



Rukaria & 15 others v Matumaini Ventures Limited & 6 others (Environment and Land Case Civil Suit 58 of 2008) [2023] KEELC 20346 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20346 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE CIVIL SUIT 58 OF 2008
OA ANGOTE, J
SEPTEMBER 28, 2023**

BETWEEN

GERALD KIJOGI RUKARIA & 15 OTHERS PLAINTIFF

AND

MATUMAINI VENTURES LIMITED 1ST DEFENDANT

KENYA COMMERCIAL BANK LIMITED 2ND DEFENDANT

GACHIRI KARIUKI & KIAI ADVOCATES 3RD DEFENDANT

EDWARD JASON WANJHIA T/A NINJAH ENTERPRISES ... 4TH DEFENDANT

BMW PRECAS HOUSING DEVELOPMENT LIMITED 5TH DEFENDANT

REGISTRAR OF TITLES NAIROBI 6TH DEFENDANT

JAMI BORA BANK LIMITED 7TH DEFENDANT

JUDGMENT

1. Vide a Further Further Amended Plaintiff dated 25th October, 2018, the Plaintiffs seek the following reliefs against the Defendants jointly and severally;
 - a. A permanent injunction to restrain the Defendants by themselves, their servants and or agents or whosoever from selling, charging, mortgaging and or in any way interfering with the disposal and alienation of L.R No 15324 and/or in any way interfering with the Plaintiffs possession of the suit property.
 - b. A declaration that the 1st and 2nd Defendants are obligated to honour the Sale Agreement made between themselves and the Plaintiffs herein.
 - c. A declaration that the Plaintiffs are the rightful owners of L.R No 15324.



- d. A declaration that the Provisional Certificate in respect of L.R No 15324 issued on the 1st August, 2011 to the 2nd Defendant and all subsequent entries therein is null and void and the same be cancelled.
- e. An order compelling the 1st, 2nd and 3rd Defendants, their agents, servants and or employees to perform their respective obligations in the Sale Agreements and to transfer the aforesaid suit land to the Plaintiffs, failing which the Deputy Registrar of this Honourable Court be hereby authorized to sign and execute all necessary documents to give effect to the said sub-division and transfer in favour of the Plaintiffs.

And or in the alternative;

- i. That the 6th Defendant do issue titles in respect of L.R No 15324 in the names of the Plaintiffs as enumerated in the Plaint.
 - ii. A declaration that the purported rescission by the 2nd Defendant and/or termination of the said Sale Agreement is illegal and contrary to the terms of the written and oral agreement by the parties to the suit and therefore null and void.
 - iii. An order to revoke and cancel the Provisional Certificate of Title issued by the 6th Defendant on the 1st August, 2011 to the 4th Defendant and entered as Entry No 11.
 - iv. An order to revoke and cancel the Provisional Certificate of Title issued by the 6th Defendant on the 28th July, 2015 and entered as Entry No 12 to the 5th Defendant herein and registration of the Plaintiffs herein as prayed above.
 - v. General, punitive and exemplary damages.
 - vi. Costs.
 - vii. Interest on [x] and [xi] above from the date of filing suit until payment in full.
 - viii. Any other reliefs that this Honourable Court may deem just and appropriate in the circumstances.
2. It is the Plaintiffs' case that vide a Sale Agreement dated 31st May, 2004, between the 1st and 2nd Defendants in which the 3rd Defendant acted for the 1st Defendant, the 2nd Defendant agreed to sell to the 1st Defendant all those parcels of land known as L.R No 12867/2, 155022(12867/9), 12867/10, 12867/11, 12867/12, 12867/13, 12867/17, 12867/21, 12867/22, 12867/23,15023(12867/24), 12867/25(15334), 15324(formerly L.R No 12867/26), 15325(12867/27), 15326(12867/30) and 15327(12867/31) at an agreed price of Kshs 110,268,000.
 3. It was averred in the Plaint that the 2nd Defendant granted the 1st Defendant express and/or implied authority to re-sell the same parcels of land to the 1st Defendant's nominees, such as the Plaintiffs or the Plaintiffs agents and that pursuant to the above, the Plaintiffs entered into an agreement with the 1st Defendant to buy five (5) acres out of the ten (10) acres comprised in L.R No 12867/26(now L.R 15324) (the suit properties) for the total purchase price of Kshs 2, 287, 500.
 4. The Plaintiffs averred in the Plaint that it was expressly stated in the agreement that the 1st Defendant had been offered by the 2nd Defendant to purchase property either by itself, nominee or assignee and that the agreement further provided for payment of the purchase price by bankers cheque either in favour of the 1st Defendant or the 2nd Defendant.



5. According to the Plaintiffs, the agreement expired before completion due to a number of factors being that the 1st and 2nd Defendants had earlier sold the same property to other buyers and were embroiled in litigation over the same being HCCC Nairobi 30 of 2006; that there was non-clearance of rates by the 2nd Defendant and that the 1st -13th Plaintiffs had financial constraints.
6. It was averred that the above notwithstanding, the 1st -13th Plaintiffs and the 1st Defendant mutually and/or by conduct agreed to the extension of the agreement to afford the said Plaintiffs time to raise funds to complete the transaction.
7. According to the Plaintiffs, by way of a further oral and written agreements made around March, 2007, the 1st -13th Plaintiffs and the 1st Defendant acting through the 3rd Defendant agreed to an increment of the purchase price at Kshs 120,000/= per acre to bring in total an increase in the purchase price of Kshs 600,000 and the entire consideration for the five acres stood at Kshs 2, 887,500 which the 1st -13th Plaintiffs agreed to pay and that the 1st -13th Plaintiffs paid the 2nd Defendant through the 1st Defendant by bankers cheque by forwarding to the 3rd Defendant the entire purchase price of Kshs 2, 887, 500/ = which was received without any demur.
8. According to the Plaintiffs, of the five acres purchased and fully paid for, the 1st -7th Plaintiffs are entitled to half of an acre each while the 8th -13th Plaintiffs are entitled to one quarter of an acre each; that by an agreement dated 21st September, 2004 made between the 14th and 15th Plaintiffs and the 1st Defendant, the 14th and 15th Plaintiffs agreed to buy two acres and one acre respectively to be excised from L.R 12867/26(now L.R No 15324) for the total purchase price of Kshs 840,000/= and Kshs 420,000 respectively.
9. It was averred that due to financial constraints by the 14th and 15th Plaintiffs and litigation over the properties and non-payment of rates by the 1st and 2nd Defendants, the agreement expired before completion; that the parties mutually and/by conduct agreed to extend the completion period as well as to an increase in the purchase price and that the 14th and 15th Plaintiffs paid a total sum of Kshs 840,000 and 520,000 respectively, which monies were received.
10. It was stated by the Plaintiffs that by an agreement dated 16th May, 2007 between the 16th Plaintiff and the 1st Defendant, the 16th Plaintiff agreed to purchase one acre to be excised from L.R No 12867/26(now L.R No 15324) for a total purchase price of Kshs 900,000; that it was expressly stated in the agreement that the 1st Defendant has been offered by the 2nd Defendant to purchase the property either by itself or its nominee and further that the 1st Defendant had nominated the 16th Plaintiff as its assignee.
11. It was averred by the Plaintiffs that the 1st -3rd Defendants agreed to transfer the title to the 16th Plaintiff upon completion and that the 16th Plaintiff as directed by the 1st Defendant paid the sum of Kshs 570,000/= to the 2nd Defendant through the 3rd Defendant and called on the 1st Defendant to release the title in exchange for the balance of Kshs 330,000, which the 16th Plaintiff's Advocate has undertaken to pay upon release of the title.
12. The Plaintiffs further averred that save for the 16th Plaintiff, it was an express term of all the agreements aforesaid that the Plaintiffs would meet the costs of the sub-division of the property to enable the transfer of the portions of the parcel of land in issue and that pursuant to the foregoing, the Plaintiffs jointly paid a surveyor recommended to them by the 1st Defendant the sum of Kshs 243,500.
13. It was averred in the Plaint that the surveyor sub-divided L.R No 15324 into respective portions for the each Plaintiff and which sub-division was duly approved by Mavoko Municipality; that the Plaintiffs



have with the consent of the 1st -3rd Defendants taken possession of their respective parcels; that the above notwithstanding, the Defendants have refused to effect transfer of the titles to the Plaintiffs and that the 1st Defendant is in breach of the sale agreement, the particulars of which include receiving payments from the Plaintiffs without notifying them that there was an alleged rescission of the Sale Agreement by the 2nd Defendant.

14. The Plaintiffs have averred that by a Sale Agreement dated 11th January, 2015, the 4th Defendant purported to sell and transfer the suit land to the 5th Defendant herein during the pendency of this suit on a purported Provisional Certificate of Title issued contrary to the Registration of Titles Act (repealed) which makes the purported transfer null and void ab initio.
15. It was averred that the agreement between the 1st and 2nd Defendants could not lapse due to effluxion of time as there were unforeseen circumstances that arose such as the failure by the 2nd Defendant to clear rates in time and the pending litigation on the suit land and the adjoining parcels and that the agreements between the 1st and 2nd Defendants did not provide for rescission of the contract and/or return of the money.
16. According to the Plaintiffs, despite insisting that it is a stranger to the Plaintiffs, the 2nd Defendant has through the 3rd Defendant and upon the 1st Defendants instructions, transferred the suit property which actions are unconscionable; that the 1st Defendant is a paper company with no known assets of its own and that the Plaintiffs stand to lose not only the monies paid to the 1st Defendant but the land and the developments thereon since 2006.
17. The Plaintiffs' case is that despite a Court order restraining the lifting of the Caveat, the Defendants proceeded to have the same removed upon a request for a Provisional Title which title was invalid as neither the requirements for advertisement nor the requisite period before issuance of title were met; and that the 6th Defendant acted unlawfully and illegally by failing to give notice of issuance of the Provisional Title through advertisement as required by law and also by his failure to allow for a period of objections.
18. It was averred that by virtue of the fraudulent and illegal actions of the 1st -3rd and 6th Defendants aforesaid, the 4th 5th and 7th Defendants could not obtain a good title to the suit property; that save for the 14th and 15th Plaintiffs (members of Supermind Development Self Help Group) who nominally participated in HCCC Nairobi No 30 of 2006, HCCC Nrb Misc Civil Application No 20 of 2008 and HCC ELC 1538 of 2014, there is no other suit pending nor has there been any previous proceedings in Court between the parties.
19. The 1st Defendant filed an Amended Defence on 18th February, 2019 denying the assertions as set out in the Plaint. According to the 1st Defendant, whereas it entered into an agreement with the 2nd Defendant dated 31st May, 2004, there was no express and/or implied authority to resell the same parcels of land to the 1st Defendant's nominees such as the Plaintiffs or the Plaintiffs' Agents or any other buyer and that as per the terms of the contract, full payment was to be made within 6 months of the execution of the agreement, which the Plaintiffs refused and/or failed to honour thereby breaching the agreement.
20. It is the 1st Defendant's case that there was no extension of the agreement orally or at all; that any further payments by the Plaintiff was not sanctioned and cannot be substantiated and that the payments were in any event made outside the timelines by which time the agreement had lapsed and automatically rescinded due to effluxion of time. The 1st Defendant averred that the Plaintiffs being responsible for the effluxion of time are the owners of their own misfortune and have no claim against the 1st Defendant.



21. According to the 1st Defendant, it was a term of the contract that in case the 1st Defendant failed to complete the contract between it and the 2nd Defendant, the Plaintiffs would be refunded their monies in full; that the Plaintiffs suit is misconceived and they are not entitled to any of the orders sought.
22. The 2nd Defendant filed a Further Amended Statement of Defence in which it admitted that it entered into an agreement with the 1st Defendant for the sale to the 1st Defendant of parcels of land known as L.R No 12867/5, 12867/9, 12867/10, 12867/11, 12867/12, 12867/13, 12867/17, 12867/21, 12867/22, 12867/23, 12867/24, 12867/25, 12867/26, 12867/27, 12867/29 and 12867/30 at an agreed price of Kshs 110, 268,000.
23. The 2nd Defendant stated that nonetheless, it did not expressly or otherwise authorize the 1st Defendant to sell the same or any of them to any person so appointed by the 1st Defendant including the Plaintiffs; that the 1st Defendant has paid the agreed purchase price as per the terms of the agreement dated 31st May, 2004 and it has duly executed transfers for the suit property thus transferring proprietary rights to the 1st Defendant and that it did not receive the purchase price of Kshs 840,000 from the 14th Plaintiff as alleged.
24. According to the 2nd Defendant, it completed its obligations with the 1st Defendant after receiving the full purchase price and duly executed transfers for the properties in favour of the 1st Defendant; that subsequently, it has no contractual obligations towards the Plaintiff and that it is not a necessary party to this suit having transferred full proprietary rights to the 1st Defendant and having no legally enforceable interests in the property.
25. The 3rd Defendant filed its Amended Defence and denied the assertions as set out in the Further Further Amended Plaintiff. The 3rd Defendant stated that whereas the 1st Defendant is indeed a limited liability company, it was not acting as an agent of the 2nd Defendant and neither did the 1st Defendant elicit the services of Rank Global Management to act as its agent.
26. It was averred that whereas the 3rd Defendant was at all material times a law firm acting for the 1st Defendant, the firm was not in possession of the original grant in respect of the suit property; that during the relevant time, it acted under the instructions of the 1st Defendant and was not under any instructions to reject any monies; that if any monies were paid by the 1st -14th Plaintiffs which is denied, the same were made out of time as per the agreement and were attempts to perform an agreement which had lapsed by effluxion of time and that the Sale Agreements referred to by the Plaintiffs were rescinded due to the Plaintiffs' breach of the material terms as to payments.
27. It is the 3rd Defendant's case that the Plaintiff was privy to all the agreements including the agreement between the 1st and 2nd Defendants and did not object to any of the terms therein and that when the Plaintiffs failed to pay the purchase price within the stipulated timelines, the 1st Defendant rescinded the agreement, returned the sums paid to it by the Plaintiffs and sold the suit property to the 4th Defendant who became the legally registered owner thereof.
28. It was averred that as the owner of the property, the 4th Defendant was well within its rights to sell the same to the 5th Defendant which it did; that the 3rd Defendant was only providing legal assistance as contracted by the 1st Defendant and was not involved in frustrating the Plaintiffs' interests at all as alleged; and that at no instance was the firm involved in the transfers of the parcels of land L.R No 12867/17 to Super Mind Development Self Help Group, L.R No 12867/21 to Athi Villas Limited and L.R No 12867/23 to Westlink Developers Limited, L.R No 12867/10, and L.R. No. 12867/11 & 13 to Archer Drammond Morgan.



29. According to the 3rd Defendant, under the 1st Defendant's instructions, the law firm returned cheque numbers 029110, 010209, and 035960 of Kshs 907, 500/=, Kshs 326,000/= and Kshs 100,000/= respectively amounting to Kshs 1, 333, 500/= to the Plaintiffs' Advocates on 25th July, 2008; that by accepting the refund, the Plaintiffs remedy if any lies in damages; that the Plaintiffs have no recourse either in law or otherwise against the 3rd Defendant and that the 3rd Defendant cannot in any event be sued in the capacity through which the Plaintiff is purporting to sue it.
30. The 4th Defendant filed its statement of Defence in which it stated that it was not privy to the contracts between the Plaintiffs and the 1st Defendant; that the Plaintiffs have no claim against the 4th Defendant and that the 1st Defendant rescinded the agreements with the Plaintiffs after the agreements lapsed for failure by the Plaintiffs to complete the payment of the purchase price in time as agreed.
31. According to the 4th Defendant, it acquired the suit land as a bonafide purchaser for value in good faith and without any knowledge of the previous sale between the Plaintiffs and the 1st Defendant; that it acquired the property upon conducting due diligence procedures in accordance with the accepted conveyancing standards; that it was not involved in any fraudulent activity with the Defendants and acquired the suit property legitimately.
32. In its Defence, the 5th Defendant stated that it is the sole proprietor of the suit property having acquired good title by virtue of the Sale Agreement dated the 11th January, 2015 executed between itself and the 4th Defendant; that the suit property was un-occupied during pre-contract negotiations and the contract period and that after it was transferred into the names of the 5th Defendant, it assumed the resultant legal rights to quiet possession.
33. It is the 5th Defendant's case that the allegations of fraud must be fully substantiated which has not been done in this instance; that the transaction was above board; that it was not aware of the existence of this suit regarding the suit property and that the suit as filed does not disclose any cause of action against the 5th Defendant and should be dismissed.
34. The 7th Defendant filed its Defence in which it denied the assertions as set out in the Plaint. The 7th Defendant stated that it has a legal charge over the suit property described as I.R 54310 having registered a first charge on 29th June, 2015; that the said land was offered as security for a loan advanced to the 5th Defendant on 5th day of April, 2015 and that at the time of the entry of the charge, the suit property had no encumbrance.
35. It was averred by the 7th Defendant that the search document shows that the land is charged to the 7th Defendant; that at the time of charging the land, the 7th Defendant conducted due diligence and confirmed that a Provisional Title to the land had been issued in favour of the 5th Defendant and that as a result of a valid first legal charge being registered in favour of the 7th Defendant, the said Defendant possesses an interest which is enforceable in law.

Hearing and Evidence

36. The 2nd Plaintiff, PW1, adopted his witness statement. It was his testimony that with a group of five others, they registered a self-help group known as Nyweri Development Group to bring them together, pool resources and invest; that one of their members who was in another group called Sweetwaters informed them about the suit property having purchased a portion thereof and that together with Plaintiff No. 7, they met the seller, the Director of the 1st Defendant, Mr Francis Nderitu, who agreed to sell them a portion of the suit property measuring three (3) acres.



37. PW1 informed the court that the Director of the 1st Defendant informed them that the land was given to him by Kenya Commercial Bank to sell it on its behalf; that he showed them the Agreement between himself and KCB; that they procured an Advocate to act for them who conducted a search and verified that the land was okay and that Mr Nderitu prepared an Agreement for the three (3) acres which they took to their Advocate.
38. PW1 stated that Plaintiffs No 1 and 7 found more people who were willing to buy the land through them and they went back to the seller and negotiated for two more acres making it a total of 5 acres; that Mr Nderitu informed them that even if they were unable to raise money for the 5 acres, they would get land equivalent to the money they had paid and that the purchase price for the 5 acres was Kshs 2,287,500.
39. According to PW1, clause 3 of the agreement assigned the land to them; that the registered proprietor of the land was KCB and it is KCB that was to transfer the title to them; that they were to pay the purchase price to either the 1st Defendant or KCB and that they paid the purchase price in full to the 1st Defendant with the beneficiary of the money being KCB as the payee.
40. It was the testimony of PW1 that they remained with a small balance and were told to increase the purchase price by Ksh 120,000 per acre; that these different negotiations brought a difference in the purchase price; that after the increment, the total purchase price came to 2,887,500; that he wrote a letter showing the increased amount which letter was copied to KCB and its Advocate; that they were to pay the purchase price within six (6) months; that the 1st Defendant refused to give them documents pertaining to the suit property on account of their failure to pay within the requisite 6 months and that Mr Nderitu, the Director of the 1st Defendant, continued receiving their cheques.
41. PW1 stated that there were other Plaintiffs who had bought the remaining five acres; that their Advocate wrote a letter asking for the release of the title to enable him process the sub-division, which sub-division they had done on the ground through the surveyor introduced to them by the 1st Defendant and that the 1st Defendant did not release the documents leading them to file this case.
42. PW1 informed the court that KCB never rescinded the agreement they had with the 1st Defendant; that entry No. 11 of the Provisional Title does not show the person who transferred the land and entry No. 2 shows that KCB was the owner; that the 1st Defendant does not appear at all on the title and were all along acting on behalf of KCB and that the land was transferred by KCB to the 4th Defendant in 2011, with the first transfer being done on 1st August, 2011.
43. It was the testimony of PW1 that they placed a Caveat on the title which is entry No. 4 and which was removed in entry No. 9 in 2011; that upon its removal, the land was transferred to the 4th Defendant; that they had someone farming on the land all along until the 5th Defendant came and fenced the land; that they had planted trees which are now big trees; that the 5th Defendant fenced the entire 10 acres and put up a gate despite this suit and that the CEO of the 7th Defendant was aware of the dispute before they charged the suit property.
44. In cross-examination, PW1 stated that he is the treasurer of the organization; that he does not have written authority to testify on behalf of the others; that they do not have an agreement with KCB and KCB never signed the agreement they had with the 1st Defendant; that the completion period was to be within 90 days but they did not know the completion period between the 1st Defendant and 2nd Defendant and that he is not sure when the 1st Defendant paid KCB (the 2nd Defendant) the purchase price.



45. According to PW1, he is not aware if the 2nd Defendant ever transferred the land to the 1st Defendant; that the 2nd Defendant transferred the suit land to the 4th Defendant; that he does not know if the 4th Defendant purchased the land directly from KCB; that he does not know if the 1st Defendant instructed KCB to transfer the land to them and that they made all the payments through the 1st Defendant.
46. It was the testimony of PW1 that the final payment was returned to them after eight (8) months but they never banked the cheques; that according to the agreement, they were to pay the purchase price in six months but were granted an extension verbally and that the 3rd Defendant never refused to receive their monies even after the effluxion of time.
47. It was the evidence of PW1 that they did not extract the Ruling which stated that the Caveat was to remain in place until the hearing of the suit; that the final order of the court was entered into the presentation book; that he does not have a copy of the order that was received by the Registrar; that they do not know why the caveat was removed when they were still in court and that the 5th Defendant is the registered proprietor of the land.
48. PW2 was Smith Muturi, the 14th Plaintiff. He adopted his written statements as his evidence in chief and produced the documents at pages 68 – 179 as [PEXB 2]. It was his testimony that his evidence is similar to that of PW1; that he had a Sale Agreement with the 1st Defendant which was acting on behalf of KCB, the 2nd Defendant and that he paid the full purchase price.
49. It was the evidence of PW2 that he took possession of the land in 2005; that the land was sub-divided after he had taken possession of two acres, build a temporary house and started farming together with the 15th Plaintiff; that he is not on the land; that after the 5th Defendant fenced off the land in 2015, he moved out and that there is a concrete perimeter fence.
50. According to PW2, having paid the full purchase price, he is entitled to two acres; that by 2011, he had finished paying for the land and that the 3rd Defendant was aware of the agreement and the 4th Defendant never bothered to check his record. PW2 stated that he is the Secretary of Supermind Development Self-help Group which bought a neighboring land; that he filed a suit in respect to that land; that the suit was determined and is on appeal in the Court of Appeal and that the Court found that due process was not followed in the sale of the land.
51. It was the evidence of PW2 that he does not have an agreement with KCB; that some payments were in the name of the 1st Defendant while others were directly to KCB, the 2nd Defendant and that his agreement was subject to the agreement between KCB and the 1st Defendant.
52. PW2 admitted that although the payments were to be done within six months, they did not pay the entire sum within six months; that there were reasons why they did not pay within six months; that they had several correspondences to extend the completion period and that he did not sign a specific agreement to extend time.
53. The evidence of PW3 and PW4 was similar, save for the payable purchase price, to the evidence of PW1 and PW2.
54. DW1 was an employee of the 2nd Defendant. He adopted his witness statement dated 4th March, 2014 as his evidence in chief and produced a copy of the Sale Agreement as DEXB 1.
55. It was his testimony that the 1st and 2nd Defendants entered into an agreement for the sale of land; that after the sale was completed, the transfer documents were handed over to the 1st Defendant and



- was duly registered as the proprietor; that there was no agreement between the 2nd Defendant and the Plaintiffs and that they had no further interest in the land after the transfer.
56. It was the evidence of DW1 that they did not know what the 1st Defendant was going to do with the land; that the 1st Defendant was not an agent of the Bank; that the bank was not a party to the agreement between the Plaintiffs and the 2nd Defendant; that they never received any money from the Plaintiffs and that there was no caveat as at the point they sold the land to the 1st Defendant.
57. In cross-examination, DW1 stated that he has been with the 2nd Defendant since 2011; that the agreement had a completion date of 90 days; that although it was not completed within the time period, the whole amount was paid; that he does not have the records indicating when the amount was paid and that he does not have copies of the transfer documents issued to the 1st Defendant nor the dates for the transfer.
58. According to DW1, the agreement shows several parcels of land; that they were not aware that the 1st Defendant was going to sell the land; that under Clause (i) of the agreement, the 1st Defendant could give instructions to the bank; that it was the 1st Defendant's responsibility to register the transfer but they never followed up to know if the 1st Defendant registered the transfer and that they handed over the titles to the 1st Defendant.
59. DW1 informed the court that he was unaware of any correspondences between the Plaintiffs and the bank although the letter in the Plaintiffs' bundle of documents filed on 14th March, 2019 was addressed to the 1st Defendant and copied to the bank; that the letter for L. R. number 12867/26 has been stamped by the 2nd Defendant and that he does not know who signed the document.
60. In re-examination, DW1 stated that he is well versed with the dispute from the records; that the bank knew the Plaintiffs after the suit had been filed; that he did not know the date of the transfer; that he has seen the letter dated 07th March, 2007 by the bank's Advocates and that by this date, the titles had passed to the 1st Defendant.
61. DW 3 was Liu We Jun, the Director of the 5th Defendant. He adopted his witness statement dated 15th March, 2013 as his evidence in chief and relied on the documents at page 10 of the bundle as [DEXB 2].
62. Briefly, it was DW3's evidence that on or about 15th January, 2015, the 5th Defendant entered into a Sale Agreement with the 4th Defendant for the purchase of the suit property for a consideration of Kshs 122,000,000; that the purchase was vide a loan facility advanced by the 7th Defendant and that the suit property was un-occupied during the pre-contract negotiations, the contract period and soon after possession was granted to the 5th Defendant.
63. According to the 5th Defendant, they assumed the resultant legal rights to quiet possession of the suit property to the exclusion of all others; that the 5th Defendant immediately began construction works which had necessitated the acquisition of the suit property targeting the construction of 1000 apartments to meet its obligations under the charge and that on the 7th October, 2016, they received an order dated 31st August, 2016 restraining him and the 5th Defendant from dealing with the suit property.
64. DW3 informed the court that the 5th Defendant is a stranger to the allegations of fraud as regards the sale and purchase of the suit property; that the 5th Defendant is an innocent purchaser for value and has the constitutional right to own and use its land and that the entire suit should be dismissed as the issues of ownership had already been heard and determined by Justices Lenaola and Thurairaja in their rulings dated 12th May, 2009 and 6th February, 2014.



65. During cross-examination, DW3 testified that he cannot recall when the payment of Ksh 122, 000,000 was made; that the 10 % was deducted directly from their account by the bank but he did not have the bank statement; that they got the original title after which the property was charged and that they conducted due diligence before the purchase although he could not see the search in the bundle of documents.
66. According to DW3, the agreement did not have a passport number and the copy of exhibited does not have the company seal which is on the original agreement; that the 5th Defendant company was incorporated a few days before the Sale Agreement; that the document at page 42 is a document which is not clear to him whereas the one at page 43 is the stamp duty for deed of guarantee and indemnity and that the P. I.N. numbers at pages 43 and 45 are not the same.
67. In further cross examination, DW3 stated that the document at page 52, is signed but does not indicate who witnessed it and the certificate is not complete; that the application for the loan is not before the Court; that he assumed the charge was registered; that the bank voucher does not have a land reference number and that he could not tell the people who signed the charge on behalf of the bank.
68. It was his further evidence on cross-examination that the proof of payment of the purchase price is in his bank statement which is not attached on the documents; that the bank has the original title deed; that the full purchase price was Ksh 122,000,000; that the 7th Defendant financed the project to the tune of USD 1,100,000; that he signed the letter of offer and also signed the charge document and that they still owe the bank and the bank is still holding the title.
69. DW 4 was Jack Kimathi, an Advocate employed as the 7th Defendant's head of legal. DW4 adopted the witness statement filed by Ms. Christine Wahome on 13th December, 2018 as his evidence in chief and produced the bundle of documents of an even date as DEXB 3.
70. It was his testimony that the 7th Defendant granted a mortgage loan facility of USD 1, 100,900/= to the 5th Defendant in the year 2015 in order to facilitate the construction of residential and commercial houses; that the loan facility was secured by a legal charge dated 29th May, 2015 over property L.R 15324 situated in Machakos County; that a search at the lands registry indicates that the property was charged under a first legal charge in favour of the 7th Defendant; that at the time of charging the property, it had no encumbrance, there was no caveat and the title was duly registered in the name of the 5th Defendant and that the 7th Defendant has a valid interest in the suit property and the Plaintiffs' case should be dismissed.
71. It was the testimony of DW4 on cross-examination that there is a discrepancy between the amount that was disbursed to the 5th Defendant in statement and the letter of offer; that a legal charge was executed, signed by the Attorney and witnessed; that the bank signed the charge and the certification on 25/06/2015 and that any party can sign the charge first.
72. A representative of the 4th Defendant, DW5, informed the court that he has never traded with nor been associated with the Plaintiffs in any way and there is no privity of contract between him and the Plaintiffs; that the averments that he purchased the suit property while there was a Court order against the same is unfounded and unsupported; that he purchased the suit property after conducting due diligence and that there was no indication of any encumbrance on the property.
73. It was his evidence that the Provisional Certificate of Title he holds with respect to the suit property was lawfully and procedurally acquired; that him being joined as a party to the suit has unnecessarily exposed him to legal costs and that he has never been involved in any proceedings with the current parties.



74. During cross-examination, he stated that during the purchase of the suit property, he dealt with the seller's Advocate one Mr Kiai; that he purchased the property from the 1st Defendant and the transfer was from KCB; that he has not produced the Sale Agreement nor any other document and that it is Mr Kiai Advocate who informed him that the agreement between the Plaintiff and the 1st Defendant had been rescinded.
75. DW6 stated that Matumaini, the 1st Defendant, was given authority to sell the suit property by KCB and he paid the purchase price to the 1st Defendant through Kiai Advocate; that whereas at the time of making his statement in 2019 he had already sold the land sometime in 2015, he did not find it necessary to state in the statement that he had sold the land as the issue was with respect to the buying of the land from the seller and that he sold the property for Ksh 122,000,000 and not Ksh 120,000,000.
76. It was his further statement on cross-examination that the purchase price was paid to him through the bank although he did not have the bank statement; that having been in real estate for about 20 years, he knows how a lost title is replaced; that after paying the duty, the title from the lands office could not be traced and that he had to apply for the Provisional Title;

Submissions

77. The Plaintiff's advocate submitted that the Sale Agreement between the 1st and 2nd Defendants envisaged a third party by expressly providing for a purchaser or its nominee and second by providing that the 1st Defendant through the 3rd Defendant would determine to whom the title would be issued, either as a purchaser or nominee; that by the word nominee in describing the purchaser, the 2nd Defendant gave the 1st Defendant the authority to act on its behalf and that the 2nd Defendant's actions further make it clear that the 1st Defendant had its blessings and concurrence to deal with third parties.
78. Reliance in this regard was placed on the case of Industrial & Commercial Development Corporation(ICDC) vs Patheon Limited[2015]eKLR and in the case of Aineah Liluyani Njirah vs Aga Khan Health Services[2013]eKLR, where the Court of Appeal considered the doctrine of privity of contract and the exceptions that have been developed to give third parties who were expressly provided for in the contract the right to enforce the contract although not signatories.
79. Counsel submitted that the Plaintiffs made full payments under their respective agreements for sale and are entitled to the property; that the Sale Agreements were not rescinded as alleged; that the inter-relationship between the parties makes it clear that the Defendants colluded to defraud the Plaintiffs of the property and that the Provisional Certificate issued by the 6th Defendant is not valid because its issuance was contrary to the law and as such could not pass title.
80. Counsel cited the case of Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura vs Attorney General & 4 Others [2017] eKLR where the Court reiterated that property cannot have two titles and even assuming the second title had been issued by mistake, the first in time prevails.
81. According to Counsel, the 2nd Defendant could not pass title to the 4th Defendant because the 2nd Defendant has flatly denied selling the property to the 4th Defendant; that the 4th Defendant did not adduce any evidence of how he acquired the suit property and as such the plea for innocent purchaser for value does not lie.
82. It was submitted that the 7th Defendants reliance on the registration of a first charge as creating an interest in the land on an illegal Provisional Certificate of Title is untenable; that the 2nd Defendant was an active party in the acquisition of the Provisional Title upon which the 4th -7th Defendants base



- their interest and that it has further not been conclusively shown that any document of transfer to the 1st Defendant was perfected.
83. The Plaintiffs' counsel lastly submitted that the Plaintiffs are entitled to the orders sought; that as regards general damages, the sum of Kshs 2,000,000 per Plaintiff will suffice and that as regards punitive/exemplary damages, the sum of Kshs 5 million will serve as deterrence. Reliance in this regard was placed on the case of Rhoda S Kiilu vs Jiayi Water and Hydropower Construction Kenya Ltd [2022] eKLR.
84. The 2nd Defendant's counsel submitted that as a general principle, at common law, the doctrine of privity of contract is that a contract cannot confer rights or impose strangers to it. Counsel cited the cases of Aineah Liluyani Njirani vs Aga Khan Health Services [2013] eKLR and Savings and Loans Kenya Ltd vs Kanyenje Karangaita Gakombe & Another [2015] eKLR in this regard; that it is evident that the 2nd Defendant was not a party to the agreement between the Plaintiffs and the 1st Defendant and that the 2nd Defendant did not have any knowledge of the Plaintiffs or the agreements entered into between the Plaintiffs and the 1st Defendant.
85. It was submitted that the 1st Defendant did not have a legitimate interest in the suit property and the principle of *nemo dat quod non habet*, which provides that one cannot give what he does not have, and is set out in Section 23 of the *Sale of Goods Act* applies; that in the circumstances, the 1st Defendant did not have any authority, written or otherwise from the 2nd Defendant to sell the suit properties until the transfer was effected and that the suit properties belonged to the 5th Defendant.
86. Counsel submitted that any transaction made prior to the 1st Defendant completing the purchase price to the 2nd Defendant was void which sentiments were reiterated in Justice Lenaola's ruling; that there has been no evidence of fraud and/or collusion on the part of the 2nd Defendant; that as expressed by the Court of Appeal in Moses Parantai and Peris Wanjiku suing as the Legal Representatives of the Estates of Sospeter Mukuru Mbeere(deceased) vs Stephen Njoroge Macharia[2020]eKLR, it is not enough to infer fraud from the facts and that the Plaintiff has not discharged the burden of proof in respect to the allegations of fraud.
87. As to whether the Plaintiffs are entitled to the orders sought, Counsel answered in the negative stating that having failed to prove ownership of the suit property, they are not entitled to the orders of specific performance or an order of cancellation of the title and issuance of the title to themselves; that as stated by the Court in Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited[2006]eKLR, specific performance is an equitable remedy and is based on the existence of a valid enforceable contract and that as regards the claim for punitive and exemplary damages, the same do not lie as they have not been proven.
88. The 3rd and 4th Defendants did not file submissions.
89. The 5th Defendant's counsel submitted that whereas the Plaintiffs claim to have had valid Sale Agreements for the suit property between themselves and the 1st Defendant, they acknowledged that the purchase price was never fully paid; that nonetheless, the 1st Defendant did not have title to pass to the Plaintiffs and that the only relief available to the Plaintiffs is to seek compensation by way of damages from the 1st Defendant.
90. Reliance was placed on the case of DCF Engineering Company Limited vs Johari Ventures Ltd & Another [2021] eKLR where the Court relied on the sentiments in Kenya National Highway Authority vs Shalien Masood Mughal, Civil Appeal 327 of 2014 which stated that a party offended



- by the misdeeds that have the effect of making his otherwise good title of no effect is at liberty to seek appropriate compensation from the persons responsible.
91. Counsel for the 5th Defendant submitted that it is apparent that whereas the Plaintiffs thought themselves to be contracting with the 2nd Defendant, the 2nd Defendant never authorized the 1st Defendant to enter into an agreement on its behalf and that this mistaken belief renders the agreement void ab initio. Reliance in this regard was placed on the case of African Cotton Industries Limited vs Rural Development Services Limited [2021] eKLR which set out mistake as one of the vitiating factors of a contract.
 92. It was submitted by Counsel that as expressed by the Court in Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited [2006] eKLR, even where a contract is valid and enforceable, specific performance will not be ordered unless there is an adequate alternative remedy and that as was held in the case of Solomon Ndegwa Kuria vs Peter Nditu Gitau [2019] eKLR, where the relief of specific performance will cause unnecessary hardship and the facts are not clear cut, specific performance will not be ordered.
 93. In the present case, it was submitted, it is apparent that the 1st Defendant already transferred the suit property to the 4th Defendant who thereafter transferred it to the 5th Defendant who has charged the property to the 7th Defendant creating a chain of transactions which will be difficult to undo and that clause 7(a) of the agreement between the Plaintiff and 1st Defendant provides for an alternative remedy of refund of the purchase price and does not provide for the relief of specific performance.
 94. The 7th Defendant's counsel submitted that the Plaintiffs have no legitimate interest in the suit property having failed to complete the purchase of the suit property after which the 2nd Defendant rescinded the sale agreement and refunded the purchase price; that as held by the Court of Appeal in Kuria Kiarie & 2 Others vs Sammy Magera [2018] eKLR, allegations of fraud must be specifically pleaded and proved and that in this instance they have not done so.
 95. Counsel for the 7th Defendant submitted that as affirmed by the Court of Appeal in Demutilla Nanyama Purumu vs Salim Mohamed Salim [2021] eKLR, the onus is on the person alleging fraud to prove it; that in the present circumstances, the allegations of fraud by the Plaintiffs as against the Defendants have not been proven and that the 5th Defendant has good title to the suit property having purchased it from the 4th Defendant who in turn had good title from the 1st Defendant.
 96. It was submitted that the Plaintiffs are not entitled to the orders sought; that as regards specific performance, the same is an equitable remedy and the Plaintiffs are not entitled to the same by virtue of their inequitable conduct as regards the Sale Agreement. Reliance in this respect was placed on the case of Gurdev Singh Birdi & Narinder Singh Ghatore as Trustees of Ramgharia Institute if Mombasa vs Abubakar Madhubuti [1997] eKLR.
 97. The Plaintiff filed submissions in reply to the 2nd -7th submissions on the 17th April, 2023 submitting that the Ruling made by Lenaola J was obtained by concealment of material facts by the 1st and 2nd Defendants; that privity of contract has no application on the facts of this case because whereas the 2nd Defendant alleges to have transferred the property to the 1st Defendant, the search shows that the property was directly transferred from the 2nd Defendant to the 4th Defendant.
 98. Counsel for the Plaintiffs submitted that Section 3(3) of the *Law of Contract Act* allows for constructive trust where it is clear that the Defendant acted unconscionably. Counsel cited the case of Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri [2014] eKLR which emphasized that the Court is mandated to do substantive justice.



Analysis & Determination

99. Having carefully considered the pleadings, testimonies and submissions herein, the issues that arise for determination are;
- i. Whether the Plaintiffs have established their case on a balance of probabilities?
 - ii. Whether the Plaintiffs are entitled to the orders sought?
100. Vide the present suit, the Plaintiffs seek inter-alia, permanent injunctive orders restraining the Defendants from any interference with the suit property, declarations that they are the rightful owners of the suit property and that the 1st and 2nd Defendants are obligated to honour the Sale Agreements made between themselves; a declaration that any purported rescission of the agreement was illegal; that the Provisional Certificate of Title in respect of the suit property issued to the 2nd Defendant and all subsequent entries therein are null and void and should be cancelled and that the title to the suit properties should be registered in their names. The Plaintiffs also seek general, punitive and exemplary damages.
101. It is the Plaintiffs' case that the 1st and 2nd Defendants entered into an agreement for the sale and purchase of the suit property; that pursuant to the agreement, the 2nd Defendant agreed to sell the land to the 1st Defendant or any of its nominees, in this instance the Plaintiffs and that based on the foregoing, they entered into agreements with the 1st Defendant for the purchase of various parcels of land, the subject herein.
102. The Plaintiffs pleaded and testified that whereas the agreements expired before completion on account of financial constraints by them and the fact that the 1st and 2nd Defendants were embroiled in litigation over the properties, they mutually and/or by conduct agreed to extend the completion period.
103. The Plaintiffs testified that the parties further agreed to an increment in the purchase price and the Plaintiffs ultimately paid the entirety of the purchase price, which the 1st, 2nd and 3rd Defendants received; that it is only the 16th Plaintiff who has not paid the entire purchase price and that the above notwithstanding, the 1st Defendant refused to transfer the suit property to them but instead sold it to the 4th Defendant who sold it to the 5th Defendant, in whose title the suit property's currently registered.
104. The Plaintiffs adduced into evidence the Sale Agreements between the 1st and 2nd Defendants dated 31st May, 2004, various Sale Agreements between the 1st Defendant and themselves dated 21st September, 2004, 16th May, 2007 and, correspondences between themselves and the 1st Defendant, Surveyors and Advocates; copies of cheques and receipts for payments, copy of grant LR No. 15324, a copy of the official search and Provisional Certificate of Title, correspondences to and from the Ministry of Lands and the Registrar of Titles, Court orders dated 14th February, 2011 and 6th September, 2012, correspondence by the Plaintiffs to the 2nd Defendant, Caveat Emptor newspaper adverts, and particulars of Directorship and secretaries of Matumaini Ventures/Rank Global Management Limited.
105. On their part, the Defendants deny these assertions. According to the 1st Defendant, whereas it indeed entered into an agreement for the purchase of the suit property from the 2nd Defendant, there was no authority by the 2nd Defendant to sell the property to the Plaintiffs or any other party as its nominee; that it entered into an agreement with the Plaintiffs for the sale of the suit property but the agreement lapsed and that the sale agreement was automatically rescinded after the Plaintiffs failed to pay the purchase price.



106. It was the evidence of the 1st Defendant's witness that there was no agreement to extend the time for the payment of the purchase price; that any payments after the stipulated timelines which is denied were not sanctioned and that the suit should be dismissed.
107. On its part, the 2nd Defendant, while admitting to have entered into an agreement to sell the land to the 1st Defendant, denied granting any authority, whether expressly or implicitly to the 1st Defendant to sell the suit properties to the Plaintiffs under the Sale Agreements or at all. The 2nd Defendant's advocate asserted that its agreement with the 1st Defendant was completed and it duly executed the transfers thus transferring the proprietary rights to the 1st Defendant.
108. The 2nd Defendant's witness testified that consequently, the 2nd Defendant had no contractual obligation to the Plaintiffs and that it has never received any monies from the Plaintiffs as alleged or at all. The 2nd Plaintiff adduced the copy of the Sale Agreement between itself and the 1st Defendant dated 31st May, 2004.
109. The 3rd Defendant's case is that it carried out its duty to its client, the 1st Defendant, lawfully and that the agreements between the Plaintiffs and the 1st Defendant were rescinded due to the Plaintiffs' failure to pay the purchase price within the stipulated timelines.
110. The 4th and 5th Defendants deny any knowledge of the issues between the 1st Defendant and the Plaintiffs, each asserting to be a bona fide purchaser for value having purchased the suit property in good faith and without notice of any default. The 7th Defendant too contends that the 5th Defendant is the legitimate owner of the suit property; which property it now has a charge over.
111. The 5th Defendant produced into evidence a copies of the authority granted to DW3 to appear on behalf of the company, the Sale Agreement between itself and the 4th Defendant dated 11th January, 2015, its MEMOARTS, Provisional Certificate of Title of the suit property before and after the transfer, Rates Clearance Certificates dated 8th January, 2018 and 14th January, 2015, Certificate of Registration of Mortgage dated 6th July, 2015, Charge document dated 29th June, 2015, letter from the Bank approving the loan dated 5th April, 2015 and photographs of the developments on the suit property.
112. The 7th Defendant produced the offer letter dated 5th April, 2011, charge instrument dated 29th June, 2015 and the search certificate.
113. As aforesaid, the Plaintiffs herein seek to assert proprietorship of the suit property. They are as such obligated to prove their case on the required standard of proof, being on a balance of probabilities. This principle is succinctly captured in Sections 107, 109 and 112 of the *Evidence Act*, Cap 80, Laws of Kenya. Section 107 provides as follows:

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”



114. Sections 109 and 112 of the same Act states as follows:

“ 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

115. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

116. On the question of burden of proof, the learned Judges of Appeal in the case of *Palace Investments Limited vs Geoffrey Kariuki Mwenda & another* [2015] eKLR, posited thus:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

117. In determining whether the Plaintiffs have met their burden, the Court will embark on a chronological investigation of the transactions in respect of the suit property.

118. The Plaintiffs’ claim to the suit property is founded on two major agreements, being the Sale Agreement between the 1st and 2nd Defendants dated 31st May, 2004 in respect of the suit property and the Sale Agreements entered into between the Plaintiffs and the 1st Defendant.



119. Pursuant to the Sale Agreement dated 31st May, 2004, the 2nd Defendant sold the suit property to the 1st Defendant. The Agreement refers to the 1st Defendant as “the purchaser and or nominee which expression shall where the context so admits include its successor in title assigns and/or nominees.”

120. The preamble to the Sale Agreements entered into between the Plaintiffs and the 1st Defendant provides as follows;

“Kenya Commercial Bank is the registered proprietor of all that piece of land known as L.R. No. 12867/26 measuring Ten (10) acres.

Matumaini Ventures Ltd has been offered for purchase by the registered owner for purchase of the aforesaid plot either by itself, nominee or assignee.”

Further that;

“Matumaini Ventures Ltd is desirous of assigning and/or nominating....a part of the aforesaid plot measuring.....acres to be excised from the aforesaid parcel of land and the purchasers are desirous of buying the same.”

121. Clause 3 of the Agreements further state that;

“The sale is subject to the main agreement between Kenya Commercial Bank Ltd, the registered owner and Matumaini Ventures Ltd, the Assignor who will give a title to the purchaser free from any encumbrances and vacant possession will be given on completion.”

122. According to the Plaintiffs, they were the nominees anticipated in the agreement of 31st May, 2004 and pursuant thereto, they entered into the agreements with the 1st Defendant for the purchase of the property. So who is a nominee?

123. Black’s Law Dictionary, 4th Edition(Revised) defines a “Nominee” as;

“One who has been nominated or proposed for an office. One designated to act for another as his representative in a rather limited sense. It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of acting for another, in representation of another, or as the grantee of another.”

124. Whereas an “Assignee” is defined as;

“A person to whom an assignment is made; grantee. The term is commonly used in reference to personal property; but it is not incorrect, in some cases, to apply it to realty.”

125. In discussing the nature of a nominee under a contract and the rights enjoyed by a party described as such, the Court of Appeal of New Zealand in GPO Holdings Ltd vs CIR (1995) 20 TRNZ 266 stated thus;

“A nomination is merely a revocable precursor to a conveyance by direction. Without more it does not confer upon the nominee any contractual rights against the vendor or the named purchaser. The named purchaser remains the only party liable for the payment of the purchase price and the only party entitled to the benefit of the agreement.”



126. What is clear from the foregoing is that at the most literal level, a nomination entitles a nominee to take over a transaction in place of the purchaser. It constitutes an assignment of the purchaser's rights under the contract of sale to the nominee.
127. Looking at the agreement between the 1st Defendant and the Plaintiffs, it is abundantly clear that first, at the time of the sale, the suit property was still registered in the name of the 2nd Defendant (KCB) and second, the 2nd Defendant was not a party to the agreement. The 2nd Defendant maintains this position and no evidence has been adduced to the contrary.
128. Indeed, the Plaintiffs all affirmed in cross-examination that they had no agreement with the 2nd Defendant. What this means is that the 1st Defendant had no capacity to enter into any Sale Agreement with the Plaintiffs as the title still belonged to the 2nd Defendant. This is especially so where the express consent of the 2nd Defendant was not sought or obtained.
129. It therefore follows that the 1st Defendant was essentially purporting to give what it did not have, notwithstanding the agreement it had with the 2nd Defendant. What becomes apparent is the import and tenor of the doctrine of *Nemo dat quod non habet*, which signifies that he who has no title, cannot pass anything at all.
130. Whereas the principle was initially with respect to sale of goods, the same has been given recognition in property law. The Court of Appeal in the case of *Arthi Highway Developers Ltd vs West End Butchery & 6 Others* [2015] eKLR expressed it best when, in dealing with a fraudulent title which had been subdivided and sold off to unsuspecting purchasers, stated as follows:
- “It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.”
131. In the end, the Court finds that the 1st Defendant did not have any title to the suit property to sale and transfer to the Plaintiffs at the time it entered into the sale with the Plaintiffs. It could only transfer the land after the same had been transferred to it by the 2nd Defendant, the registered owner.
132. While admitting to have no express contract with the 2nd Defendant, the Plaintiffs seek to bring themselves within the exception to the privity doctrine by alleging an agency relationship between the 1st and 2nd Defendants for their benefit as third parties.
133. Indeed, as cited by the Plaintiffs, the Court of Appeal in *Aineah Likuyani Njirah vs Aga Khan Health Services*(supra), while discussing the exceptions to the doctrine of privity of contract stated that one of the exceptions is the need to grant third parties the right to enforce a contract made for their benefit.
134. In the case of *Karuri Civil Engineering (K) Limited vs Equity Bank Limited* [2019] eKLR, the Court of Appeal followed the decision in the *Aineah* case stating thus;
- “In *Aineah Likuyani Njirah vs Aga Khan Health Services* (2013) eKLR, this court expressed that there are now many exceptions to the privity rule, both at common law and in the statute books. One of the exceptions is the need to grant third parties the right to enforce a contract made for their benefit. In our considered view, the doctrine of privity of contract cannot be used to oust responsibility to a third-party beneficiary of a performance bond.



See also *Darlington Borough Council v Wiltshire Northern Ltd* [1995] 1 WLR 68 (as cited in *Mark Otanga Otiende vs Dennis Oduor Aduol* (2021) eKLR) to demonstrate the rationale behind exceptions to the privity of contract rule per Lord Steyn :

“The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract.”

135. In the circumstances of this case, there was no express agreement between the 2nd Defendant and the Plaintiffs. The 2nd Defendant was not a party to the agreement between the Plaintiffs and the 1st Defendant and there was no agency or nominee agreement between the 1st and 2nd Defendants. Be that as it may, this court is enjoined to ascertain from the conduct of the parties herein, the pleadings and communication between the parties on the performance of the terms of the contract signed between themselves.
136. According to the Plaintiffs, the agency relationship between the 1st and 2nd Defendants was implied by virtue of their conduct including: the 2nd Defendant’s inaction in light of the Plaintiffs’ representations to them about the suit property; the fact that the 1st Defendant entered into similar transactions with other parties; the fact that the 2nd Defendant procured the transfer of the suit property in the 4th Defendant’s name; the fact that the 3rd Defendant has at different times acted for the 1st, 2nd and 3rd Defendants and the fact that payments were made to the 2nd Defendant.
137. As to whether the foregoing conduct leads to an inference of agency, the Court thinks not. If anything, quite to the contrary. The fact of multiple similar transactions some of which are the subject of litigation in other Courts and the 3rd Defendant’s involvement with multiple Defendants cannot in itself infer an agency relationship, but at best, under hand dealings.
138. With regard to the claim of receipt of money, no evidence has been adduced that the 2nd Defendant received any monies from the Plaintiffs. Whereas some cheques have been written in the names of the 2nd Defendant, the 2nd Defendant denied cashing the cheques and receipt of any payments. The Plaintiffs should therefore have adduced evidence of payments to the 2nd Defendant, by producing bank statements showing funds had moved to the 2nd Defendant or acknowledgment of receipt of the monies by the 2nd Defendant.
139. In any event, the Plaintiffs admitted having not paid the purchase price within the stipulated time. It is trite that an oral agreement cannot override a written agreement. Having failed to prove ownership of the suit property, and having failed to abide by the terms of the agreements they are relying on, it is the finding of the court that the Plaintiffs are not entitled to the orders of specific performance or an order of cancellation of the title.
140. This position was upheld by the Court in *Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited* [2006] eKLR, where it was stated that specific performance being an equitable remedy, the same is based on the existence of a valid enforceable contract, which was lacking in the instant case.



141. It is not in dispute that the suit property is currently registered in the name of the 5th Defendant. The 5th Defendant holds a Provisional Certificate of Title dated 1st August, 2011 registered pursuant to the Registration of Titles Act. By dint of the provisions of Section 107 of the [Land Registration Act, 2012](#), the law applicable to the title held by the 5th Defendant is the Registration of Titles Act (now repealed).

142. The Registration of Titles Act (now repealed) provides as follows with respect to proprietorship;

“ 23.

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

143. The same is replicated in Section 24 of the [Land Registration Act, 2012](#) which provides as follows;

“ Subject to this Act-

i.

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

144. Section 26 (1) of the [Land Registration Act, No. 3 of 2012](#) embodies the doctrine of indefeasibility of title as envisaged under the Torrens System of registration. It provides thus;

“ The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

145. It can be seen from the above provisions that whereas title is protected, the protection can be removed and title impeached, if it is proved to have been procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme.



146. It is trite law that fraud must not only be pleaded and particularized but strictly proven. This position was affirmed by the Court of Appeal in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* (supra) which stated:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

147. As regards the standard of proof, the Court of Appeal in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows:

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

148. It is noted that no allegations of fraud have been pleaded as against the 5th Defendant, the current title holder. What the Plaintiff has pleaded in the Further Further Amended Plaintiff is that “by reason of the illegal actions of the 1st-3rd and 6th Defendants, the 4th, 5th and 7th Defendants could not obtain a good title to the suit land.”

149. As such any attempts to impugn the title pursuant to the provisions of Section 26 (a) of the [Land Registration Act](#) or section 23 of the Registration of Titles Act (repealed) must fail.

150. In any event, although the Plaintiffs have stated that the transfer of the title by the 2nd Defendant to the 4th Defendant on the 1st August, 2011 was fraudulent, and that the procurement of the Provisional Title by the 5th Defendant was done unprocedurally, the owner of the land then, the 2nd Defendant, has not complained.

151. What that means is that the Plaintiffs do not have the locus standi to question the transfer of the suit property from the 2nd Defendant to the 4th Defendant, who subsequently transferred the land to the 5th Defendant. Even if the title which is in the name of the 5th Defendant was to be cancelled, the title will still revert to the 4th Defendant, or at worst, the 2nd Defendant and not to the 1st Defendant or the Plaintiffs.

152. Considering that the Plaintiffs’ claim is based on the agreement between the themselves and the 1st Defendant, which has been frustrated on the grounds that I have enumerated above, it is the finding of the court that the Plaintiffs have not proved their case on a balance of probabilities. The only recourse the Plaintiffs have, if at all, is a claim for refund of the monies paid to the 1st Defendant.

153. For those reasons, the Plaintiffs’ suit is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF SEPTEMBER, 2023.

O. A. ANGOTE



JUDGE

In the presence of;

Mr. Moraa holding brief for Madahana for Plaintiffs

Mr. Eredi for 5th Defendant

Ms Cheruiyot for 2nd Defendant

Mr. Dachi for Mogisha 7th Defendant

