences. They either failed to conduct a proper search of the title or if they did, they ignored the glaring differences that the title revealed. To me the 3rd and 4th defendants and their advocates, appear to have been bent to complete the transaction at any cost and at any risk. I guess they were all, including those who helped them in the Commissioner of Lands and Registrar of Title's offices, being driven by nothing less than acute greed. The 3rd defendant was accordingly, in my view, party to the fraud committed by the 2nd and 5th defendants. In fact the 2nd, 4th and 5th defendants most probably, acted in collusion, not only in issuing the Grant exh. 35 to the 4th defendant but also later in effecting the fraudulent registration of the transfer to the 3rd defendant, with the 3rd defendant's participation.

Issue No. 10 in my opinion, has just been answered in answering issued No. 7, 8 and 9. The court has shown that the person who effected the registration of the transfer of the suit property from the 4th to 3rd defendant, was DW1, Rosemary Anyango Ngonga who was then the Registrar of Titles at the Coast Land Registry. She was aware and admitted in evidence that the title was registered in the name of Peter Gacii whose ID was No. 3430044/66. She admitted that the letter of consent to transfer the title was not in the name of Peter Gacii who was the registered proprietor. She explained that since the land in dispute was not developed as required by a terms of allotment, an effective transfer had to be a special transfer jointly executed at the same time by the proprietor and by the President but which requirement was not followed as well. She admitted that even the receipts produced to confirm payment of stamp duty and registration fees which payment is mandatory before registration, were not proper since those produced did not carry the relevant title number or any number to confirm such payment. She agreed that the caveat needed to be properly removed before registration of the transfer, which was as well not done by her when she deliberately ignored to countersign such removal. Indeed at the end of her testimony in the record, Mrs Rosemary Anyango Ngonga confessed that her conduct in respect to the registration of the transfer under discussion, was "remarkably" "inadvertent" and that were she to be given a chance before being suspended, she would have rectified the inadvertence. She agreed that her senior officers, including the Deputy Chief Land Registrar, PW2 held the view that the correct and genuine Grant to the suit property was Grant exh. 5 held by Prof. Peter Gacii, not exh. 35 held by the 4th defendant. She admitted that she came to testify in this case without consulting with and against the wishes of the Chief Land Registrar and the Commissioner of Lands even the Attorney –General who represented the 2nd and 5th defendants in this case. And finally, she admitted that she went ahead and registered the transfer despite the fact that there was really no genuine or proper letter of consent to transfer, the one available having been in the name of a person not registered as the proprietor. And she concluded by saying that looking back at what she had done, with all the "mistakes" "inadvertence" and the "serious oversight", and with the basis that the transfer was done by a crook as the evidence now shows, the transfer should not be left to stand. From Ng'ong'as evidence plus that of others including the plaintiff and Njue the Deputy Chief Land Registrar, I have no hesitation in concluding that the transfer was illegal, contrary to Sections 20 (1) and 23(1) of the relevant Act, and therefore liable for annulment as sought in paragraph 21 of the plaint.

As between the title held by the 3rd defendant and the plaintiff and relying on the evidence on record as already analysed in this judgment, the correct and valid title presently is exh. 5 held by the plaintiff in her husband's name Peter Gacii. From that conclusion the title held by the 3rd defendant is rooted on Grant exh. 35 whose origin is not only dubious but null and void in terms of Sections 20 (1) and 23 (1) of the

Registration of Titles Act aforesaid. As earlier stated in this judgment, the 4th defendant had no valid title issued to him. His grant came after the plaintiff's husband's title Grant Exh. 5 had been validly issued. It cannot therefore have precedence over the firstly issued title and is therefore defeasible in terms of Section 23 (1) of Registration of Titles Act aforementioned. And finally, the 3rd defendant's title contravened several of the requirements, substantive procedures and legal provisions of the Act contrary to Section 20 (1) of the Registration of Titles Act. That answers issue No. 12.

Issue No. 13 is whether the 2nd, 3rd and 5th defendants were properly notified that Peter Gacii (Prof.) was long deceased and that any transaction dealing with the suit property was invalid, null and void. The answer, in my view and finding is in the affirmative. M/S Mativo- Kitulu & Co. wrote letter exh. 15 and sent it to the 2nd and 5th defendant as well as the 4th defendant through Arum & Co. advocates and 3rd defendant through Sachdeva & Co. advocates. A caveat was entered against the title through the 5th defendant who was later to remove it under dubious instructions of the 2nd defendant or its authorized (or) agent. That the 2nd, 3rd and 5th defendants were aware of the existence of Prof. Peter Gacii existence through his wife, the plaintiff, has never been denied by the defendants. Infact to defeat Peter Gacii (Prof.'s) rights, the 2nd defendant had to write the letter exh. 24 the validity of which was to be denied and disowned only after it had achieved its purpose of opening the way for the registration of the transfer of the suit property from the 4th to 3rd defendant. This court had earlier come to the conclusion on credible and probable evidence, whether direct or circumstantial, that exh. 24 aforesaid was based on false or deceitful or non-existent or fraudulent evidence. It also had come to the conclusion that exh. 36 and exh. 33 were deliberately concocted in a process of deceit and fraud and in collusion between the 3rd and 4th defendants. From exh. 15 which they were all the time aware of and which was in their custody, they knew or ought to have known that Prof. Peter Gacii died in April, 1992 as shown in the said letter. They therefore knew or ought to have known in fact and in law that any transaction relating to the suit property without the express consent or authority of the plaintiff, who was her husband's estate administratrix, would be null and void.

It is now time to resolve issue No. 14 which I earlier deliberately deferred. I did so because establishment of the correct facts in this case would be necessary to help the court in deciding whether or not this suit would be time barred under Section 4 (2) of the Limitation of Actions Act, Cap 22 and under the provisions of the Public Authorities Limitations Act, Cap 39 and also the Government Lands Act Cap 280 of the Laws of Kenya which claim was strongly urged by the defendants.

I will first consider whether the offending acts or conduct averred by the plaintiff in this case, were tort, contract or claim in land, as each attracts a different limitation period. The defendants submitted that the defendants' acts that led to the plaintiff's cause of action amounted to tort. The 3rd and 4th defendants argued therefore that the cause of action would be time barred within three years from the time the transfer depriving the plaintiff of the suit property, was registered, i.e. the 24/1/1996. On the other hand, the 1st, 2nd and 5th defendants, apart from relying on the above averment found in the Limitations of Actions Act cap 22, also in addition sought protection under the Public Authorities Limitation Act Cap 39 which would reduce the limitation period on tort to one year.

The plaintiff's response, if I understood it properly, was that the acts or conduct of all the defendants from the beginning to the end, were acts to deprive the plaintiff the suit property through a process involving fraud, forgery and deceit, a process which was achieved by unlawful and fraudulent registration of a transfer of the suit property. The plaintiff further argued that the declaration sought to the effect that the transfer by the 4th defendant of the suit property to the 3rd defendant was illegal and fraudulent and therefore null and void, would have the effect of retrieving or recovering the suit land back to her. Plaintiff therefore argued that her cause of action was practically, a suit for recovery of land whose time limitation is 12 years. The plaintiff, in the alternative, further submitted that the conduct and actions of the defendants were actions in fraud whose treatment is different. She referred the court to Section 26 of the Limitations of Actions Act, Cap 22.

I have carefully perused the provisions of Limitation of Actions Act and the Public Authorities Limitation

Act. I have also examined the nature of the acts and conduct of the five defendants.

My view and decision is that while the acts and conduct of the 4th and 3rd and also the conduct of the 2nd and 5th defendants, are all amounting to tort and/or fraud, they however were acts applied towards achieving the main purpose or result which was, the depriving of the plaintiff of her suit property. It follows therefore that a declaration that the transfer of the suit property was illegal and null and void, would amount to a retrieving or a recovering of the suit property by the plaintiff. It is my considered opinion accordingly that this is a suit for the recovery of land, whose cause of action would not normally be time barred for a period of 12 years under Section 7 of the Limitations of Actions Act aforementioned, unless otherwise provided by any other law. In my view this finding would straight away deny the 4th and 3rd defendant any defence under the Limitations of Actions Act Cap 22, because they are private individuals and are not to my knowledge and information, given such protection by any other law.

This invites the court to consider the effect of Section 7 of the Limitations of Actions Act. Does it apply to the 1st, 2nd and 5th defendants who are undeniably persons employed by departments of the Government of Kenya? Section 42 of the said Act, inter alia, provides that the Act does not apply to proceedings to which the Public Authorities Limitations Act applies. The answer to the question posed above will therefore probably be provided by the provisions of Public Authorities Limitation Act whose Section 6 states as follows:

“Notwithstanding the provisions of Section 31 of the Limitation of Actions Act, Sections 22 of the Act shall not apply in respect of the provisions of this Act; and in Section 27 of the Limitation of Actions Act the reference to Section 4 (2) of that Act shall be read and construed as reference to section 3 (1) of this Act; but subject thereto and notwithstanding Section 42 of the Limitation of Actions Act, part III of that Act shall apply to this Act.”

I have perused and considered Section 31 of the Limitation of Actions Act. It is to the effect that where a period of limitation is prescribed for any action by any other written law (which should include Public Authorities Limitation Act) Part III of Limitation of Actions Act Cap 22, should be incorporated into such written law. The said Part III deals with extension of limited periods of time by methods or procedures and upon grounds provided in the said part of the Act. The grounds for extension of time include disability, acknowledgement and part-payment, and fraud, mistake and ignorance of material facts.

My understanding of Section 6 of the Public Authorities Limitation Act above quoted is as follows:-

- a) That despite the fact that section 31 of the Limitation of Actions Act incorporates the whole of its Part III into the Public Authorities Limitation Act, the latter Act accepts such incorporation less Sections 22 and 4 (2) of the former Act. This means that Section 23 to 31, less exceptions referred to in Section 27, of the Limitation of Actions Act, are incorporated into and become part of the Public Authorities Limitation Act.
- b) That the rest of the provisions of the Limitation of Actions Act, which in my view include Section 7 which provides the limitation period in proceedings for recovery of land, are excluded in their operation and application as against the Government and Local Authorities.

The result of my interpretation above is that even in proceedings for recovery of land against the Government such as the one before me, action must be filed within 12 months if it basically arises from tort and 36 months if it arises from contract. It is as if Parliament never envisaged an action for recovery of land against the Government or Local Authority as provided, for example, under Section 7 of the Limitation of Actions Act.

If my interpretation on this issue is correct, parliament’s intention was clearly to protect the Government and Local Authorities beyond the protection granted to private individuals. Whether such a provision is fair at this age of strong assertion for the protection of Human Rights, including the elimination of discrimination, is not a matter for resolution by this court.

The saving grace in this case, however in my view, comes from the fact that the Public Authorities Limitation Act incorporates much of the Part III of the Limitation of Actions Act that includes Section 26 thereof. The Section provides as follows:-

“Where, in the case of action for which a period of limitation is prescribed, either-

a) the action is based upon the fraud of the defendant or his agent, or any person through whom he claims or his agent; or

b) the right of action is concealed by fraud of any such person as aforesaid; or

c) the action is for relief from the consequences of a mistake, the period of limitation do not begin to run until the plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it.

Provided that this Section does not enable an action to be brought to recover,or set aside any transaction affecting, any property which-

i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

ii. in the case of mistake, has been purchased for valuable consideration, after the consideration in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

In this case before me I had earlier come to the conclusion that the 4th defendant, Peter Waithaka Gacii, was not the genuine registered proprietor of the suit property and that with the help of the 2nd and 5th defendant, he obtained an illegal and void Grant exh. 35. I also came to the conclusion that he colluded with the 3rd defendant through the latter's advocates, to transfer the suit property to the 3rd defendant, Dhanjal Investments Ltd. I concluded finally that the whole process of transferring the property was fraudulent as well as illegal in so far as both the 4th and 3rd defendants and/or their advocates with full knowledge, participated in the process.

The 3rd defendant's defence which was advanced by Mr Dilip Singh Dhanjal the Managing Director of the company, was that he was not aware that the 4th defendant was not the genuine owner of the suit property and that he did not know that the 4th defendant was a fraud all along. Mr Dhanjal also had argued that he did not participate in any fraudulent transaction as the transfer of the suit property to his company was straight forward and for a valuable consideration. As per my earlier finding however, Mr Dhanjal and his advocate were, immediately after signing the sale agreement, warned that the purporting seller was not the genuine proprietor. I also concluded that Mr Dhanjal and his advocate, Sachdeva & Co. positively participated in the fraud as the court found that the writing of the letter exh. 36 and the writing and receipt of the letter exh. 33 were part of the grand scheme of deceit committed in this case, therefore bringing this case within Section 26 (a) of Limitation of Actions Act.

Suppose however the 3rd defendant or its advocates who are its agents did not deliberately participate in the discussed fraud, nevertheless, they had received more than adequate warnings and notice from the plaintiff's advocates. They knew or ought to have known that the plaintiff could not have easily dropped his concern and interest over a plot of such great value after taking such serious measures and publicity over it. It would have been very strange for plaintiff to suddenly drop her case without properly informing all the parties concerned. In my opinion the 3rd defendant should have sought direct communication, for example a telephone conversation or any other more reliable communication with the plaintiff's counsel to confirm, that the letter exh. 33 indeed came from the plaintiff. This would be necessary considering the slippery and tricky history of the 4th defendant. But as it happened, the 3rd defendant and/or his advocate

chose not to ascertain the true position even under the existing negative and and uncertain circumstances. I accordingly find that if the 3rd defendant or its advocate did not know or participate in the fraud knowingly, which has been negated already, it should have had reason to know or believe that fraud had been committed. They therefore cannot get any limitation defences on the face of Section 26 of the Limitation of Actions Act aforequoted.

Finally I find that the plaintiff was deliberately kept in the dark, not only of the Commissioner of Land's letter exh. 24 purporting to deprive her of the suit property but also of the fact that the 2nd, 3rd, 4th and 5th defendants proceeded with the transfer of the property to the 3rd defendant without informing her. They all four, thus fraudulently concealed plaintiff's right of action as envisaged under Section 26 (b) of the Limitation of Actions Act.

The conclusion I accordingly reach is that by the fraud of the 4th, 3rd, 2nd and 5th, the period of limitations did not start to run against the plaintiff until 9/8/2000 when by an official search of the title register, she discovered that all the defendants, jointly and severally, transferred her property to the 3rd defendant on 24/1/1996, which should be the date when time started to run.

The plaintiff thereafter having filed this suit within three months from the date of such discovery, her cause of action could not in the finding of this court be defeated by limitation of time against the 4th and 3rd defendants or the 2nd or 5th defendants separately. Indeed under those circumstances, it did not finally matter whether the actions committed by any of the defendants jointly or severally, which necessitated the filing of this suit, were founded in tort, contract or in recovery of land since the action was within the said Section 26 (1) brought within three months.

SUMMARY OF COURT FINDINGS

- 1) The plaintiff's husband Prof. Peter Gacii, who died in April 1992, had applied for a beach plot in the South Coast of Mombasa.
- 2) Prof. Peter Gacii was allotted a plot at Tiwi, Mombasa South Coast, which had been specifically surveyed after his request vide Letter of Allotment Exh. 9 and he paid Stand Premium, Conveyancing and Registration fee amounting to Kshs.179,700 by a Banker's cheque No. 283186 and was given government receipts No. B392527 exh. 11 and 12.
- 3) That thereafter Prof. Peter Gacii was given a Grant No. CR 19864 (LR No. 12962) under R.T.A -exh. 5 registered in his original name Peter Gacii without his professorial title.
- 4) That by a stroke of luck the plaintiff who had been appointed the Administratrix of Prof. Peter Gacii's estate, which included L.R. No. 12962 aforementioned learnt through a letter exh. 14 written by Arum & Co. Advocates that someone calling himself Peter Gacii, was in the process of selling and transferring L.R. No. 12962 to the 3rd defendant, Dhanjal Investment Ltd. through Sachdeva & Co. Advocates.
- 5) The plaintiff through his advocates, Mativo, Kitulu & Co, wrote a strong warning letter to Arum & Co. informing them that the person trying to sell the suit property is an impostor as the real Peter Gacii died in 1992 and that the matter should be reported to the CID for investigations and arrest. The letter was copied to Sachdeva & Co, CID, the Commissioner of Lands and the Registrar of Titles.
- 6) That the plaintiff's son visited the Registrar of Titles, Mombasa Land Registry and successfully persuaded the Registrar of Titles to enter a caveat which was to protect the property from any alienation.
- 7) That the plaintiff and his advocate visited the 2nd and 5th defendants, surrendered the original Grant exh. 5 and other root of title documents and sought a thorough investigation of the likely

fraud going on.

8) The CID were also requested to investigate possible criminal activity going on.

9) A month or so later in September 1995 the 2nd defendant forwarded a letter containing the purported result of investigations. The content of the report are expressly opposite to the root of title documents found in the Commissioner of Lands Deed File relating to the suit property.

10) The letter exh. 24, which effectively opens up for the 4th and 3rd defendants to proceed with the transaction to transfer the land to 3rd defendant is (for unknown but obvious reasons of fraud) not delivered to the plaintiff and her advocate and who therefore continue waiting for the results of investigations.

11) The 3rd defendant and his advocate who receive the above letter apparently on 9/11/1995, consult together and decide to write a letter exh. 36 to the plaintiff assuring her that they will not proceed to purchase the suit premises until the plaintiff will assure them that the dispute of ownership is cleared up and plaintiff expresses no further interest in the suit premises.

12) The above letter exh. 36 (for unknown but obvious reasons of fraud) is not again delivered to the plaintiff or her advocates. However, (very conveniently) the 3rd defendant and its advocate receive a purported reply to exh. 36 in form of exh. 33, purporting to have originated from the plaintiff's advocates, expressing no further interest in the suit property.

13) To be observed is the fact that exh. 36 was written by 3rd defendant who pretended that the Commissioner of Lands investigations was yet to come out and yet they already had received the report and had already discussed it. The court accordingly reached the conclusion that 3rd defendant wrote exh. 36 to insulate themselves from likely future blame and most probably knowing that plaintiff had not and would not receive the said Commissioner of Lands investigation report.

14) The letter exh. 33 in answer to crucial points raised in exh. 36 was supposed to come from plaintiff's advocates to whom Exh. 36 was purportedly addressed but since the letter was not delivered to Mativo Kitulu & Co. as clearly was the plan, someone else wrote exh. 33 stating that the plaintiff was no longer interested in the suit property (a most unlikely event). This fully answered the undertaking contained in 3rd defendant's letter exh. 36 and appeared not only to open the door for the 4th defendant to transfer the suit property, but also appeared to insulate the 3rd defendant and its advocates from being expressly accused of participating in fraud.

15) Note is taken of plaintiff's evidence accepted by this court, that the letter-head in the name of Mativo, Kitulu & Co. upon which letter exh. 33 is written carried the Reg. No. MRO/CON/31/95 which was a reference of Arum & Company, the advocates of the 4th defendant who finally purported to sell and transfer the suit property. This prompted this court to conclude that exh. 33 was authored by Arum & Co. and/or the 4th defendant, but most likely both. More so because the plaintiff and her advocates denied authoring it and pointed out to the satisfaction of this court that both the letter-head and the contents were forged. It was forged with the likely unlawful co-operation of the 3rd defendant and its advocates who had authored exh. 36 to which exh. 33 was a very necessary and convenient reply.

16) In the meantime in September 1995, and without the knowledge of the plaintiff, the 2nd defendant had issued a consent to transfer the suit property. The consent was not in the name of the registered proprietor Peter Gacii, but in the name of the 4th defendant Peter Waithaka Gacii who was not the registered proprietor and whose national identify card is different from the one kept in the Deed File.

17) That despite several obvious and glaring impediments, the 5th defendant deliberately registered

the Transfer of the suit property from 4th to 3rd defendant. The impediments included:

- (a) Lack of consent or proper consent to transfer.
- (b) Lack of the proprietor's national ID or passport carrying the proper name.
- (c) Lack of proper form of the instrument of Transfer properly executed by Commissioner of Lands on behalf of the President jointly with the registered proprietor.
- (d) Lack of receipts or proper receipts confirming that payment of Stamp Duty and registration fees had been made.
- (e) Removal of the Registrar's caveat over the suit title in an unlawful manner and without giving warning or notice to the plaintiff who had prompted its entry.

18) The 2nd defendant admitted that the 2nd defendant's investigations report Exh. 24 did not come from Commissioner's office and did not exist in their records in the Deed File. He also admitted that the proper title document is exh. 5 held by the plaintiff not exh. 35 held by 4th defendant and transferred to 3rd defendant. This meant that Grant exh. 35's origin was not only obscure but also unaccounted for and therefore concluded to be fraudulent.

19) The court made a finding that fraud was committed not only by the 4th and 3rd defendants but also most likely, by their advocates. The 2nd and 5th defendants through their officers or agents also provided the 4th defendant with not only with a forged Grant exh. 35 but also helped in transferring it to the 3rd defendant.

20) This court made a finding that although the acts of all the defendants were tortuous and fraudulent, such acts were committed by all the four defendants in the process of depriving the plaintiff her land and were therefore merely incidental to the main conduct that created the cause of action i.e. seeking to cancel the offending transaction of registering an illegal transfer to retrieve the land back to the plaintiff.

21) Following from (20) above, the cause of action to recover land against the 4th and 3rd defendant was 12 years. In the alternative and without prejudice, the four defendants committed fraud within Section 26 of the Limitation of Actions Act.

22) Arising from (21) above, the period for the purpose of limitation of time did not start to run until August 2000 but since the suit was filed within three months after time started to run, it denied the defendants the defences of limitation of time.

23) As to the question whether the Limitation of Actions Act applied to the Government, the court found that except where specifically provided so, the Act does not by virtue of its Section 42 apply to the Government except Part III of it which is applied by Section 6 of the Public Authorities Limitation Act Cap 39, less Section 22 of the former Act. Since Part III aforementioned deals inter alia, with fraud, the Government is not therefore shielded from acts of fraud just like any private person.

24) That the Grant exh. 35 that the 4th defendant obtained from sources shown to be obscure and unknown in relation to the title known as C.R. No.19864 L.R. No. 12962 was issued subsequent to that originally issued to the plaintiff's late husband Prof. Peter Gacii-exh.5. Exh. 35 was therefore was null and void. Accordingly the 4th defendant had no valid title to pass to the 3rd defendant.

25) In the alternative, since the issuance of a title and the transfer or transmission of the same has a procedure laid down in the Act and since such procedure was not followed as provided in the Act,

then the issuance and transfer or transmission therefore contravened the provisions of Section 20 (1) of the Act making the same null and void and of no effect.

In the conclusion it is my findings that for the reasons discussed hereinabove, the plaintiff has proved, her case on the balance of probability. She is therefore entitled to the order she prayed for in her plaint.

ORDERS

Judgment is entered against the 1st, 2nd, 3rd, 4th and 5th defendants jointly and severally in the following terms:

- a) A declaration hereby issues to the effect that the Transfer of L.R. No. 12962/1 by the 4th defendant to the 3rd defendant on 21/1/1996 was null and void for all intents and purposes.
- b) An order hereby issues directing the 1st, 2nd and 5th defendants jointly and severally to forthwith delete and/or cancel the Grant exhibit 35 and the transfer dated 10th January 1996 and the registration thereof dated 24th January 1996 so as to restore and preserve Grant No. C.R. 19864 – L.R No. 12962, Mombasa, in the name of Peter Gacii.
- c) An order to issue forthwith against the defendants jointly and severally for costs of this suit, to be agreed upon or taxed as the case may be.

Dated and delivered at Nairobi this 14th day of July, 2006.

D.A. ONYANCHA

JUDGE