



REPUBLIC OF KENYA



**Abdis World Group of Companies Limited v Nandrat & 2 others (Environment and Land Case Civil Suit 328 of 2019) [2023] KEELC 17884 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17884 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 328 OF 2019**

**JO MBOYA, J**

**MAY 18, 2023**

**BETWEEN**

**ABDIS WORLD GROUP OF COMPANIES LIMITED ..... PLAINTIFF**

**AND**

**AVTAR SINGH NANDRAT ..... 1<sup>ST</sup> DEFENDANT**

**FOUZAN INVETSMENTS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Introductin and Background**

1. The suit herein was commenced vide Plaintiff dated the 11<sup>th</sup> October 2019, which Plaintiff was subsequently amended. Consequently, the current proceedings are premised and anchored on the basis of the amended Plaintiff dated the 14<sup>th</sup> October 2021.
2. Pursuant to the amended Plaintiff dated the 14<sup>th</sup> October 2021, the Plaintiff herein has approached the Honourable court seeking for the following reliefs;
  - i. A Permanent Injunction restraining the 1<sup>st</sup> Defendant by himself, servants, legal representatives, agents or howsoever from remaining upon, entering into, blocking the Plaintiff's agents, erecting structures or in any other manner interfering with the Plaintiff's or its successors in title's peaceful and quiet enjoyment of its property known as L.R No. 209/12594 (I.R No. 205587) situate in Nairobi which order shall be enforced by Officer Commanding Station, Lang'ata Police Station or any other nearby police station.
  - ii. General Damages.
  - iii. Cost of the suit plus Interest.



- iv. Any other Relief that this Honourable court may deem fit and just to grant.
  - v. A Declaration that the Plaintiff lawfully acquired and was registered as the Proprietor of the suit Property known as L.R No. 209/12594.
  - vi. A Declaration that the 1<sup>st</sup> Defendant has no Legal Right or recognizable Interests over the Property known as L.R No. 209/12594 and any Title Document he holds is a nullity and stand revoked forthwith
3. Inevitably, upon being served with the Plaint and summons to enter appearance, the 1<sup>st</sup> Defendant herein duly entered appearance and thereafter filed a Statement of Defense and Counter-claim dated the 22<sup>nd</sup> October 2019. However, the Statement of Defense and Counter-claim was subsequently amended in terms of the amended Defense and Counter-claim dated the 10<sup>th</sup> November 2021; and in respect of which the 1<sup>st</sup> Defendant sought for the following reliefs
- a. The Plaintiff's suit be dismissed in its entirety with cost to the 1<sup>st</sup> Defendant.
  - b. The 2<sup>nd</sup> Defendant's Counter-claim be dismissed in its entirety with costs to the 1<sup>st</sup> Defendant.
  - c. Judgment be entered for the 1<sup>st</sup> Defendant in terms of the Counter-claim.
  - d. A Permanent Injunction be and is hereby ordered restraining the Plaintiff and the 2<sup>nd</sup> Defendant whether by themselves, their agents and/or such other person acting for and on behalf the said Parties from interfering howsoever against the 1<sup>st</sup> Defendant's continued quiet and peaceful enjoyment of the Suit Property.
4. Despite having filed and commenced the instant suit vide original Plaint dated he 11<sup>th</sup> October 2019; the Plaintiff herein proceeded to and sold the suit property to and in favor of the 2<sup>nd</sup> Defendant. Arising from the sale of the suit property, the 2<sup>nd</sup> Defendant was thereafter issued with a Certificate of Lease pertaining to and concerning the suit property.
5. Owing to the foregoing, the 2<sup>nd</sup> Defendant sought for and obtained leave to be joined in the instant suit and same thereafter filed a Statement of Defense and Counter-claim, which was thereafter amended in terms of the amended Statement of Defense and Counter-claim dated the 19<sup>th</sup> November 2021.
6. Vide the amended Statement of Defense and Counterclaim, the 2<sup>nd</sup> Defendant has sought for the following reliefs;
- a. A Declaration that the Plaintiff in the counterclaim, Fouzan Investments Limited acquired valid interest over property L.R No. 209/12594 situated in Nairobi from the 2<sup>nd</sup> Defendant, Abidis World Group of Companies Limited, who was lawfully registered as the proprietor; and is entitled to absolute ownership, possession and occupation thereof to the exclusion to the Defendants.
  - b. A Permanent Injunction be issued restraining the Defendants, whether by themselves, or otherwise howsoever acting from trespassing, charging, leasing, disposing of and/or in any manner whatsoever from interfering with the Plaintiff, Fouzan Investment Limited' rights to ownership, quiet and peaceful possession and utilization of property known as L.R No. 209/12594 situate in Nairobi, which order should be enforced by officer commanding station officer in Lang'ata.
  - c. A Permanent Injunction against the 1<sup>st</sup> Respondent in the Counter-claim prohibiting himself, servants, from entering upon, remaining upon, occupying or in any manner howsoever



interfering with the Plaintiff in the counterclaim, Faouzan Investment limited, ownership, quiet possession, occupation and utilization of the Property known as the suit property LR No. 209/129454, and in default an Eviction order do issue after the lapse of 30 days from the date of the Judgment; and which order should be enforced by the officer commanding station Lang'ata.

- d. A Mandatory Injunction do issue compelling the Defendants in the Counter-claim, the Chief Land Registrar to annul and revoke any purported title document and the 1<sup>st</sup> Defendant in the Counter-claim, Avtar Sighn Nadra within 21 days from the date of delivery of the Judgment herein failure of which the same shall be deemed revoked.
  - e. General Damages for Infringement of Property rights.
  - f. In the alternative to prayers (a) to (d) above, the 2<sup>nd</sup> Defendant to the Counter-claim, Abdis World Group of Companies Ltd be ordered to refund the Plaintiff in the counter-claim, Fouzan Investment Limited Kes.44, 330, 000/= Only, being the amount paid to it as the Purchase Price for the Property, namely, L.R No. 2019/12 5954, all the related costs incurred in the registration of the Transfer together with Interests on the same at commercial rates.
  - g. Cost of the suit.
  - h. Any other Relief that the court may just to grant in the circumstances.
7. It is instructive to state that upon being served with the amended Statement of Defense and Counter-claim by the 1<sup>st</sup> Defendant, the Plaintiff who was impleaded as the 2<sup>nd</sup> Defendant to the counterclaim filed a Reply to the amended Defense and Counter-claim on the 22<sup>nd</sup> November 2021. For good measure, the Plaintiff denied the allegations contained at the foot of the Statement of Defense ad Counter-claim.
  8. Nevertheless, even though the same Plaintiff was also served with the 2<sup>nd</sup> Defendants amended Statement of Defense and Counter-claim dated the 19<sup>th</sup> November 2021, it is evident and apparent that same did not find it appropriate and expedient to file any Reply to the amended to Defense and Defense to the amended to Counterclaim, whatsoever.
  9. For coherence, the court appraised and cross checked the case tracking system (CTS) to ascertain whether the Plaintiff herein ever filed a Reply to the amended Statement of Defense and Counter-claim by the 2<sup>nd</sup> Defendant, but none was available.
  10. Notwithstanding the foregoing, it is also not lost on the Honourable court that the court ordered and directed all the Parties to file composite trial bundles, containing all the pleadings, documents and witness statement to be relied upon during trial.
  11. In this regard, counsel for the Plaintiff indeed complied and filed the bundle dated the 22<sup>nd</sup> November 2021. However, yet again, no such document has been alluded to and or exhibited. In a nutshell, it is clear that the Plaintiff herein did not respond to the amended statement of defense and counterclaim by the 2<sup>nd</sup> Defendant.
  12. Nevertheless, the Legal consequence attendant to such failure to file a Reply to Statement of Defence and Counter-claim, if any, shall be adverted to later on in this Judgment.
  13. Finally, the 2<sup>nd</sup> Defendant filed a Reply to the amended Defense and Counter-claim, which was filed on behalf of the 1<sup>st</sup> Defendant. Fir clarity, the said Reply and Defense to Counter-claim mounted by the 1<sup>st</sup> Defendant is dated the 19<sup>th</sup> November 2021.



14. The 3<sup>rd</sup> Defendant on her part, duly entered appearance and filed a Statement of Defense dated the 20<sup>th</sup> December 2021; and in respect of which same denied the claims at the foot of the amended Plaint. However, the 3<sup>rd</sup> Defendant was silent in respect of the Counter-claims raised by both the 1<sup>st</sup> and 2<sup>ND</sup> Defendants, respectively.
15. Upon the close of the Pleadings, the suit herein was listed for Case Conference and the Parties beforehand duly confirmed to the Honourable court that same had duly complied with the Pre-trial directions; and that the matter was thus ready for hearing.
16. Consequently and in the premises, the Honourable court issued appropriate directions and the suit was ultimately set down for Hearing.

## **Evidence by the Parties**

### **a. PLAINTIFF'S CASE:**

17. The Plaintiff's case revolves around the Evidence of one, Hussein Biire Mirre, who testified as PW1.
18. It was the testimony of the witness herein that same is a Director of the Plaintiff Company and that by virtue of being a Director of the Plaintiff company, same is knowledgeable of and conversant with the facts/ Issues in respect of the subject matter.
19. In addition, the witness averred that the Plaintiff company bought and acquired the suit property from the previous owners, namely, Osman Gabow Ibrahim and Esther Wahito Kuria, respectively. Further, the witness stated the Plaintiff company paid to and in favor of the Vendors the entire Purchase price in the sum of Kes.40. 000, 000/= only.
20. Nevertheless, the witness testified that prior to and before purchasing the suit property from the named Vendors, the Plaintiff carried out and undertook due diligence by ascertaining whether the Vendors were duly the owners/proprietors of the suit property. In this regard, the Witness testified that the Plaintiff indeed undertook an Official Search at the Land Registry; and ascertained that the Vendors had been issued with a Certificate of Lease on the 13<sup>th</sup> December 2017.
21. Furthermore, the Witness added that upon undertaking due diligence, the Plaintiff entered into the Sale Agreement with Vendors, who thereafter executed the Instrument of Transfer, culminating into the eventual Transfer and registration of the suit Property in favor of the Plaintiff company on the 31<sup>st</sup> January 2019.
22. Additionally, the witness testified that the Transfer of the suit Property was entered and endorsed at the Land Registry and the Plaintiff Company was issued a Certificate of Title I.R No. 205587; in respect of L.R No, 209/594.
23. On the other hand, it was the further testimony of the witness that upon purchase and Transfer of the suit Property in her favor, the Plaintiff entered upon and took possession of the suit Property. However, the witness averred that thereafter the 1<sup>st</sup> Defendant herein invaded the suit property with the assistance of armed goons and thus interfered with the Plaintiff's occupation and possession of the suit Property.
24. It was the further testimony of the witness that on the 2<sup>nd</sup> October 2019, the 1<sup>st</sup> Defendant again invaded the suit Property and commenced to put up a perimeter wall fence round the Property, which acts caused the Plaintiff to lodge a formal Complaint with the OCS Lang'ata; and the District Commissioner Lang'ata, with a view to seeking their intervention.



25. Be that as it may, the witness averred that upon the lodgment of the Compliant with the OCS Lang'ata Police Station; and the District Commissioner, the 1<sup>st</sup> Defendant herein remained adamant and continued with the offensive activities complained off.
26. As a result of the foregoing, the witness averred that the Plaintiff was thereafter constrained to file and or lodge the instant suit, with a view to protecting her rights and or Interests over and in respect of the Suit Property.
27. Additionally, the witness referred to the witness statement dated the 14<sup>th</sup> October 2019 and thereafter sought to adopt and rely on the contents of the said witness Statement. In this respect, the witness Statement dated the 14<sup>th</sup> April 2021; was admitted as Further Evidence- in- chief of the Witness.
28. On the other hand, the Witness also alluded to the List and Bundle of Documents dated the 14<sup>th</sup> October 2021 and same sought to adopt and rely on the said Documents. For completeness, the Documents at the foot of the List dated the 14<sup>th</sup> October 2021, were duly admitted ad adopted as Exhibits P1 to P4, respectively.
29. Finally, the witness alluded to the Amended Plaint dated the 14<sup>th</sup> October 2021; and implored the Honourable court to grant the Reliefs/ Prayers sought thereunder.
30. On cross examination by Learned Counsel for the 1<sup>st</sup> Defendant, the witness stated that same is a Director of the Plaintiff company and that the Plaintiff company had duly authorized same to execute the various Documents as pertains to the instant suit. However, the witness added that no such document has been tendered and availed to the court.
31. Besides, the witness testified that the Plaintiff bought and purchased the suit Property from Osman Gabow Ibrahim and Esther Wahito, respectively, who were the previous owners/ Proprietors thereof.
32. Whilst under further cross examination, the witness stated that prior to and before entering into the transaction, same carried out and undertook due diligence by obtaining an Official search from the Land Registry. In addition, the witness also stated that same was also availed a copy of the Certificate of Lease bearing the names of the Vendors.
33. Further, the witness pointed out that the Plaintiff company herein had hitherto filed a suit in the Chief Magistrate's Court and wherein the Plaintiff company indicated that the 1<sup>st</sup> Defendant was her Tenant. In any event, the witness added that thereafter the Chief Magistrate's Court issued an order for purposes of Levying Distress as against the 1<sup>st</sup> Defendant.
34. It was the further testimony of the Witness that upon procuring and obtaining the order for Levying Distress, same engaged Police Officers; and thereafter went on to the suit Property, wherein the 1<sup>st</sup> Defendant was conducting a Garage business.
35. On the other hand, the witness testified that same was privy to the Sale transaction and that he (Witness) duly signed the Transfer Instrument.
36. On cross examination, by Learned counsel for the 2<sup>nd</sup> Defendant, the witness pointed out that the Plaintiff company bought and acquired the suit Property from Osman Gabow and Esther Wahitu Kuria, respectively, who were the previous owners of the Property.
37. Furthermore, the witness testified that prior to and before entering into the transaction, same undertook an official search, which revealed/confirmed that the Vendors were indeed the registered owners of the suit Property. However, the witness added that same has not produced any document



to show that there was a Lease agreement between himself and the 1<sup>st</sup> Defendant to warrant the contention that the 1<sup>st</sup> Defendant was a tenant.

38. Whilst under further cross examination, the witness stated that it is the Plaintiff company who sold the suit property to and in favor of the 2<sup>nd</sup> Defendant. Nevertheless, the witness admitted that at the time of the Sale, the Plaintiff herein did not alert the 2<sup>nd</sup> Defendant about the existence of the case/ Suit herein.
39. On cross examination by Learned counsel for the 3<sup>rd</sup> Defendant, the Witness stated that the Plaintiff has filed the case herein even though the suit property has since been sold and transferred to the 2<sup>nd</sup> Defendant.
40. Additionally, the witness pointed out that by the time the Plaintiff bought and purchased the suit Property, there was a garage on the Land. Besides, the witness added that there was also a Water Vendor business.
41. On re-examination, the Witness stated that same is the sole shareholder and Director of the Plaintiff company. In this regard, the Witness contended that he therefore did not require any Resolution of the Company to execute any Document and to appear before the Honourable court.
42. Furthermore, the witness confirmed that the suit Property was sold to and in favor of the 2<sup>nd</sup> Defendant. Invariably, the witness added that it is the 2<sup>nd</sup> Defendant who should be the owner of the Land/ Property in question.
43. With the foregoing testimony, the Plaintiff's case was closed.

#### **b. 1<sup>st</sup> Defendant's Case**

44. The 1<sup>st</sup> Defendant's case revolves and gravitates around the Evidence of one witness, namely, Jagpeed Singh Nadra, Son of Avtar Singh Nadra; who testified as DW1.
45. It was the testimony of the witness that the 1<sup>st</sup> Defendant herein is his Father and that same has been granted a Power of Attorney dated the 20<sup>th</sup> October 2021. In this regard, the witness testified that he was therefore authorized and mandated to testify on behalf of the 1<sup>st</sup> Defendant.
46. Furthermore, the Witness averred that the suit Property was hitherto allocated to an organization, known as Bull Holders Investment vide Letter of allotment dated the 11<sup>th</sup> April 1995, who thereafter entered into a Sale Agreement and thus sold the interests at the foot of the Letter of allotment to and in favor of the 1<sup>st</sup> Defendant.
47. Additionally, the witness testified that upon the purchase of the Interest, which was allocated to Bull Holders Investment, the 1<sup>st</sup> Defendant processed and was ultimately issued with a Certificate of Title in his name. For clarity, the Witness referred to Certificate of Title registered on the 5<sup>th</sup> October 1995.
48. On the other hand, the witness also testified that upon the transfer and registration of the suit Property in favor of the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant entered upon and took possession of the suit Property. In addition, the Witness testified that the Family of the 1<sup>st</sup> Defendant has been operating a garage business for a very long time.
49. Nevertheless, it was the further testimony of the witness that on or about October 2019 a firm of Auctioneers proceeded to the suit Property, whilst under escort of Police Officers; and thereby evicted him and the garage business, together with the other tenants who were on the suit Property.



50. Be that as it may, the witness added that prior to the Eviction, the 1<sup>st</sup> Defendant had not been served with any Court process, relating to the matter which gave rise to the impugned orders that were used to Evict same from the suit Property.
51. Nevertheless, the witness averred that same subsequently engaged and retained a firm of advocates to proceed and ascertain the circumstances leading to the issuance of the orders that were used to Evict same from the suit Property. In this regard, the witness testified that his advocate indeed established that the Plaintiff herein had filed a Misc. suit before the Chief Magistrate's Court at Milimani vide CMC Misc. Application No. 806 of 2019.
52. It was the further testimony of the witness that upon ascertaining the position in respect of the named suit, his advocates discovered that the suit was in relation to Distress for rent, which was alleged to be owed by the 1<sup>st</sup> Defendant.
53. On the other hand, the Witness testified that the suit Property lawfully belongs to the 1<sup>st</sup> Defendant, who acquired same in the year 1995. In any event, the witness added that the 1<sup>st</sup> Defendant has also been paying the requisite Land Rents and Rates pertaining to the suit Property.
54. Additionally, the witness contended that the 1<sup>st</sup> Defendant has also previously entered into various Lease Agreements dating back to the year 2000. Consequently and premised, on the foregoing, the witness thus stated that the suit property lawfully belongs to the 1<sup>st</sup> Defendant.
55. Furthermore, the witness alluded to the Witness statement dated the 26<sup>th</sup> November 2021; and same sought to adopt and rely on the contents thereof. In this regard, the contents of the witness statement dated the 26<sup>th</sup> November 2021, were duly adopted and admitted as the Evidence- in -Chief.
56. In addition, the witness also alluded to the List and Bundle of Documents dated the 26<sup>th</sup> November 2021; and same sought to adopt and produce the documents as Exhibits before the Honourable court. Suffice it to state, that the documents at the foot of the said List were thereafter produced and marked as Exhibit D1 to D34, save for Document Number 35, which was marked as PMFI 35.
57. Other than the foregoing, the witness pointed out that the 1<sup>st</sup> Defendant had also filed an amended Statement of Defense and Counter-claim. In this respect, the witness sought to adopt and rely on the contents on the Counter-claim dated the 10<sup>th</sup> November 2021.
58. On cross examination by Learned counsel for the 2<sup>nd</sup> Defendant, the witness pointed out that he is a Son of the 1<sup>st</sup> Defendant. Nevertheless, the witness added that same has been granted a Power of Attorney; and thus he is seized of the requisite authority to testified for and on behalf of the 1<sup>st</sup> Defendant.
59. Furthermore, the witness also stated that the Power of Attorney which was issued in his favor had however not been lodged for registration and neither was same registered.
60. It was the testimony of the witness that the suit property lawfully belongs to the 1<sup>st</sup> Defendant, who bought and purchased same from the initial allottee thereof. In this regard, the witness alluded to the Sale Agreement dated the 31<sup>st</sup> August 1995; and which was executed between the 1<sup>st</sup> Defendant and M/s Bull Holder Investment Ltd.
61. Whilst still under cross examination, the witness testified that the 1<sup>st</sup> Defendant, duly carried out and undertook due diligence before entering into the Purchase Agreement. However, the witness added that upon Purchase of the suit Property, the 1<sup>st</sup> Defendant has entered upon and remained in possession of the suit property.



62. On the other hand, the witness pointed out that the Sale Agreement that was entered into between the 1<sup>st</sup> Defendant and Bull Holders Investment Ltd showed that part of the purchase price was to be utilized to facilitate the payment of the allotment fees.
63. Additionally, the witness stated that the Letter of allotment showed/indicated that the payments at the foot thereof were to be made within 30 days. In any event, the witness the witness pointed out that it was evident that payment at the foot of the Letter of allotment was made after the 30 days, stipulated in the Letter of allotment.
64. Other than the foregoing, the witness stated that same has not produced before the Honourable court any evidence to show/ confirm that the payment was ever made to the Government.
65. Notwithstanding the foregoing, the Witness testified that the suit Property lawfully belongs to the 1<sup>st</sup> Defendant, who acquired same in the year 1995. However, the witness pointed out that same has not availed or adduced any Certificate of Official search that was issued before the year 2017.
66. Other than the foregoing, the witness testified that same has produced a Certificate of official search issued in the year 2019. Further, the witness has added that it is the 1<sup>st</sup> Defendant who was issued with a Certificate of Title first, pertaining to and concerning the suit Property.
67. On cross examination by Learned counsel for the Plaintiff, the witness reiterated that same has produced before the Honourable court a copy of the Certificate of Title over and in respect of the suit property. In any event, the witness has added that the Certificate of title shows that it is the 1<sup>st</sup> Defendant who is the owner of the suit property.
68. Whilst still under cross examination, the witness pointed out that same has been able to tender and adduce before the Honourable court all relevant Evidence to show that the suit Property belongs to the 1<sup>st</sup> Defendant.
69. On re-examination, the witness pointed out that the Letter of allotment which was issued in favor of Bull Investments showed that the suit property was allocated for the purpose of Light Industries. In addition, the witness stated that the 1<sup>st</sup> Defendant has been paying the Land Rates and Rents in respect of the suit property ever since same was registered in his name.
70. With the foregoing testimony, the 1<sup>st</sup> Defendant's case was duly closed.

### **c. 2<sup>nd</sup> Defendant's Case**

71. The 2<sup>nd</sup> Defendant's case similarly revolves and gravitates on the Evidence of one witness, namely, Mohamed Ado Adan, who testified as DW3.
72. It was the testimony of the witness that he is a Director of the 2<sup>nd</sup> Defendant and that by virtue of being a Director of the said 2<sup>nd</sup> Defendant, same is thus knowledgeable of and conversant with the facts pertaining to the subject suit.
73. Additionally, the witness testified that the 2<sup>nd</sup> Defendant bought and purchased the suit property from the Plaintiff herein vide a Sale Agreement entered into and executed on the 4<sup>th</sup> May 2020. In addition, the witness averred that the suit Property was bought at a consideration of the sum of Kes.44, 300, 000/= only.
74. On the other hand, it was the testimony of the witness that prior to and before entering into the Sale Agreement, the 2<sup>nd</sup> Defendant undertook due diligence, including carrying out official search at the



- Ministry of Lands. In this regard, the witness added that the 2<sup>nd</sup> Defendant was able to ascertain/confirm that indeed the suit property belonged to the Plaintiff herein.
75. It was the further testimony of the witness that the 2<sup>nd</sup> Defendant was also able to confirm that the suit Property was previously registered in the names of Osman Gabow Ibrahim and Esther Wahitu Kuria. Furthermore, the witness added that same ascertained that the Certificate of Lease in favor of Osman Gabow Ibrahim and Esther Wahitu Kuria, was issued on the 13<sup>th</sup> September 2017.
  76. Other than the foregoing, the witness testified that upon entering into the Sale Agreement with the Plaintiff, the Plaintiff executed the requisite Transfer Instrument, which was thereafter presented for registration and was ultimately registered on the 12<sup>th</sup> May 2020. In this regard, the witness averred that the 2<sup>nd</sup> Defendant thereafter became the lawful owner of the suit Property.
  77. In any event, the witness has testified that after the transfer and registration of the suit Property in the name of the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant carried out official search and it transpired that indeed the 2<sup>nd</sup> Defendant was the lawful Proprietor/ Owner of the suit property.
  78. Nevertheless, the witness testified that after the suit Property was transferred and registered in the name of the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant was blocked from gaining access to and taking possession of the suit property by the 1<sup>st</sup> Defendant.
  79. Further, the witness pointed out that at the time of the purchase and acquisition of the suit property, the 2<sup>nd</sup> Defendant was made to believe that the 1<sup>st</sup> Defendant was a Trespasser onto the suit property; and thus same was devoid of any legitimate claim over the suit property.
  80. As a result of the actions and activities by the 1<sup>st</sup> Defendant, the witness testified that the 2<sup>nd</sup> Defendant was called upon to file civil proceedings seeking for Eviction and Permanent Injunction against the 1<sup>st</sup> Defendant. In this regard, the witness pointed out that the 2<sup>nd</sup> Defendant indeed filed/ commenced civil proceedings vide Milimani ELC E055 of 2020.
  81. Other than the foregoing, the Witness testified that at the time when the Plaintiff sold the suit Property to the 2<sup>nd</sup> Defendant, the Plaintiff did not disclose to the 2<sup>nd</sup> Defendant that same had a Dispute over ownership of the suit property with the 1<sup>st</sup> Defendant.
  82. Notwithstanding the foregoing, the witness alluded to the Witness statement dated the 27<sup>th</sup> October 2021; and same sought to adopt and rely on same. In this respect, the witness statement, was duly admitted and constituted as the Evidence-in -Chief of the Witness.
  83. On the other hand, the Witness also alluded to the List and Bundle of Documents dated the 27<sup>th</sup> October 2021; and same sought to adopt and produce the various Documents as Exhibits before the Honourable court. For good measure, the documents contained at the foot of the List dated the 27<sup>th</sup> October 2021, were duly admitted and marked as 2<sup>nd</sup> Defendants Exhibit Numbers 48 to 58, respectively.
  84. Finally, the witness alluded to the amended Statement of Defense and Counter-claim dated the 19<sup>th</sup> November 2021; and sought to adopt the contents thereof. Invariably, the witness implored the Honourable court to grant the reliefs/ Prayers sought at the foot thereof.
  85. On cross examination, by Learned counsel for the 1<sup>st</sup> Defendant, the Witness admitted and acknowledged that the 2<sup>nd</sup> Defendant bought and acquired the suit Property from the Plaintiff herein.



86. In addition, the witness also pointed out that prior to and before purchasing the suit Property from the Plaintiff, he ( Witness), personally visited the suit property and that during the time he visited the suit property there was someone who was running a Garage therefrom.
87. Furthermore, the witness testified that same is aware of a suit that was filed/lodged before the Chief Magistrate's Court. In this respect, the Witness stated that the said suit was Milimani CMC No. 2052 of 2020.
88. On the other hand, the witness added that same is aware that the said suit was heard and the 2<sup>nd</sup> Defendant procured and obtained assorted orders including Temporary Injunction.
89. Whilst still under cross examination, the witness stated that the Transfer Instrument in respect of the suit Property was duly lodged and presented for registration. Furthermore, the witness stated that the 2<sup>nd</sup> Defendant duly paid Stamp Duty on the Instrument of Transfer.
90. Be that as it may, the witness acknowledged that same has not availed any evidence to show/ confirm that Stamp Duty was ever paid.
91. On re-examination, the witness stated that the Purchase price which was agreed upon between the Plaintiff and the 2<sup>nd</sup> Defendant was duly paid. In particular, the witness pointed that the 2<sup>nd</sup> Defendant paid kes.44, 300, 000/= only.
92. In addition, the witness pointed out that the suit Property belongs to the 2<sup>nd</sup> Defendant, who lawfully bought same from the Plaintiff.
93. Thereafter, the 2<sup>nd</sup> Defendant's case was duly closed.

#### **d. 3<sup>rd</sup> Defendant's Case**

94. The 3<sup>rd</sup> Defendant's case is premised and anchored on the Evidence of one , Mr. Charles Ng'etich, who testified as DW2. For good measure, the witness stated that he is currently the Deputy Chief Land Registrar.
95. In addition, the witness testified that by virtue of his portfolio, same is privy to and knowledgeable of the records pertaining to and concerning L.R No. 209/12594, which is the suit Property herein.
96. Furthermore, the witness testified that having checked and perused the various records contained in the correspondence File Number 301824, same established that the suit property was first allocated to Osman Gabow Ibrahim and Esther Wahitu Kuria, vide Letter of allotment dated the 10<sup>th</sup> May 1995.
97. It was further the testimony of the witness that upon being allocated the suit Property, the allottees proceeded to and accepted the allotment in terms of the Letter dated the 22<sup>nd</sup> May 1995; and also paid the sum of Kes.165, 937 through a Bankers Cheque.
98. Notwithstanding, the foregoing, it was the further testimony of the witness that the Director of Administration latter requested the allottees of the suit property to make additional payments in the sum of Kes.40, 810/= Only, which was stated to be the outstanding Road charges to facilitate the processing and issuance of Certificate of Title. Further, the witness added that the allottees duly paid the additional charges on the 14<sup>th</sup> November 2016.
99. It was the further testimony of the witness that ultimately, the Certificate of Title was processed and issued in favor of Osman Gabow and Esther Wahitu Kuria. In this respect, the witness clarified that the Certificate of title was issued on the 22<sup>nd</sup> December 2017.



100. Other than the foregoing, it was the testimony of the witness that the suit Property was thereafter transferred to and registered in the name of the Plaintiff company vide Transfer Instrument dated the 22<sup>nd</sup> January 2019.
101. On the other hand, the witness added that later on the Plaintiff company transferred the suit property to the 2<sup>nd</sup> Defendant; and the Certificate of title was issued on the 12<sup>th</sup> May 2020.
102. Other than the foregoing, the witness adopted his witness statement dated the 20<sup>th</sup> December 2021 and which statement was duly admitted and constituted as the Evidence- in- Chief. Furthermore, the witnesses also referred to the List and Bundle of documents dated the 20<sup>th</sup> December 2021 and sought to adopt and rely on same.
103. Suffice to point out that the documents, were thereafter produced and admitted as Exhibit 36 to 47, respectively.
104. On cross examination, by Learned counsel for the Plaintiff, the witness pointed out that the Chief Land Registrar is the custodian of all records at the Lands office within the City of Nairobi. In addition, the witness stated that the suit property is currently registered in the name of the 2<sup>nd</sup> Defendant.
105. On the other hand, the witness also stated that the land/ Property in question was transferred to the 2<sup>nd</sup> Defendant on the 12<sup>th</sup> May 2020. Further, the witness added that prior to the Transfer in favor of the 2<sup>nd</sup> Defendant, the suit property was registered in the name of the Plaintiff.
106. Whilst still under cross examination, the witness testified that earlier the suit property was registered in the names of Osman Gabow Ibrahim and Esther Wahitu Kuria, respectively.
107. On the other hand, it was the testimony of the witness that the allottees, who were the 1<sup>st</sup> registered proprietors of the suit property, duly complied with all the conditions at the foot of the Letter of allotment dated the 10<sup>th</sup> May 1995. In this respect, the witness proceeded to and itemized what he termed as compliance.
108. Additionally, the witness testified that the suit property was transferred to and in favor of the Plaintiff on the 31<sup>st</sup> January 2019. Furthermore, the witness pointed out that the name of the First Defendants does not appear on the records obtaining at the land record.
109. On cross examination by Learned counsel for the 1<sup>st</sup> Defendant, the witness pointed out that the office of the Chief Land Registrar does not deal with the allocation of land. However, the witness added that from their records, the suit property was allocated in favor of Osman Gabow Ibrahim and Esther Wahitu Kuria, respectively.
110. Whilst still under cross examination, the witness testified that at the top of the Letter of allotment issued in favor of Osman Gabow Ibrahim and Esther Wahitu Kuria, same contained the words new file. However, the witness added that the land in question had not been registered as at the year 1995.
111. In addition, the witness testified that the allottees of the suit property accepted the Letter of allotment and also forwarded a Bankers cheque. However, the witness admitted that even though the Letter of acceptance showed that the payments were made vide Bankers cheque, the letter itself, as well as the acknowledgment receipt do not contain the Banker's cheque Number or at all.
112. On the other hand, the witness stated that the additional monies was a Penalty arising out of monies which had not been paid by the allottees. At any rate, the witness added that the first allotte was issued with Certificate of title in the year 2017.



113. On cross examination by Learned counsel for the 2<sup>nd</sup> Defendant, the witness confirmed that same has been a Land Registrar to close to 20 years. Further, the witness stated that the records at the Lands office reveal that the suit property was first registered in the names of Osman Gabow Ibrahim and Esther Wahitu Kuria, respectively.
114. Nevertheless, the witness pointed out that the Lease Instruments does not capture the full details, pertaining to the date when same was registered. For good measure, the witness stated that what is shown is merely the date and the month, but the year of registration, is blank.
115. On the other hand, the witness testified that the transfer of the Lease from Osman Gabow Ibrahim and Esther Wahitu Kuria, on one hand, to the Plaintiff was lawful. In this regard, the witness stated that the current owner/ Proprietor of the suit land/ Property is the 2<sup>nd</sup> Defendant.
116. Instructively, with the foregoing testimony, the 3<sup>rd</sup> Defendant's case was closed.

### **Submissions by the Parties**

#### **a. Plaintiff's Submissions:**

117. The Plaintiff filed written submissions dated the 15<sup>th</sup> February 2023; and in respect of which the Plaintiff has highlighted, canvassed and amplified three (3) issues for consideration and determination by the Honourable court.
118. Firstly, Learned counsel for the Plaintiff submitted that the suit property was duly and lawfully allocated to and in favor of Osman Gabow Ibrahim and Esther Wahitu Kuria, respectively vide Letter of allotment dated the 10<sup>th</sup> May 1995. In addition, learned counsel has submitted that upon being issued with the Letter of allotment over and in respect of the suit property, the named allottee duly complied with the terms of the Letter of allotment culminating into the issuance of a Certificate of Lease on the 22<sup>nd</sup> December 2017.
119. Furthermore, Learned counsel has submitted that the propriety of the Letter of allotment issued in favor of Osman Gabow Ibrahim and Esther Wahitu Kuria and the subsequent Certificate of lease issued on the 22<sup>nd</sup> December 2017, were duly confirmed by DW2, namely, the Deputy Chief Land Registrar.
120. To the contrary, Learned counsel for the Plaintiff has submitted that the Letter of allotment which was issued to Bull Holders Investments and which has been relied upon by the 1<sup>st</sup> Defendant, was not complied with within the set timelines. In this regard, Learned counsel has contended that the lifespan of the impugned Letter of allotment lapsed and thus same cannot be relied upon to anchor a claim of ownership by the 1<sup>st</sup> Defendant.
121. In this respect, Learned counsel for the Plaintiff has cited and relied on, inter-alia, the case of Wreck Motors Enterprises versus The Commissioner of Land & 3 Others Civil Appeal No. 71 of 1997 (unreported), Dr. Joseph Arap Ngok versus Justice Moiwo Olekuewa (1997)eKLR, Mary Mukami Karithi versus Dentonpak Agencies Ltd & 2 Others (2021)eKLR and Bubaki Investment Company Ltd versus National Land Commission & 2 Others (2015)eKLR, respectively.
122. Secondly, Learned counsel has further submitted that even though the 1<sup>st</sup> Defendant purported to have acquired the suit property from Bull Holders investments Ltd, the 1<sup>st</sup> Defendants did not tender and/ or produce before the Honourable court any Letter of Application by Bull Holders Investments or at all. Instructively, Learned counsel contended that it was not possible for the suit property to have been allocated to M/s Bull Holders Ltd, albeit in the absence of an application for allotment.



123. Additionally, Learned counsel has submitted that the 1<sup>st</sup> Defendant also did not tender or produce before the Honourable court any evidence to show that the Letter of allotment which was dated the 20<sup>th</sup> April 1995; was ever submitted to the Director of Survey, to facilitate survey of the land which have been allocated.
124. In any event, Learned counsel has also submitted that the 1<sup>st</sup> Defendant also did not produce a copy of the Part Development Plan, if any, that was relied upon to facilitate the Letter of allotment of the suit property or otherwise.
125. On the other hand, Learned counsel has also submitted that there is no Evidence that has been placed before the Honourable court to show that what was purportedly allocated to Bull Holders Ltd is the same as the suit property.
126. Consequently, learned counsel for the Plaintiff has poked holes in the evidence tendered by and on behalf the 1<sup>st</sup> Defendant.
127. Nevertheless, Learned counsel has cited and relied on the case of Nelson Kazungu Chai & 9 Others versus Pwani University (2018)eKLR, to underscore that a Part Development Plan was critical and essential in the allocation of the Suit property. Further, counsel has pointed out that in the absence of such a Plan, the 1<sup>st</sup> Defendant cannot lay any claim to the suit property.
128. Thirdly, Learned counsel for the Plaintiff has submitted that even though the 1<sup>st</sup> Defendant has impleaded fraud as against the Plaintiff, the 1<sup>st</sup> Defendant has neither tendered nor produced any scintilla or iota of Evidence to prove the alleged fraud.
129. In any event, Learned counsel has added that it is not enough to supply particulars of fraud and thereafter seek to infer fraud by implication. Inevitably, Learned counsel has pointed out that it was incumbent upon the 1<sup>st</sup> Defendant to prove the allegations of fraud, which is not the case.
130. In support of the foregoing submissions, Learned counsel has cited and relied on the case of Ndolo versus Ndolo (2008) 1KLR and Kinyanjui Kamau versus George Kamau Njoroge (2015)eKLR, respectively.
131. Premised on the foregoing, Learned counsel for the Plaintiff has thus submitted that the Plaintiff herein has been able to established and demonstrate her claim to and in respect of the suit Property. Consequently, Learned counsel has implored the Honourable court to proceed and grant the reliefs sought at the foot of the amended Plaint dated the 14<sup>th</sup> October 2021.

#### **b. Submissions by the 1<sup>st</sup> Defendant**

132. On her part, the 1<sup>st</sup> Defendant filed written submissions dated the 28<sup>th</sup> February 2023; and same has similarly raised, canvassed and highlighted three (3) issues for consideration and determination by the Honourable court.
133. First and foremost, Learned counsel for the 1<sup>st</sup> Defendant has submitted that the dispute beforehand touches on and concerns two Letters of allotment which were produced before the court and a determination of which of the two Letters of allotments is valid and legitimate.
134. In this regard, Learned counsel submitted that the suit property was hitherto unsurveyed Land and same was lawfully allocated to Bull Holders Investment Ltd vide Letter of allotment issued on the 20<sup>th</sup> April 1995.



135. Further, Learned counsel submitted that thereafter Bull Holders Investment Ltd sold her interests at the foot of the Letter of allotment dated the 20<sup>th</sup> April 1995; to and in favor of the 1<sup>st</sup> Defendant, who thereafter followed up and ultimately procured a Certificate of title in his favor. For good measure, Learned counsel pointed out that the Certificate of Title in favor of the 1<sup>st</sup> Defendant was issued on the 5<sup>th</sup> October 1995.
136. On the contrary, Learned counsel for the 1<sup>st</sup> Defendant contended that the Letter of allotment issued in favor of Osman Gabow Ibrahim and Esther Wahitu Kuria was dated the 26<sup>th</sup> May 1995. In this respect, Learned counsel pointed out that the said Letter of allotment was issued subsequently and thus cannot undertake the First Letter of allotment.
137. According to Learned counsel for the 1<sup>st</sup> Defendant, though the Deputy Chief Land Registrar testified, his testimony was not helpful; and in any event, the said witness (DW2) was unable to speak to the process relating to allotment of lands.
138. Secondly, Learned counsel for the 1<sup>st</sup> Defendant submitted that upon purchasing the interests at the foot of the Letter of allotment dated the 20<sup>th</sup> April 1995 and thereafter obtaining Certificate of title, same entered upon and took possession of the suit property. In this respect, counsel added that the 1<sup>st</sup> Defendant was in possession of the suit property long before the allottees who sold the suit property to the Plaintiff, had acquired their Certificate of Lease.
139. Thirdly, Learned counsel for the 1<sup>st</sup> Defendant has submitted that the 1<sup>st</sup> Defendant was a Bona fide purchaser for value without notice of defect or at all. In this respect, Learned counsel has invited the Honourable court to take cognizance of, inter-alia, the case of Katende versus Haridar & Company Ltd (2008) 2EA 173; and Weston Gitonga & 10 Others versus Peter Rungu Gikanga & Anothers (2017)eKLR.
140. Lastly, Learned counsel for the 1<sup>st</sup> Defendant has submitted that by the time the suit property was allegedly being registered in the name of Osman Gabow Ibrahim & Esther Wahitu Kuria, respectively, who transferred the suit property to the Plaintiff herein, the suit property was not available for (sic) allocation, alienation and registration.
141. Owing to the foregoing, Learned counsel for the Defendant has therefore submitted that the purported registration to and in favor of Osman Gabow Ibrahim and Esther Wahitu Kuria, and the subsequent actions arising therefrom, were therefore illegal and unlawful.
142. In this regard, Learned counsel has submitted that the Certificate of title that the Plaintiff acquired and obtained was therefore invalid and a nullity ab initio.
143. In support of the foregoing submissions, Learned counsel has invited the attention of the Honourable court to the case of, inter-alia, Mfil Ltd versus Registrar of Titles, Mombasa & 2 Others (2014)eKLR, Caroget Investment Ltd versus Aster Holdings Ltd & 4 Others (2019)eKLR; and Alice Chemutai Too versus Nickson Kipkirui Korir & 2 Others (2015)eKLR, respectively.
144. In view of the foregoing, Learned counsel for the 1<sup>st</sup> Defendant has thus invited the Honourable court to find and hold that the Plaintiff herein did not acquire any lawful and legitimate title to and in respect of the suit property; and thus same had no valid title to pass over to the 2<sup>nd</sup> Defendant, whatsoever.

**c. The 2<sup>nd</sup> Defendant's Submissions:**

145. The 2<sup>nd</sup> Defendant filed written submissions dated the 14<sup>th</sup> March 2023; and same has raised, highlighted and canvassed five(5) issues for consideration and determination by the Honourable court.



146. First and foremost, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that unregistered special power of attorney, which was relied upon by DW1, to act for and on behalf of the 1<sup>st</sup> Defendant was invalid and thus incapable of bestowing upon DW1 the authority to act on behalf of the 1<sup>st</sup> Defendant.
147. In addition, Learned counsel for the Second Defendant submitted that the impugned special power of attorney, which was unregistered, could also not authorize DW1 to testify on behalf of the 1<sup>st</sup> Defendant.
148. Owing to the foregoing, Learned counsel for the 2<sup>nd</sup> Defendant has thus contended that all the actions and activities that were undertaken by DW1 are therefore of no legal consequence. In a nutshell, Learned counsel has invited the Honourable court to find and hold that DW1 therefore lacked the requisite Locus standi to act on behalf of the 1<sup>st</sup> Defendant.
149. In support of the foregoing submissions, Learned counsel for the 2<sup>nd</sup> Defendant has cited and relied on, inter-alia, the case Francis Mwangi Mugo versus David Kamau Gaciago (2017)eKLR; and Daniel Kipketer Rugut versus Ernest Kawai & 5 Others (2021)eKLR, respectively.
150. Secondly, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that the Letter of allotment which was issued to and in favor of Bull Holder Investments Ltd and upon which the 1<sup>st</sup> Defendant purports to anchor his claim of ownership, lapsed prior to and before same could be acted upon. In this regard, Learned counsel has submitted that upon the lapse of the said Letter of allotment, no further action could be taken on same, let alone issuance of a Certificate of title.
151. On the other hand, Learned counsel has submitted that the Plaintiff acquired lawful title over and in respect of the suit property, having bought and or purchased same from the previous allottees thereof, namely, Osman Gabow Ibrahim and Esther Wahitu Kuria, respectively.
152. In any event, Learned counsel has submitted that once the terms of a Letter of allotment are not complied with within the stipulated timeline, such Letter of allotment lapses and becomes on extinguished. Consequently, Learned counsel has invited the Honourable Court to find and hold that the 1<sup>st</sup> Defendant did not acquire any lawful interests over the suit Property.
153. In support of the submissions that a Letter of allotment cannot be acted on beyond the stipulated timelines, Learned counsel has cited the decision in the case of Joseph Kamau Muhoro versus Attorney General & Another (2021)eKLR and George Kimani Njuki versus National Land Commission & 2 Others (2022)eKLR.
154. Thirdly, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that the 1<sup>st</sup> Defendant herein has failed to establish and or prove that same acquired a valid interest over the suit property, either as a Purchaser or at all. In any event, Learned counsel has submitted that a Letter of allotment by itself, is unable to confer and/or vest any ownership rights on a person, the 1<sup>st</sup> Defendant not excepted.
155. Furthermore, Learned counsel for 2<sup>nd</sup> Defendant has submitted that where the legality and validity of Certificate of Title is challenged, it is incumbent upon the Parties to place before the Honourable court cogent, plausible and credible evidence to demonstrate the process leading to the acquisition of the impugned Certificate of title. However, to this respect, counsel pointed out that the 1<sup>st</sup> Defendant was unable to lay before the Honourable court any credible evidence to prove the root of his Certificate of title.
156. In respect of the foregoing submissions, Learned counsel for the 2<sup>nd</sup> Defendant has cited and relied on the following decisions, inter-alia, Munyu Maina versus Hiram Gathiha Maina (2013)eKLR,



Philemon L Wambia versus Gaitano Lusita Mukofu & 2 Others (2014)eKLR and Chemey Investment Ltd versus Attorney General & 2 Others (2018)eKLR.

157. Fourthly, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that even though the 1<sup>st</sup> Defendant has made various allegations of fraud against the Plaintiff, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, respectively, same did not place before the Honourable court any credible evidence to prove and or establish the allegations of fraud.
158. In addition, Learned counsel has submitted that it behooved the 1<sup>st</sup> Defendant to tender before the Honourable court cogent, plausible and credible evidence in proof of the claim of fraud. However, counsel has pointed out that in the absence of such proof, the claim anchored on fraud remains a mere allegation.
159. To buttress the submissions, that fraud ought to be proved to a standard beyond a balance of probabilities and that specific evidence must be tendered, Learned counsel for the 2<sup>nd</sup> Defendant cited and quoted the case of Philemon L Wambia versus Gaitano Lusita Mukofu & 2 Others (2014)eKLR.
160. Finally, Learned counsel for the 2<sup>nd</sup> Defendant has submitted that the 2<sup>nd</sup> Defendant herein lawfully acquired title to and in respect of the suit property, having bought and purchased same from the Plaintiff, who was hitherto the registered proprietor thereof.
161. Furthermore, Learned counsel has submitted that the 2<sup>nd</sup> Defendant is a Bona fide Purchaser for value in respect of the suit property. In any event, Learned counsel added that the title of the 2<sup>nd</sup> Defendant was vindicated by the Evidence of DW2; who confirmed that the suit Property is currently registered in the name of the 2<sup>nd</sup> Defendant herein.
162. Based on the foregoing, Learned counsel for the 2<sup>nd</sup> Defendant has thus implored the Honourable court to find and hold that indeed the 2<sup>nd</sup> Defendant undertook due diligence prior to acquisition of the suit property; and hence the 2<sup>nd</sup> Defendant is entitled to protection as a Bona fide purchaser for value.
163. Premised on the foregoing, Learned counsel has invited the Honourable court to find and hold that the Certificate of Title/Grant issued in the name of the 1<sup>st</sup> Defendant, was invalid and a nullity and thus incapable of vesting any rights in favor of the 1<sup>st</sup> Defendant.
164. To the contrary, Learned counsel has submitted that the 2<sup>nd</sup> Defendant has indeed placed before the Honourable court sufficient and credible evidence to vindicate her claim to and in respect of the suit Property. In this regard, Learned counsel has therefore submitted that it would be a travesty of justice to decree that the 1<sup>st</sup> Defendant has any lawful rights/claims over the suit property.

#### **d. The 3<sup>rd</sup> Defendant's Submissions**

165. The 3<sup>rd</sup> Defendant filed written submissions dated the 9<sup>th</sup> March 2023; and in respect of which same has raised, highlighted and amplified two issues for consideration and determination.
166. Firstly, Learned counsel has submitted that the suit property was hitherto allocated in favor of Osman Gabow Ibrahim and Esther Wahitu Kuria, respectively, vide Letter of allotment dated the 10<sup>th</sup> May 1995.
167. In addition, Learned counsel has submitted that upon being allocated the suit property, the named allottees, duly complied with the terms and conditions thereof.



168. It was the further submission for counsel for the 3<sup>rd</sup> Defendant that on or about the 10<sup>th</sup> November 2016, the office of the Director of Land Administration wrote to the allottees of the suit property, namely, Osman Gabow Ibrahim and Esther Wahitu Kuria, respectively, to settle outstanding road charges, to facilitate the processing of the Grant in their favor.
169. In this respect, Learned counsel added that the named allottees thereafter proceeded to and indeed paid the sum of Kes.40, 810/= only, which payment was duly acknowledged and receipted on the 14<sup>th</sup> November 2016.
170. Based on the foregoing, Learned counsel for the 3<sup>rd</sup> Defendant submitted that Osman Gabow Ibrahim and Esther Wahitu Kuria, respectively, were lawfully allocated the suit property and thereafter duly complied with the terms of the Letter of allotment. In this respect, counsel emphasized that the said allottees were therefore entitled to be issued with the Certificate of title.
171. On the other hand, Learned counsel pointed out that a Letter of allotment whose terms are not complied with, within the stipulated timeline lapses and cannot thereafter be acted upon. In this respect, Learned counsel cited and relied on the decision in the case of Joseph Kamau Muhoro versus Attorney General (2021)eKLR; and George Njuki Kimani versus Kenya National Highways Authority (2022)eKLR.
172. Secondly, Learned counsel has submitted that the 2<sup>nd</sup> Defendant bought and purchased the suit property from the Plaintiff, who was hitherto the lawful owner thereof. In this respect, Learned counsel submitted that indeed the 2<sup>nd</sup> Defendant is the legitimate owner and proprietor of the suit property.
173. Additionally, Learned counsel has pointed out that even though the 1<sup>st</sup> Defendant had hitherto filed a counterclaim, the said counterclaim was withdrawn by the 1<sup>st</sup> Defendant and hence it is apparent that the 1<sup>st</sup> Defendant is not challenging the propriety of the title registered in the name of the 2<sup>nd</sup> Defendant.
174. Notwithstanding the foregoing, Learned counsel has further submitted that having withdrawn his counterclaim, the 1<sup>st</sup> Defendant herein cannot now purport to impeach the 2<sup>nd</sup> Defendant's Certificate of title. In this respect, Learned counsel submitted that Parties are bound by their pleadings.
175. In a nutshell, Learned counsel has supported the 2<sup>nd</sup> Defendant's case and thereafter prayed that the Honourable court be pleased to award costs to the 3<sup>rd</sup> Defendant. However, it is not clear which costs Learned counsel for the 3<sup>rd</sup> Respondent is alluding to given that there are three sets of claims before the Honourable court.

### **Issues for Determination**

176. Having reviewed the pleadings filed by the Parties (whose details were articulated elsewhere at the beginning of the Judgment), and having taken into account the oral and documentary evidence produced before the Honourable court; and having considered the written submissions filed, the following issue do arise and are thus worthy of determination;
  - a. Whether DW1 had the requisite capacity or Locus standi to act for and tender evidence on behalf of the 1<sup>st</sup> Defendant.
  - b. Whether the amended Plaint by the Plaintiff discloses any reasonable cause of action, capable of being entertained and adjudicated upon by the Honourable court.
  - c. Whether the Plaintiff herein acquired lawful and Legitimate title in respect of the suit Property.



- d. Whether the 2<sup>nd</sup> Defendant is a Bona fide Purchaser for value without notice of any defect in the title of her Predecessor.
- e. What Reliefs ought to be granted

## **Analysis and Determination**

### **Issue Number 1**

#### **Whether DW1 had the requisite capacity or Locus Standi to act for and tender evidence on behalf of the 1<sup>st</sup> Defendant.**

177. Learned counsel for the 2<sup>nd</sup> Defendant has submitted that because DW1 purported to act on behalf of the 1<sup>st</sup> Defendant and thereafter adduced evidence on behalf of the said 1<sup>st</sup> Defendant, albeit on the basis of an unregistered foreign Power of Attorney, same therefore contended that the evidence tendered by DW1 was invalid and thus incapable of being relied upon by the Honourable court.
178. Furthermore, Learned counsel submitted that insofar as the power of attorney had not been registered, the witness DW1 therefore did not have the requisite Locus standi to appear before the Honourable court and to tender any evidence on behalf of the First Defendant.
179. In view of the foregoing, Learned counsel has thus implored the Honourable court to find and hold that the unregistered foreign special power of attorney was therefore a nullity. In this regard, Learned counsel has cited and quoted the decision in the case of Francis Mwangi Mugo versus David Kamau Gaciogo (2017)eKLR and Daniel Kipketer Rugut versus Ernest Kawai and 5 Others (2021)eKLR, respectively.
180. My understanding of the submissions by Learned counsel for the 2<sup>nd</sup> Defendant is twofold. Firstly, Learned counsel seems to implore the Honourable court to find and hold that DW1 could not act and or appear on behalf of the 1<sup>st</sup> Defendant in respect of the subject matter before the court.
181. Secondly, I also understand Learned counsel for the 2<sup>nd</sup> Defendant to be suggesting that because the power of attorney was not registered, then the evidence tendered by Dw1, albeit on behalf of the 1<sup>st</sup> Defendant, was therefore a nullity and thus devoid of probative value. In any event, learned counsel has implored the court to find that the actions of and the evidence by DW1, were therefore a nullity in law.
182. To start with, I acknowledge and confirm that a Power of attorney is a registerable Instrument and thus the law requires that same be registered. However, the issue beforehand relates to authority to act, appear and testify before the Honourable court, which was anchored on an unregistered power of attorney.
183. In this respect, Learned Counsel for the 2<sup>nd</sup> Defendant has contended that the lack of registration of the Power of Attorney vitiates the actions and the evidence tendered by the said witness. Consequently, same has implored the Honourable court to find and hold as much.
184. On my own, I do not find that the lack of registration of the power of attorney would negate and vitiate the apparent authority that was bestowed upon DW1, to act on behalf and to tender evidence on behalf of the 1<sup>st</sup> Defendant.
185. For good measure and in any event, the factual position pertaining to the fact that the authority was given to Dw1 has not been impugned or challenged. In this respect, the Document constituting the Power of Attorney is effective Inter-Pares as between the Donor and the Donee thereof.



186. Notwithstanding the foregoing, the implication of lack of registration of a power of attorney and whether such non-registration would deprive a Party of a right to appear and testify before a court of Law was considered by the Court of Appeal in the case of *Mayfair Holdings Ltd versus Ahmed* [1990] eKLR, where the Court stated and held as hereunder;

“Accordingly, in my judgment, the power of attorney was not inadmissible as a document evidencing the issue of the authority of the principal, even though for the purposes of registration it did not comply with the Kenya statute.

What value then, if any, does this power of attorney have? In my opinion it has to be considered as part of the wider concept of the law relating to principal and agent. It will be a matter of fact, not of law, to determine what authority the agent in this case, that is Shakeel, had to bind the principal, that is Dr Shabbir Ahmed; who is the party sued and the respondent to this appeal”.

187. Furthermore, the Court proceeded and stated as follows;

There can be no doubt that, whether or not the power of attorney is in strict conformity with the Kenya law, it nevertheless constitutes Shakeel a recognised agent under order 3 rule 2 of the Civil Procedure Rules, for the purpose of service and appearance in the suit. It was therefore advisable, though I do not need to consider if it was essential, at the inception of this suit for the heading to refer, as it did, to Shakeel as Dr Ahmed’s attorney. But that kind of recognised agency for procedural purposes is distinct from the type of agency which has to be considered as part of the law of principal and agent, in order to ascertain whether a principal is bound by an agreement purportedly made by his agent. Since the defence was immediately taken over by the advocate the necessity thenceforth for a recognised agent disappeared. So the case has, so far as this issue of liability is concerned, to be determined fairly and squarely within the law of principal and agent, and as to whether the acts of the agent are such as to bind the principal.

188. Guided by the foregoing decision, I come to the conclusion that the mere fact that the power of attorney was not registered in accordance with the *Land Registration Act*, 2012, does not deprive DW1 of the authority and mandate that was granted unto him by the 1<sup>st</sup> Defendant to appear before the court, execute the requisite documents and to tender evidence in respect of the subject matter.

189. Additionally, though I have read and understood the import and tenor of the holding in the case of *Francis Mwangi Mugo versus David Kamau Gaciago* (2017)eKLR, which indicates that want of registration of a Power of attorney divests the donee of capacity to act in a matter involving immovable property, I must state that I am not aware whether the attention of the court, ( the Learned Judge) was indeed drawn to the decision of the Court of Appeal cited (supra).

190. Premised on the explicit and succinct position taken by the Court of Appeal, whose decision is binding on me and coupled with the hackneyed doctrine of stare decisis, whose import and tenor was amplified in the case of *Dodhia v National Grindlays Bank Ltd and Another* [1970] EA 195, I am obligated to abide by and follow the established position as expounded by the Court of Appeal and not otherwise.

191. On the other hand, Learned counsel for the 2<sup>nd</sup> Defendant also seems to suggest that the evidence that was tendered by DW1, ought to be declared a nullity, merely because same acted on the basis of an unregistered power of attorney.



192. I am afraid that I cannot act on the request herein, insofar as either party to civil proceedings, is at liberty to either personally appear before the Honourable court and tender evidence on his/her behalf, or better still summon such other witness, as he/she deems fit to testify on his/her behalf.
193. Whatsoever way that a Party chooses, the bottom line is whether the evidence tendered by such witness, is capable of proving the issues in dispute and by extension helping the Party in question to discharge the burden of proof, if any, placed on same. In short, it is my humble position that it is not a mandatory or peremptory position that a Party to a suit must physically appear and testify, in a matter wherein same has been sued.
194. To the contrary, I hold the firm position that a Party to a civil suit can discharge his/her civil obligation, as pertains to a civil suit by procuring the attendance of such witness, as he or she may deem fit and expedient; and once such a witness testifies, it is the obligation of the Honourable court to evaluate and appraise the evidence tendered and thus discern whether same is credible and has probative value.
195. As pertains to the position discussed in the preceding paragraphs, I beg to take cognizance of the decision in the case of Julianne Ulrike Stamm versus Tiwi Beach Hotel Ltd (1998)eKLR, where the Court of Appeal discussed the import and implication of a Party adducing evidence by a witness/ witnesses other than himself.
196. For coherence, the Court of Appeal stated and held as hereunder;
- “There is no reference in this rule to plaintiff himself, giving evidence first or at all. But a plaintiff is bound to produce evidence in support of the issues, which he is bound to prove and which evidence can be given by any competent witness not necessarily himself. A plaintiff does not have to be personally present when he is represented by duly instructed counsel as was the case here. It is for a plaintiff’s counsel to decide how to prosecute his case. If a plaintiff can prove his case by the evidence of someone else he does not have to be present at the hearing of the suit. Similarly, if a plaintiff can prove his case by means of legal arguments only, he does not also have to be physically present at the hearing of the suit so long as his advocate is present to prosecute his suit. In short, according to Order 17 rule 2(1), a plaintiff can prove his case by the evidence of a witness or witnesses other than himself, or by the arguments of his counsel and we say with no hesitation whatsoever, that the point taken by Mr. Kirundi could be described as an abuse of the process of court and that the acceptance of this point and the reasons for this in the ruling by the learned judge were not only surprising but also totally erroneous.
197. In my humble albeit considered view, the mere fact that the special power of attorney, was unregistered, does not vitiate, negate and/or impugn the credibility or better still the probative value of the evidence tendered by the said witness. Invariably, it will be incumbent upon the Honourable court to evaluate that evidence and to see whether the witness (DW1) was knowledgeable of and conversant with the issues at the foot of his testimony or otherwise.
198. In a nutshell, I am afraid that the submissions by learned counsel for the 2<sup>nd</sup> Defendant, which sought to have the actions and the evidence tendered by DW1, to be declared a nullity, are misconceived, misplaced and legally untenable, taking into account the succinct exposition of the law, in the manner espoused by the Court of Appeal, in terms of the decisions that I have alluded to herein before.



## Issue Number 2:

### **Whether the amended Plaintiff by the Plaintiff discloses any reasonable cause of action, capable of being entertained and adjudicated upon by the Honourable court.**

199. It was the Plaintiff's case that the suit property herein was hitherto allocated to and in favor of Osman Gabow Ibrahim and Esther Wahitu Kuria, respectively, in terms of the Letter of allotment dated the 10<sup>th</sup> May 1995.
200. Furthermore, the Plaintiff proceeded on the basis that thereafter the said allottees were issued with a Certificate of Lease over and in respect of the suit Property. For clarity, it was pointed out that the Certificate of Lease was registered on the 22<sup>nd</sup> December 2017.
201. Additionally, the Plaintiff contended that on or about the 22<sup>nd</sup> January 2019, same entered into a Sale Agreement with the allottees of the suit Property, who thereafter caused the suit property to be transferred to and in favor of the Plaintiff. Invariably, the Transfer instrument in favor of the Plaintiff was presented for registration and was indeed registered on the 21<sup>st</sup> January 2019.
202. Moving forward, the Plaintiff herein contended that on or about the 4<sup>th</sup> of May 2020, same sold and transferred the suit Property to and in favor of the 2<sup>nd</sup> Defendant. In this respect, it was contended that the Instrument of transfer was duly lodged and registered on the 12<sup>th</sup> May 2020.
203. My understanding of the foregoing events, denote that by the 12<sup>th</sup> May 2020, the suit property was deemed to have been lawfully transferred to and thus belonged to the 2<sup>nd</sup> Defendant. Consequently, the question that must be addressed is whether the Plaintiff herein retained any Legal Interests and/or rights over the suit property capable of being canvassed/ventilated before a court of law.
204. It is instructive to recall that the amended Plaintiff upon which the plaintiff's suit is premised is dated the 14<sup>th</sup> October 2021. Clearly, the amended Plaintiff is being generated and filed, long after the Plaintiff sold and transferred (sic) her Interests over and in respect of the Suit Property to the 2<sup>nd</sup> Defendant.
205. In my humble view, the moment the Plaintiff sold and transferred her interest over and in respect of the suit property to and in favor of the 2<sup>nd</sup> Defendant; the Plaintiff ceased to have any rights capable of being vindicated vide a suit before a court of law.
206. Inevitably, after selling and transferring her interests over the suit property, the Plaintiff herein was divested of a reasonable cause of action capable of being entertained and adjudicated upon by a court of law.
207. The significance of a cause of action was discussed by the Court of Appeal in the case of Puis Kimaiyo Langat versus Cooperative Bank of Kenya Ltd (2017)eKLR, where the court stated as hereunder;
  25. A cause of action is a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. See *Letang vs Cooper* [1964] 2 All ER 929 at 934, per Lord Diplock. Lord Esher, M. R. in the case of *Read vs Brown* (1888), 22 QBD 128, defined a cause of action as:-

“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court”.

So, when was the bank in this case entitled to obtain a remedy from court against Langat?



208. Recently, the Court of Appeal revisited, the import, tenor and scope of what constitutes a cause of action in the case of Kigwor Company Ltd versus Samedy Trading Co Ltd (2021)eKLR, stated as hereunder;

36. In the Court of Appeal case of Attorney General & another v Andrew Maina Githinji & Another [2016] eKLR Justice Waki held that:-

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

That definition was given by Pearson J. in the case of Drummond Jackson vs. Britain Medical Association (1970) 2 WLR 688 at pg 616. In an earlier case, Read vs. Brown (1889), 22 QBD 128, Lord Esher, M.R. had defined it as:-

“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court.”

Lord Diplock, for his part in Letang vs. Cooper [1964] 2 All ER 929 at 934 rendered the following definition:-

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

When did the cause of action in this case arise? Put another way, when did the respondents become entitled to complain or obtain a remedy ...”

209. Arising from the foregoing, the critical question to be determined is whether upon the sale and (sic) transfer of her interests in the suit property to the 2<sup>nd</sup> Defendant, the Plaintiff herein has any legal interest, capable of being entertained and ventilated before a court of law.

210. Similarly, the other incidental question is whether having sold and transferred her interests in respect of the suit property, the Plaintiff can now be heard to propagate a claim pertaining to and touching on the suit property, inter-alia, a claim seeking for issuance of a Permanent Injunction.

211. Certainly, the moment the Plaintiff (sic) sold and transferred her interests over and in respect of the suit property, to and in favor of the 2<sup>nd</sup> Defendant, same became divested of all the legal rights pertaining to and arising from the suit property. Inevitably, the Plaintiff cannot now mount and propagate a suit on the basis of the amended Plaint dated the 14<sup>th</sup> October 2021.

212. Without belaboring the point, I come to the conclusion that the Plaintiff's suit vide the amended Plaint dated the 14<sup>th</sup> October 2021, is not only misconceived, but same is stillborn. In other words, the Plaintiff's suit constitutes and otherwise amounts to an abuse of the Due Process of the Honourable court.



213. As to what constitute an abuse of the Due process of the court, it is instructive to restate and reiterate the holding of the Court of Appeal in the case of Muchanga Investment Ltd versus Safaris Africa (Unlimited) Ltd (2009)eKLR, where the court stated as thus;

“To re-inforce the point, abuse of process has been defined in Wikipedia, the free encyclopedia:

“The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice.”

In *Beinosi v Wiyley* 1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

Again the Court of Appeal in Abuja, Nigeria in the case of *Attahiro V Bagudo* 1998 3 NWLL pt 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of *KARIBU-WHYTIE J Sc in SARAK v KOTOYE* (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-

“The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ...”

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

- (a) “Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.
- (d) (sic meaning not clear))
- (e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness.”



We are of the view that the circumstances of the case before us, falls squarely in illustration (e) above, in that there was no valid law supporting the process followed by the respondent.

214. In short, the amended Plaint filed by and at the instance of the Plaintiff herein, does not disclose and or espouse any cause of action, pertaining to and concerning the suit property, that is capable of being entertained and/or being adjudicated upon by this Honourable court.

### **Issue Number 3**

#### **Whether the Plaintiff herein acquired Lawful and Legitimate Title in respect of the suit Property.**

215. Notwithstanding the fact that the Plaintiff herein no longer has a legitimate cause of action to be propagated before this Honourable court, the question whether or not the Plaintiff acquired a lawful and legitimate title to the suit property, is still critical and paramount in resolving the issue of ownership of the suit property.
216. From the onset, it was the Plaintiff's position that the suit property was hitherto allocated to and in favor of Osman Gabow Ibrahim and Esther Wahitu Kuria, respectively, on the basis of the Letter of allotment dated the 1st May 1995.
217. In addition, the Plaintiff contended that upon the issuance of the Letter of allotment, the allottees duly complied with the terms and conditions of the Letter of allotment and thereafter same were issued with the requisite Certificate of Lease. For the avoidance of doubt, it was pointed out that the Certificate of Lease was registered in favor of the allottees on the 22<sup>nd</sup> December 2017.
218. Other than the evidence tendered by DW1 on behalf of the Plaintiff, DW2, (The Deputy Chief Land Registrar), also testified and stated that indeed after Osman Gabow Ibrahim and Esther Wahitu Kuria, were issued with a Letter of allotment, same duly complied with the terms of the Letter of allotment and thereafter same were issued with a Certificate of Lease on the 22<sup>nd</sup> December 2017.
219. Notwithstanding the foregoing, two critical Questions require serious interrogation and due analysis. Firstly, even though Osman Gabow Ibrahim and Esther Wahitu Kuria, are said to have been issued with a Letter of allotment on the 10<sup>th</sup> May 1995, the Certificate of Lease was not issued until 22<sup>nd</sup> December 2017.
220. The question that now needs to be interrogated is, was the Letter of allotment issued in favor of the Osman Gabow Ibrahim and Esther Wahitu Kuria, respectively, capable of being acted upon by the Chief Land Registrar on the 22<sup>nd</sup> December 2017, to be able to culminate into a Certificate of Lease.
221. In my humble view, if the Letter of allotment was not acted upon prior to and before the enactment of *the Constitution* 2010, then going forward any alienation of (sic) land, which at the material point in time had not been alienated, transferred and registered in favour of a Private Entity, could only be undertaken by the National Land Commission and not otherwise.
222. To this end; it is instructive to take cognizance of the provisions of Article 67(2) of *the Constitution* 2010, as read together with Section 5(2) of the *National Land Commission Act*, 2012.
223. In my humble view, the act of the Chief Land Registrar purporting to act on a Letter of allotment which was issued on the 10<sup>th</sup> May 1995; but which had not attracted a Lease, was tantamount to usurping the mandate of the National Land Commission. Indeed, the Chief Land Registrar could not purport to issue a New Grant either as indicated at the foot of the impugned Certificate of Lease; or on the Lease Data Form.



224. To my mind, the endeavor to issue a Certificate of Lease in favor of (sic) Osman Gabow Ibrahim and Esther Wahitu Kuria, respectively, on the 22<sup>nd</sup> December 2017, without due regard to the mandate of the National Land Commission was an exercise in futility. Clearly, the impugned Certificate of Lease and the resultant New Grant attendant thereto were null and void.
225. To amplify the position that it is only National Land Commission that could allocate, alienate or issue any New Grant over a Public Land; it is imperative to take cognizance of the holding in the case of Cordison International (K) Limited versus Chairman National Land Commission & 44 others [2019] eKLR, where the Court of Appeal held as hereunder;
- “ 31. Section 12 of the *Land Act* grants the Commission authority to allocate public land on behalf of the national or county governments and section 14 of the Act specifies the steps that the Commission ought to take before it undertakes any such allocation. The Commission has to issue, publish or send a notice of action to the public and interested parties, at least thirty days before offering for allocation a tract or tracts of land.
32. At least thirty days prior to the allocation the Commission should send a notice to the governor in whose county the public land proposed for allocation is located and to the head of the governing body of any administrative subdivision having development control, among others. The notice should then be published in the Kenya Gazette and at least once a week for a period of three weeks and thereafter published in a newspaper of general circulation in the general vicinity of the land being proposed to be offered for allocation.
33. It is therefore clear beyond any peradventure that it is the role of the Commission, and not a county government, to allocate public land. The allocation must however comply with the laid down constitutional and statutory procedure as stated above.
226. Having found and held that the Certificate of Lease issued on the 22<sup>nd</sup> December 2017; and the purported New Grant attendant thereto were issued without the requisite mandate, I hereby proclaim that the impugned documents were a nullity ab initio.
227. Notably and in this respect, it is instructive to re-visit the decision of the Court of Appeal in the case of Sukhdeve Singh Lali versus Philip Ojwang Kamau & 3 Others (2018)eKLR, where the court stated thus;
- “It was stated in the case of Macfoy vs United Africa Co. Ltd(1961) 3 All ER, 1169 that;
- ?If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse??
- In this case, Ojwang’s certificate of title having been found to be invalid, illegal, null and void, we find that the learned judge, rightfully cancelled it, and properly declared the Jethwas to be the legal and valid titleholders of the suit property.”



228. The second limb that also merits discussion relates to whether, the suit property, which was allegedly allocated to Osman Gabow Ibrahim and Esther Wahitu Kuria, respectively, at the foot of the Letter of allotment dated the 10<sup>th</sup> May 1995, was still available for allocation if at all.
229. It is imperative to recollect and recall that the Office of the Commissioner of Land had hitherto issued a Letter of allotment in favor of Bull Holders Investment Ltd and which Letter of allotment was dated the 20<sup>th</sup> April 1995. Furthermore, the Letter of allotment dated the 20<sup>th</sup> April 1995 was attached to a Plan, whose details are clearly referenced in the said Letter of allotment.
230. Additionally, the Plan whose details are captured at the foot of the Letter of allotment, clearly delineated the ground position/location of the property which was being allocated.
231. At any rate, it is not lost on this Honourable court that subsequently the Letter of allotment and the Plan which had been attached thereto were acted upon and culminated into the issuance of certificate of title/grant in favor of the 1<sup>st</sup> Defendant.
232. The question that arises from this aspect is whether the office of the commissioner of lands could issue another letter of allotment relating to the same ground on the 10<sup>th</sup> May 1995, during the lifetime of the previous Letter of allotment. For the avoidance of doubt, the initial Letter of allotment was issued on the 20<sup>th</sup> April 1995; and hence by the 10<sup>th</sup> May 1995, when the second Letter of allotment was (sic) issued, the previous Letter dated the 20<sup>th</sup> of April 1995, was still alive and in existence.
233. In my humble view, the moment the Office of the Commissioner of Land had issued a previous Letter of allotment, the impugned ground/property ceased to be available for further allocation until and unless the previous Letter of allotment is rescinded, canceled and nullified, which was not the case in respect of the suit Property.
234. In this respect, it is instructive to adopt and reiterate the holding in the case of *Waas Enterprises Ltd versus City Council of Nairobi & Another* (2014)eKLR, where the court stated and observed as hereunder;
- “..Once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.” It is therefore my opinion the suit property was not available at all for the 2<sup>nd</sup> defendant because by the time the licence was issued to the 2<sup>nd</sup> defendant, an allotment letter had already been issued to the plaintiff.
235. Additionally, it is also worthy to adopt the succinct position that was espoused by the Court of Appeal in the case of *Benja Properties Limited versus Syedna Mohammed Burhannudin Sahed & 4 others* [2015] eKLR. For coherence, the Honourable of Court of Appeal held as hereunder;
25. In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5<sup>th</sup> respondent, the appellant and the original allottees did was to engage in paper transactions



without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum.

236. Consequently and in answer to the second aspect to the issue canvassed herein, I come to the conclusion that the moment the suit property had been allocated, the same ground/property could not form the basis of a subsequent allocation/allotment. Clearly and certainly, not during the life span of the previous Letter of allotment.
237. Furthermore, there is yet another issue that still requires deliberation. This relates as to whether the Letter of allotment which was issued in favor of Osman Gabow Ibrahim and Esther Wahitu Kuria, on the 10<sup>th</sup> May 1995 was legitimate.
238. In respect of this aspect, it is imperative to state and underscore that prior to allocation of Public land, it is imperative that a Part Development Plan be prepared, insofar as it is the Part Development Plan that will confirm and authenticate that the property at the foot of allotment/allocation is indeed available.
239. For good measure, once the Part Development Plan has been prepared; same must be subjected to the requisite approval and thereafter be assigned a Plan Number. In addition, the Plan Number assigned to the Part Development Plan would thereafter reflect on or better still, be reflected as against the Letter of allotment.
240. I beg to point out that the elaborate process that undergirds the allotment/allocation of Public Land was succinctly expounded and canvassed in the case of Nelson Kazungu Chai & 9 Others versus Pwani University [2014] eKLR as follows:

“...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of African Line Transport Co. Ltd vs. The Hon. Attorney General, Mombasa HCCC No. 276 of 2013 where Njagi J. held as follows: “Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.<sup>132</sup> A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed...”

241. Sadly, the Letter of allotment which was issued to and in favor of Osman Gabow Ibrahim and Esther Wahitu Kuria, respectively, on the 10<sup>th</sup> May 1995; and which founds the ultimate Certificate of Lease herein, did not allude to any Part Development Plan. In addition, even the purported copy the was produced by DW2; as exhibits D36 is devoid of the said essential document.



242. Other than the foregoing, even though DW2 testified before the Honourable court and stated that the allottees, namely, Osman Gabow Ibrahim and Esther Wahitu Kuria, duly complied with the terms of the Letter of allotment and also made the requisite payment vide Bankers cheque. Curiously, the purported Bankers cheque, which is alleged to have been used to pay the Stand Premium and statutory charges, was conveniently missing and was never availed to the Honourable court.
243. Moreover, even the Revenue receipt issued on the 25<sup>th</sup> May 1995; and which indicated to have been issued upon receipt of the Bankers cheque, does not reveal the details, if any, of the said (purported) bankers cheque.
244. First forward, the allottees Osman Gabow Ibrahim and Esther Wahitu Kuria, respectively, are said to have timeously acknowledged the Letter of allotment. In this regard, DW2 produced exhibit D37 as evidence of the said acceptance.
245. Nevertheless, unbeknown to DW2 same also produced exhibit D40 which is a Letter dated the 6<sup>th</sup> December 2016; and apparently wherein Osman Gabow Ibrahim and Esther Wahitu Kuria, respectively, were purporting to be accepting the letter of allotment issued on the 10<sup>th</sup> May 1995.
246. Clearly, would the allottees, namely, Osman Gabow Ibrahim and Esther Wahitu Kuria, be accepting the Letter of allotment on the 6<sup>th</sup> December 2016, if same, had hitherto made an acceptance letter.
247. I am afraid that the totality of the documents which were produced by DW2 were contrived and tailor-made, if not fashioned to propagate a premeditated scheme. Unfortunately, the totality of the said documents were inherently contradictory and thus depriving same of any legitimacy in the eyes of the law.
248. Further, I hasten to state that the documentation that were brought forth by DW2 and the evidence tendered by DW2, when juxtaposed as against the provisions of Article 67(2), denote an attempt by the Office of the Chief Land Registrar or officers thereunder, to defeat clear Constitutional and Statutory provisions.
249. I am afraid that the foregoing discourse drives me to the conclusion that the Plaintiff herein did not acquire a lawful and legitimate title to the suit property. In my mind, the Certificate of Lease, which was (sic) issued on the 22<sup>nd</sup> December (on a year that is not disclosed) and the New Grant attendant thereto were issued in vacuum.

#### **Issue Number 4**

#### **Whether the 2<sup>nd</sup> Defendant is a Bona Fide Purchaser for value without Notice of defect in the title of her Predecessor.**

250. It was the evidence by and on behalf of the 2<sup>nd</sup> Defendant that same entered into a sale agreement with the Plaintiff herein, culminating into the transfer and ultimate registration of the suit property in her favor.
251. Nevertheless, DW3 who testified on behalf of the 2<sup>nd</sup> Defendant stated that prior to the purchase of the suit property from the Plaintiff, same went on to the suit property and undertook a physical search. Instructively, the witness stated that during the visit of the suit property, he established that there was a garage thereon.
252. Furthermore, DW3 also testified that the 2<sup>nd</sup> Defendant also undertook official search at the Land Registry and established that the suit property was indeed registered in the name of the Plaintiff.



253. Having carried out both the physical and official search, DW3 testified that the 2<sup>nd</sup> Defendant thereafter proceeded to and executed a Sale Agreement over and in respect of the suit Property. In addition, DW3 testified that the suit property was ultimately transferred and registered in favour of the Second Defendant, as the owner.
254. Nevertheless, it was the further testimony of the witness that upon the completion of the transaction and registration of same as the proprietor of the suit property, the 1<sup>st</sup> Defendant, who was already in occupation of the suit property blocked same (read 2<sup>nd</sup> Defendant) from entering the suit property.
255. On the other hand, it was also the testimony of DW3 that the 2<sup>nd</sup> Defendant was made to believe that the 1<sup>st</sup> Defendant herein was a Trespasser, albeit, without any claim over the suit property. Clearly, there is some iota of circumstance that ought to have raised a concern and/or sounded alarm on the part of the 2<sup>nd</sup> Defendant.
256. To my mind, the 2<sup>nd</sup> Defendant herein was privy to and knowledgeable of the existence of a dispute pertaining to and concerning the ownership of the suit property. For clarity, such knowledge stems from the fact that same was aware of Third-party occupation and possession of the suit property, even prior to entry and execution of the sale agreement.
257. In this respect, it is appropriate to take cognizance of the observation by the Court of Appeal in the case of *Central Kenya Ltd versus Trust Bank & Others* (1996)eKLR, where the court stated thus;
- There is no specific evidence to show that Floriculture and First National were aware of any dispute or defect in the title of the suit property. Mrs. Muiruri has said in her affidavit that one Mr. Nakar who was a director of the Floriculture was "linked" with Ajay Shah, the majority shareholder of Trust Bank and Trust Finance. That by itself cannot be evidence of Floriculture's complicity in the alleged fraud.
258. Moreover, by the time the suit property was being sold to and in favor of the 2<sup>nd</sup> Defendant, that is on the 4<sup>th</sup> May 2020, the Plaintiff who was selling the suit property to the 2<sup>nd</sup> Defendant was already involved in a Deval dispute with the 1<sup>st</sup> Defendant over and in respect of ownership of the suit property.
259. Instructively, the instant suit was filed by the Plaintiff on the 11<sup>th</sup> October 2019 and thereafter the 1<sup>st</sup> Defendant herein (who was the only the Defendant then) entered appearance and filed a Statement of Defense and Counter-claim on the 23<sup>rd</sup> October 2019.
260. Suffice it to point out that as at the time the Plaintiff was purporting to sell the suit property to the 2<sup>nd</sup> Defendant, the Plaintiff knew that the 1<sup>st</sup> Defendant herein was indeed laying a claim to ownership of the suit property. In my understanding, the 1<sup>st</sup> Defendant by raising the counterclaim as against the Plaintiff was claiming to be the owner of the suit property and thus by extension impugning the title registered to and in favor of the Plaintiff.
261. However, despite being aware that the same (Plaintiff) was already disputing ownership of the matter herein with the 1<sup>st</sup> Defendant, same still had the brevity to enter into and execute a sale transaction with the 2<sup>nd</sup> Defendant, albeit in contravention of the Doctrine of Lis Pendens.
262. In my humble view, insofar as the suit property was the subject of a pending suit and/or court proceedings, it was not open for the Plaintiff herein, to purport to enter into and/or dispose of the interest in the suit property. In this regard, it is instructive to adopt and reiterate the ratio decidendi in



the case of Naftali Ruthi Kinyua versus Patrick Thuita Gachure & another [2015] eKLR, where the Court of Appeal stated as hereunder;

“Black’s Law Dictionary 9<sup>th</sup> edition, defines Lis Pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending.

Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in *Bellamy vs Sabine* [1857] 1 De J 566 held as follows:-

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

In the case of *Mawji vs US International University & another* [1976] KLR 185, Madan, J.A. stated thus:-

“The Doctrine of Lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of Lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

In the same case at page it was observed inter alia that:-

“Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore purchase made of a property actually in litigation pendete lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”

263. Recently, the legal import and implication of the Doctrine of Lis Pendens was revisited by the court of appeal in the case of *Cooperative Bank of Kenya Ltd v Patrick Kang’ethe & Another* (2017)eKLR, where the court reiterated the pronouncement highlighted in the case (supra).

50. As to whether there is any interplay between statutory power of sale and the doctrine of lis pendens; the Black’s Law Dictionary defines lis pendens as the jurisdiction, power or control acquired by a court over property while a legal action is pending. The Supreme Court of India in the case of *KN Aswathnarayana Setty (D) Tr. LRs. & Others v. State of Karnataka & Others* [2013] INSC 1069 stated that the doctrine is based on the legal maxim ‘ut lite pendente nihil innovetur’ (During a litigation nothing new should be introduced). The doctrine is couched equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail.



51. Our previous land legislation regime expressly embraced the doctrine under Section 52 of the repealed (Indian) Transfer of Property Act (ITPA) 1882 by stipulating that:
- “During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.” Emphasis added.
52. Do courts still recognize the doctrine? The ITPA was repealed by the [Land Registration Act](#) (LRA) Number 3 of 2013; whose Section 107 (1) of the LRA provides for the saving and transitional provisions of the Act, and provides that:-
- “Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”
53. Presently, the LRA does not prohibit the application of the doctrine of lis pendens; nor does any law for that matter. For this reason and in view of Section 107 aforesaid, this Court has previously held that the doctrine of lis pendens is still applicable to this day, albeit under common law (see. *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* [2015] eKLR)
264. Premised on the foregoing and especially that the dispute pertaining to ownership of the suit property was actively being litigated between the Plaintiff and the 1<sup>st</sup> Defendant, it is not legally tenable that the Plaintiff herein could bestow any lawful or legitimate interests to and in favor of the 2<sup>nd</sup> Defendant.
265. Put differently, insofar as the Plaintiff could not convey any legitimate interest in the suit property to the 2<sup>nd</sup> Defendant, there is therefore no gainsaying that and surely, by parity of reasoning the 2<sup>nd</sup> Defendant cannot purport to have acquired any legitimate title to and in respect of the suit property, to warrant a contention that same is a Bona Fide Purchaser for value with out notice.
266. Certainly and on the basis of the Doctrine of Lis Pendency, it is deemed that the 2<sup>nd</sup> defendant was privy to the going- ons before the Honourable court.
267. Furthermore, the said same Plaintiff had purportedly gone to court vide another suit, namely, *Milimani CMC Misc. Application No. 806 of 2019*, wherein same was purporting that the 1<sup>st</sup> Defendant was in rent areas and thus there was need to levy distress.
268. Notwithstanding the foregoing, DW3 is on record as stating that the Plaintiff never disclosed to the 2<sup>nd</sup> Defendant that it already had a legal dispute with the 1<sup>st</sup> Defendant, touching on and concerning ownership of the suit property.
269. Based on the forgoing factual situation, the question to be determined is whether the 2<sup>nd</sup> Defendant can contend that same is a Bona Fide Purchaser for value without notice of any dispute over or defect in the title of her predecessor (read the Plaintiff) or otherwise.
270. Suffice it to say, that the law as pertains to bona fide purchaser for value is now well settled. In this regard, the decision of the Court of Appeal in the case of *Arthi Highway Developers Limited versus West End Butchery Limited & 6 others* [2015] eKLR is succinct and apt.



271. For coherence, the court stated as hereunder;

“... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

272. Recently, the Court of Appeal re-visited the circumstances under which a declaration of bona fide purchaser for value without notice can be granted. This was in the case of *Mwangi James Njehia v Janet Wanjiku Mwangi & another* [2021] eKLR, where the court stated as follows;

37. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

For a purchaser to successfully rely on the bona fide doctrine as was held in the case of *Hannington Njuki v William Nyanzi* High Court civil suit number 434 of 1996, must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

273. Further the court stated as follows;

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

274. Taking into account the finding that the Plaintiff who sold the suit property to and in favor of the 2<sup>nd</sup> Defendant, did not procure and obtain a valid title from her predecessors; and coupled with the circumstances, surrounding the sale transaction between the Plaintiff and the 2<sup>nd</sup> Defendant, (on the face of *Lis Pendens*), I am afraid that the 2<sup>nd</sup> Defendant herein does not meet the threshold of a bona fide purchaser for value without notice.

275. Additionally, it is also important to state and underscore that even the sale agreement that was entered into and executed between the Plaintiff and the 2<sup>nd</sup> Defendant, pertaining to the suit property, is also curious. For clarity, it is interesting to note that the sale price/consideration is not reflected to have been paid and acknowledged, anywhere in the Body of the Sale Agreement.



276. Notwithstanding the foregoing, there is then the evidence of DW3; as contained in the statement recorded with the Directorate of Criminal Investigation wherein same alluded to the fact that as at 18<sup>th</sup> June 2020, only a total of Kes.7, 878, 000/= Only, had been paid.
277. From the obtaining circumstances, I am constrained to state and observe that something seems to be a mis as pertains to the transaction that was entered into between the Plaintiff and the 2<sup>nd</sup> Defendant, as pertains to the suit property. To my mind, it appears that the sale of the suit property to and in favor of the 2<sup>nd</sup> Defendant was orchestrated to convolute/ obscure the ownership dispute and create an impression of a bona fide purchaser for value.
278. Be that as it may and based on the totality of the discussion contained in the preceding paragraphs, I am no prepared to find and hold that the 2<sup>nd</sup> Defendant was a bona fide purchaser for value without notice of any defect in the title of her predecessor. To this end, I am alive to the ratio decidendi of the Court of Appeal in the case of Chemey Investment Limited versus Attorney General & 2 others [2018] eKLR.

## **Issue Number 5**

### **What Reliefs ought to be granted**

279. The Parties before the Honourable court have variously raised and ventilated claims, inter-alia, pertaining to ownership over and in respect of the suit property. Invariably, the Plaintiff herein, has also sought for declaratory orders as well as an order of Permanent Injunction, pertaining to and concerning the suit property.
280. However, it is worthy to recall that this court has since established and found that the Plaintiff herein (sic) sold and transferred the suit property to and in favor of the 2<sup>nd</sup> Defendant, albeit during the active prosecution and pendency of the current suit. Consequently, the issue that the court had to deal with, was whether the Plaintiff can still stake a claim over the suit property and by extension be entitled to the reliefs sought.
281. Sadly, I have found that the Plaintiff's suit, does not raise or disclose any reasonable cause of action. Consequently, there is no gainsaying that the Plaintiff herein, cannot be entitled to the assorted reliefs that have been espoused and articulated at the foot of the amended Plaint.
282. In respect of the claim by the 1<sup>st</sup> Defendant, this court has found that same is in possession of a Certificate of Title which was issued by the office of the Registrar of titles (now defunct), arising from the letter of allotment which was hitherto issued on the 20<sup>th</sup> April 1995, certainly prior to and before the impugned Letter of allotment, which underscores/ anchors the claim on behalf of the Plaintiff.
283. Nevertheless, I am also alive to the fact that even though the 1<sup>st</sup> Defendant herein had filed an Amended Statement of Defense and Counter-claim, the counterclaim was subsequently withdrawn. In this regard and premised on the Doctrine of Departure; the court would not legally be obliged to make any positive orders in favor of the 1<sup>st</sup> Defendant.
284. However, having said as much, I have already stated elsewhere herein before that the Certificate of Lease/title which was issued in favor of the Plaintiff and thereafter transferred to the 2<sup>nd</sup> Defendant, was replete and wrought with illegality. In addition, I have since impugned and vitiated the said Certificate of Lease.
285. Conversely, the Certificate of Title in favor of the 1<sup>st</sup> Defendant remains alive and thus same is the only legitimate certificate of title/instrument, speaking to ownership of the suit property. Simply put, I am constrained to make the said proclamation, nay declaration in favor of the 1<sup>st</sup> Defendant.



286. On behalf of the 2<sup>nd</sup> Defendant, it is not lost on the court that I have since found and held that same purported to purchase and acquire the suit property albeit during pending proceedings touching on and concerning ownership thereof. Instructively, I have invoked and applied the Doctrine of Lis Pendens.
287. Furthermore, the court has also found that the root of the title that was ultimately sold and transferred unto her (2<sup>nd</sup> Defendant), was vitiated. In this respect, it suffices to adopt and reiterate the Doctrine of Ex- Nihilo Nil Fit. See the explication of the law as pertains to the said doctrine in the case of Caroget Investment Limited v Aster Holdings Limited & 4 others [2019] eKLR.
288. Informed by the doctrine of Lis Pendens and Ex- Nihilo Nihil Fit, respectively, I am not persuaded that the 2<sup>nd</sup> Defendant is entitled to any declaratory orders pertaining to and concerning ownership of the suit property. Further, the Certificate of Lease currently held by the 2<sup>nd</sup> Defendant is invalid and thus void.
289. Be that as it may, the 2<sup>nd</sup> Defendant herein had sought an alternative claim at the foot of the counterclaim, wherein same impleaded a claim for refund of the sum of Kes.44, 300, 000/= only, being the purchase price that was paid to the Plaintiff as consideration for the suit property.
290. Notably, even though the Plaintiff was served with the statement of defense and counterclaim by the 2<sup>nd</sup> Defendant, same neither filed a Reply to Defense nor Defense to the said counter-claim. Invariably and in the absence of any defense to the counterclaim by the 2<sup>nd</sup> Defendant, it then means that the Plaintiff conceded the claim for refund.
291. At any rate, it is not lost on the court that during the hearing, the 2<sup>nd</sup> Defendant tendered and produced before the court a copy of the sale agreement which was entered into and executed between the Plaintiff on one hand and the 2<sup>nd</sup> Defendant, on the other hand. Clearly, the said sale agreement, underscored that the consideration at the foot of the sale agreement was Kes.44, 300, 000/= only.
292. Other than the foregoing, I must also point out that during the entire proceedings, the Plaintiff herein did not contest or deny payment/receipt of the consideration from the 2<sup>nd</sup> Defendant. In this regard, it must thus be taken that the Plaintiff acknowledges that the entire consideration was paid.
293. In view of the foregoing, it suffices to state that the 2<sup>nd</sup> Defendant's counterclaim has partially succeeded and especially, as concerns the alternative claim for refund of the purchase price/consideration, which was paid at the foot of the sale of the suit property in favor of the Plaintiff.

### **Final Disposition**

294. Having discussed the salient and pertinent issues that were highlighted in the body of the Judgment herein, it is now appropriate and expedient, to bring the entire Judgment to a close, by proclaiming the final and dispositive orders.
295. Nevertheless, in the course of canvassing the various items, in terms of the preceding paragraphs, the Honourable court has made various findings. Ostensibly, the court has found that the Plaintiff's suit does not disclose any reasonable cause of action or at all.
296. In a nutshell, the court makes the following orders;
- i. The Plaintiff's suit be and is hereby struck out with costs to the Defendants.



- ii. The 2<sup>nd</sup> Defendant's Counter-claim be and is hereby Dismissed; save for the aspect pertaining to the alternative claim, relating to Refund of the Consideration that was paid to and in favor of the Plaintiff.
- iii. For good measure, the Certificate of Lease/Title issued to and in favor of the 2<sup>nd</sup> Defendant herein, pertaining to and in respect of L.R No. 209/12594 (I.R No. 205587) be and is hereby revoked/nullified.
- iv. The 2<sup>nd</sup> Defendant shall pay costs of the Counter-claim to the 1<sup>st</sup> Defendant herein.
- v. The 2<sup>nd</sup> Defendant is however entitled to Refund of the sum of Kes.44, 300, 000/= only as against the Plaintiff.
- vi. The Refund of the sum of Kes.44, 300, 000/= only, in terms of clause (v) hereof, shall attract Interests at court rates (14% p.a) w.e.f May 2020; when same was paid to the Plaintiff.
- vii. The Suit Property, namely, L.R No. 209/12594 (I.R No. 205587) be and is hereby declared to lawfully belong to the 1<sup>st</sup> Defendant.
- viii. The 2<sup>nd</sup> Defendant shall pay to and in favor of the 1<sup>st</sup> Defendant costs of her (2<sup>nd</sup> Defendant's) counterclaim.
- ix. Any other Relief not granted is deemed declined/dismissed.

297. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MAY 2023.**

**OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

Benson Court Assistant

Mr. Salim Omar for the Plaintiff

Mr. Hillary Orina for the 1<sup>st</sup> Defendant

Mr. Odunga for the 2<sup>nd</sup> Defendant

Mr. Motari , Principal Litigation Counsel for the 3<sup>rd</sup> Defendant

