



REPUBLIC OF KENYA



Ngatho & another v Moki Savings Co-operative Society Ltd & 18 others (Environment & Land Case 745 of 2001) [2023] KEELC 22497 (KLR) (13 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22497 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 745 OF 2001
JO MBOYA, J
DECEMBER 13, 2023

BETWEEN

LILIAN WAIRIMU NGATHO 1ST PLAINTIFF

ELIZABETH MURUNGARI NJOROGE 2ND PLAINTIFF

AND

MOKI SAVINGS CO-OPERATIVE SOCIETY LTD 1ST DEFENDANT

LUCY WANJIRU KIRUHI 2ND DEFENDANT

BEATRICE NJERI GACHUKIA 3RD DEFENDANT

JOYCE WARINGA NJUGUNA 4TH DEFENDANT

SUSAN MUGURE NJUGUNA 5TH DEFENDANT

JAMES NJOROGE MWANGI 6TH DEFENDANT

VENANSIO MBATARU KARIUKI 7TH DEFENDANT

MICHAEL MBIRA NGINGI 8TH DEFENDANT

FRANCIS KARIUKI MACHARIA 9TH DEFENDANT

GEORGE MURIGU GITHUKU 10TH DEFENDANT

SAMMY THUMBI NYAMBARE 11TH DEFENDANT

SIMON GATHII MACHARIA 12TH DEFENDANT

JAMES NDUATI KURIA 13TH DEFENDANT

JAMES MARAGWA WERU 14TH DEFENDANT

JUSTINE WILLY KARIUKI 15TH DEFENDANT

JAMES MATHO WAKABA 16TH DEFENDANT



JAMES NJOROGE NJAU 17TH DEFENDANT
RICHARD GICHINI NJOROGE 18TH DEFENDANT
BETH WAIRIMU KAHIU 19TH DEFENDANT

JUDGMENT

Introduction and Background

1. The instant matter was commenced vide Originating Summons [O.S] dated the 8th May 2001; by and on behalf of the Plaintiffs' herein and in respect of which same sought for the determination of various albeit numerous reliefs/determination. For coherence, the Plaintiffs' highlighted a total of Twenty two [22] reliefs/questions for determination by the Honourable court.
2. Subsequently, the Originating Summons under reference was amended and thereafter further amended with leave of the court. Instructively, the Further Amended Originating Summons dated the 4th February 2022, has sought for the following reliefs/determination;[verbatim]:
 - i. Whether the land parcel L.R No. 5964/1 Nairobi plot No. 24 Section 2 Eastleigh , L.R No Kiambaa Waguthu/385 form part and parcel of the Estate of the Late Wanjiku Njau, Deceased.
 - ii. Whether the 1st defendant forged Land Sale and transfer documents and thereafter fraudulently had L.R No. 5964/1 Nairobi transferred to itself without the consent of the late Wanjiku Njau, now Deceased.
 - iii. Whether adequate consideration had been paid to the deceased by the 1st Defendant before it unilaterally and fraudulently transferred L.R No. 5964/1 Nairobi to itself.
 - iv. Whether the withdrawal of the High Court Civil Case No. 3973 of 1991 (Wanjiku Njau versus Moki Savings Co-operative Society Limited & another) and 5868 of 1992(Wanjiku Njau versus Moki Savings Co-operative Society Limited 2 Others) was done fraudulently on the part of the Defendants in collusion with the advocates who purportedly represented the deceased.
 - v. Whether the withdrawal of HCCC No, 3973 of 1991 and HCCC no. 5868 of 1992; and all Applications therein was done procedurally at the Courts Registry or not.
 - vi. Whether P.S Gatimu Advocate purportedly representing the Late Wanjiku Njau in HCCC No. 3973 of 1991 and HCCC No. 5868 of 1992 at the time of the withdrawal herein had proper instructions to conduct the said matters on behalf of the deceased.
 - vii. Whether the 1st defendant breached the terms of Sale Agreement between it and the Late Wanjiku Njau over the Sale of part of land parcel L.R No. 5964/1 Nairobi and whether the sale Agreement was enforceable under the circumstances.
 - viii. Whether the further transfer of title of parcel L.R No. 5964/1 Nairobi from the 1st defendant to 2nd defendant which was almost immediately after the first transfer, was in itself a cover up of a fraud and forgery herein and a way of placing the ownership of the title of the said parcel beyond the reach of the deceased.
 - ix. Whether the 1st Defendant had any authority at all to transfer to a third party (2nd Defendant) the title of the parcel of land herein when it had not acquired a good title from the deceased.



- x. Whether the subsequent title derived from the original L.R. No 5964/1 Nairobi are valid under the circumstances.
 - xi. Whether the defendants, their agents and/or servants should be restrained by way of permanent injunction from alienating, subdivision, selling, intermeddling and/or in any way interfering with land parcel L.R No. 5964/1 Nairobi (original title) and all the subsequent titles derived therefrom.
 - xii. Whether a Prohibitory Order should be issued restraining further dealing and/or transaction relating to the property known as L.R No. 5964/1 Nairobi (original title) and all the subsequent title derived therefrom, and whether all these subsequent titles should be declared null and void ab initio.
 - xiii. Whether the transfer from the Late Wanjiku Njau of the suit premises to the 1st Respondent was in contravention of the principle of Lis pendense under section 52 of the Indian Transfer of Property Act (1 TPA) which is applicable to our law via Registration of the Title Act (RTA).
 - xiv. Whether as per Kenya Court of Appeal judgement in Civil Appeal No. 8 of 2000 the balance of one of the suit premises (L.R No. 5964/1 Nairobi) i.e. twelve and a half 12 1/2 acres, automatically reverts to the Estate of the Late Wanjiku Njau and/or the beneficiaries of her Estate.
 - xv. Whether the subdivision and subsequent transfers emanating from the (L.R No. 5964/1 Nairobi) to the 3rd to 22nd defendants are fraudulent and should be nullified for being tainted with forgery, misrepresentation and fraud.
 - xvi. Whether the 2nd defendant had good title to transfer parcels of land carved out of the suit land to the 3rd to 22nd defendants.
 - xvii. Whether the 3rd to 22nd defendants are bona-fide purchasers for value and if they have a valid claim to the land as against the plaintiffs.
 - xviii. Whether the titles issued to the 3rd to 22nd defendants emanating from (L.R No. 5964/1 Nairobi) should be cancelled.
 - xix. Whether the 3rd to 22nd Respondents were aware of and/or were part of the fraud conducted by the 2nd Respondent in regards to the suit premises.
 - xx. Whether the 3rd to 22nd Respondents were aware of the existence of the orders in this suit and the Caveat Emptors placed on the land.
 - xxi. Whether the 3rd to 22nd Respondents were aware of the plaintiff's ownership of the suit land.
 - xxii. Whether the subdivisions carried out on (L.R No. 5964/1 Nairobi) should be cancelled and the land revert back to the original title number in the name of Late Wanjiku Njau alias Mary Wanjiku Njau.
3. The Further amended Originating Summons, [details in terms of the preceding paragraph], is supported by (sic) a Further amended supporting affidavit sworn on the 4th February 2022; and to which the Deponent thereof has annexed a total of 21 documents, inter-alia, a set of Caveat Emptors Notices, which were (sic) advertised in various daily Newspapers.



4. Other the Further supporting affidavit sworn on the 4th February 2022, the Originating Summons is also anchored on subsequent Further affidavit(s) sworn on the 10th March 2022; 21st March 2022; and 24th May 2022, respectively.
5. Upon being served with the Further amended Originating Summons the 2nd , 13th to 22nd Defendants duly entered appearance and thereafter filed assorted Replying affidavits in opposition to the Further amended Originating Summons. For the avoidance of doubt, the Replying affidavits filed by the said Defendants are sworn on the 28th April 2022.
6. On behalf of the 3rd to 7th Defendants , same filed assorted Statement of Defense and counterclaim(s) dated the 8th March 2022. For good measure, the 3rd to 7th Defendants also sought for various reliefs, inter-alia;
 - i. An order for removal of any order or caution registered against the Defendants’ titles.
 - ii. A declaration that the Defendants’ are Innocent Purchasers for value without notice of any defect in title of her predecessor
 - iii. A declaration that the Plaintiffs’ claim, if any, lies as against the 1st and 2nd Defendants and the same is for the balance of the purchase price and not cancellation of title
 - iv. An order that the Plaintiffs pay General damages to the defendants’ for unlawfully and improperly encumbering the defendants’ title.
 - v. In the alternative to the foregoing and in any event, the court orders the cancellation of the defendants’ titles, an order that the plaintiffs compensate the defendants for their developments on the suit land by paying the current value of the said land and the developments thereon.
 - vi. An order that the Plaintiffs’ pay the Defendants costs of the suit.
7. On behalf of the 8th to 12th Defendants, same similarly entered appearance and thereafter filed a Statement of Defense and counterclaim dated the 12th April 2022; and in respect of which same sought for the following reliefs;
 - i. The Further amended Originating summons dated 8TH February 2022; be dismissed.
 - ii. General & punitive damages.
 - iii. Costs of the counterclaim.
 - iv. Interest on a and b above
8. Suffice it to point out that upon being served with the Statement of Defense and Counterclaim by and on behalf of the 3rd to 12th Defendants, the Plaintiffs’ herein filed assorted Statement of Defense and Defenses to counterclaim, which are variously dated the 10th March 2022, 21st March 2022; as well as Further affidavits, essentially in answer to the contention by the named Defendants that same are lawful and bona fide purchasers’ for value over and in respect of the assorted properties registered in their names.
9. Be that as it may, upon the close of pleading, the Honourable court gave directions pertaining to and concerning the manner of disposal of the Further amended originating summons and the various counterclaims that had been filed by and on behalf of the Defendants.



10. Suffice it to point out that with the concurrence of the advocates for the respective Parties, the suit herein was directed to proceed vide viva voce evidence and thereafter the Parties who were granted liberty to file witness statements and bundle of documents, where appropriate.
11. Furthermore, the matter herein came up for hearing on the 7th February 2023; when the Plaintiffs' case was heard and closed.

Evidence by the Parties':

A. Plaintiffs' Case:

12. The Plaintiffs' case revolves and/or gravitates around the Evidence of one [1] witness, namely, Elizabeth Murungari Njoroge, who testified as PW1.
13. It was the testimony of the said witness that same is one of the Legal Administratrix of the Estate of Wanjiku Njau, now deceased, together with the 1st Plaintiff herein. Besides, the witness also averred that same had the requisite authority of the 1st Plaintiff, who is a Co-administratrix, to prosecute the instant suit.
14. Other than the foregoing, the witness herein testified that same was privy to and/or conversant with the facts of the subject suit. In this regard, the witness proceeded to and adopted the supporting affidavit sworn on the 4th February 2022, which the witness sought to adopt as her Evidence- in chief in respect of the instant matter.
15. Pursuant to and at the instance of the witness, the contents of the Supporting affidavit sworn on the 4th February 2022; were constituted as the Evidence in chief of the witness.
16. On the other hand, the witness also alluded to assorted documents annexed to the Supporting to the affidavit sworn on the 4th February 2022; and therefore sought to adopt and produce same before the Honourable court as part of the Exhibits on behalf of the Plaintiffs'.
17. There being no objection by an on behalf of the Defendants, the various documents which were annexed to the affidavit sworn on the 4th February 2022, were duly admitted in Evidence and marked as Plaintiffs' Exhibits P1 to P21, respectively.
18. Furthermore, the witness herein also alluded to the Supporting affidavit sworn on the 10th March 2022; and similarly, sought to adopt and rely on the contents thereof. In this respect, the contents of the supporting affidavit sworn on the 10th March 2022, were duly admitted and constituted as further evidence in chief of the witness.
19. Additionally, the witness also referred to the annexure attached to the said Affidavit and implored the Honourable court to adopt and admit same as further Exhibits on behalf of the Plaintiffs.
20. Suffice it to point out that the annexures attached to the Supporting affidavit sworn on the 10th March 2022; was thereafter admitted and thereafter produced as Exhibit P22.
21. Other than the foregoing, the witness herein drew the attention of the Honourable court to the Further affidavit sworn on the 21st March 2022; and also sought to adopt and rely on the contents thereof as further Evidence in chief.
22. Consequently and in the premises, the affidavit dated the 21st March 2022; was duly admitted and constituted as Further Evidence in chief of the witness.



23. On the other hand, the witness also adverted to a Further supporting affidavit sworn on the 24th March 2022 and 24th May 2022, respectively; and which the witness similarly sought to adopt and rely on as further Evidence in chief. For coherence, the named affidavits were thereafter constituted and admitted as further evidence in chief on behalf of the witness [PW1].
24. Further and in addition, the witness also adverted to assorted documents attached to the supporting affidavit sworn on the 24th March 2022 and sought to have the various documents admitted in Evidence on behalf of the Plaintiff.
25. For completeness, the documents annexed to the Supporting affidavit sworn on the 24th May 2022 was thereafter marked as Exhibit P22 to P24, respectively.
26. Finally, the witness herein alluded to assorted affidavits which were filed in Response to the Statement of Defense by and on behalf of the 13th, 14th, 15th, 16th, 17, and 18th Defendants, respectively. In this regard, the said affidavit were equally constituted as further Evidence- in -chief on behalf of the Plaintiffs.
27. On cross examination by Learned counsel to the 3rd to 7th Defendants, the witness admitted that the Sale agreement between Wanjiku Njau, now Deceased, and the 1st Defendnt herein was entered into and executed in 1989. Further, the witness stated that Wanjiku Njau, now deceased, was not blessed with any child.
28. Whilst under further cross examination, the witness herein also stated that same was not aware whether Wanjiku Njau, now deceased had swore any affidavit, wherein same intimated that she (Wanjiku Njau) had nominated Leonard and Joseph to represent her.
29. Further and in any event, the witness averred that same was not privy to and knowledgeable of the contents of the affidavit sworn on the 1st November 1990.
30. Other than the foregoing, the witness also averred that same is the one who swore the Supporting affidavit in respect of the Further amended originating summons. Besides, the witness added that same (witness) is aware that the 3rd to the 7th Defendants bought their respective parcels of lands/Plots from the 2nd Defendant.
31. Furthermore, it was the evidence of the witness that other than the 3rd to the 7th Defendant who bought from the 2nd Defendant, same is not aware whether there are other Defendants who also bought from the said 2nd Defendants.
32. Other than the foregoing, it was the testimony of the witness that the 3rd to the 22nd Defendants however did not undertake any due diligence prior to and before purchasing their respective Plots. In any event, the witness added that the transfer instruments would show whether there were any encumbrance or otherwise.
33. Additionally, it was the testimony of the witness that the transfer to and in favor of the 3rd to the 22nd Defendant were done on account of fraud.
34. Whilst under further cross examination, the witness herein clarified that same [Witness], however has not stated that the fraud alluded to was perpetrated by the 3rd to the 7th Defendants or at all.
35. Other than the foregoing, it was the testimony of the witness that same has equally not stated that the 3rd to 7th Defendants knew whether the Plaintiff, namely, Wanjiku Njau, now deceased, had been paid the entire purchase price.



36. It was the further evidence of the witness that there were several court cases that had been filed by Wanjiku Njau, now deceased. In any event, the witness added that the various cases alluded to, had been shown in the Register.
37. On the other hand, it was the testimony of the witness that the various cases which had hitherto been filed by and on behalf of Wanjiku Njau, now deceased, were later on withdrawn. However, the witness added that the withdrawal of the said cases was not known to Wanjiku Njau, now deceased.
38. Other than the foregoing, it was the testimony of the witness that though Wanjiku Njau, now deceased, entered into and executed a Sale agreement with the 1st Defendant herein, same (Wanjiku Njau), now deceased, was however not paid the full purchase price pertaining to the sale of the suit property.
39. Furthermore, the witness also testified that same (witness) was aware that Wanjiku Najau, now deceased, went to court to challenge the transfer and registration of the suit property in the names of both the 1st and 2nd Defendants, respectively.
40. Whilst under further cross examination, the witness herein testified that prior to and or before purchasing (sic) their respective parcel of lands, it was incumbent upon the 3rd to the 7th Defendants to undertake an official search with a view to ascertaining the status of the suit property. Further, the witness added that if the 3rd to 7th Defendants had undertaken a search over the suit property, same would have discerned the existence of a caveat.
41. Besides, it was the testimony of the witness that there was a court order which had been issued to stop/prohibit, any transactions over and in respect of the suit property.
42. Be that as it may, the witness herein averred that same neither gave nor served the 3rd to the 7th Defendants with any court order. Furthermore, the witness added that same is not aware whether the 3rd to the 7th Defendants were privy to and/or knowledgeable of the existence of the court orders.
43. On cross examination by Learned counsel for the 8th to the 12th Defendants, the witness herein stated that Wanjiku Njau, now deceased, died in the year 1998. Besides, the witness also stated that the sale agreement between Wanjiku Njau, now deceased and the 1st Defendant was entered into in the year 1989.
44. Further and in addition, it was the testimony of the witness that same was not present when the sale agreement was entered into and executed.
45. Whilst under further cross examination, the witness admitted that upon the execution of the sale agreement, Wanjiku Njau, now deceased, surrendered the certificate of title in respect of the suit property to the transaction advocates, to facilitate transfer of the suit property in favor of the 1st Defendant.
46. On the other hand, the witness herein acknowledged that the 8th to 12th Defendants were not part of the sale agreement between Wanjiku Njau, now deceased and the 1st Defendant herein.
47. Additionally, it was the evidence of the witness that the 7th to 12th Defendants, were not part of any fraud, if any, that was perpetrated by the 1st Defendant. In any event, the witness acknowledged that same has neither tendered nor produced any complaint lodged with the Directorate of Criminal Investigations [DCI], as against the 8th to the 12th Defendants.
48. Whilst under further cross examination, the witness also stated that the 8th to the 12th Defendants were not aware of any court order.



49. Cross examination by Learned counsel for the 2nd, 13th to the 22nd Defendants, respectively, it was the testimony of the witness herein that Wanjiku Njau, now deceased, entered into and executed a sale agreement over and in respect of the suit property. Further, the witness added that the sale agreement was drawn by an advocate.
50. On the other hand, it was the testimony of the witness that when the Sale agreement in question, was entered into and executed, same (witness) was not present.
51. Whilst under further cross examination, the witness stated that it is Wanjiku Njau, now Deceased, who transferred the land to the 1st Defendant. In any event, the witness averred that the transfer to and in favor of the 1st Defendant was done on the 13th September 1998.
52. Other than the foregoing, the witness averred that by the time the suit property was transferred and registered in the names of the 1st Defendant, Wanjiku Njau, now deceased, had not been paid the entire Purchase price in respect of the suit property.
53. It was also the further testimony of the witness that same is conversant with the succession proceedings, namely, Succession No. 1074 of 1998, pertaining to and concerning the Estate of Wanjiku Njau, now deceased. However, the witness admitted that the suit property, was not one of the assets listed as part of the Estate of Wanjiku Njau, now deceased, at the foot of the said succession cause.
54. On the other hand, it was the testimony of the witness that though same was issued with the Grant of Letters of administration over the Estate of Wanjiku Njau, now deceased, the Grant of Letters of administration has not been confirmed as of date.
55. Besides, it was the testimony of the witness that though Wanjiku Njau, now deceased had filed various suits against the 1st and 2nd Defendants herein, inter-alia, HCC No. 3973 of 1991, the said suit was withdrawn. However, the witness contended that Wanjiku Njau, now Deceased, was not privy to or knowledgeable of the withdrawal of the suit.
56. It was the further testimony of the witness that the withdrawal of the various suits, which had been filed by and on behalf of Wanjiku Njau, now Deceased, were part of the fraud that were perpetrated with a view to defrauding Wanjiku Njau of the suit property.
57. On re-examination by Learned counsel for the Plaintiffs', the witness herein stated that same [Witness], is duly authorized to swear the affidavits in support of the instant suit. In any event, the witness added that same has pointed out that the 3rd to the 22nd Defendants were involved in fraud as pertains to the suit property.
58. Other than the forgoing, it was the further testimony of the witness that same (witness) filed the instant suit, with view to obtaining interim orders, to restrain and/or prohibit further dealings in respect of the suit property.
59. Furthermore, the witness averred that subsequent to obtaining the court orders same were advertised in the various Newspapers, wherein the terms of the caveat emptor were duly explained.
60. Additionally, it was the testimony of the witness that same (witness) did not take any Notices to the ground because the ground was hostile.
61. On the other hand, the witness herein testified that though Wanjiku Njau, now Deceased, had filed various suits challenging the transfer and registration of the suit property to and in favor of the 1st and 2nd Defendants, the various suits, were withdrawn without the consent and knowledge of Wanjiku Njau.



62. Furthermore, it was the testimony of the witness that same is one of the duly appointed administratrix of the Estate of Wanjiku Njau, now deceased; and thus authorized to administer the Estate of the deceased.
63. In any event, the witness added that she is seized of the requisite capacity/ Locus standi to maintain the suit.
64. Finally, the witness averred that the transfer and registration of the suit property to and in favor of the 1st and 2nd Defendant was neither undertaken by nor sanctioned by Wanjiku Njau, now deceased. For good measure, the Witness added that the impugned transfer was fraudulent and illegal.
65. With the foregoing testimony the Plaintiffs' case was closed.

b. The 2nd Defendant's Case:

66. The 2nd Defendant's case revolves around the Evidence of one witness, namely, Lucy Wanjiru Kiruhi. It was the testimony of the said witness [DW8] that same is the Legal administratrix of the Estate of Hannah Mukami Kiruhi, now deceased, who was the original 2nd Defendant in respect of the instant matter. Same testified as DW8.
67. Furthermore, the witness testified that same was conversant to and privy to the facts pertaining to the subject matter and in this respect, the witness adverted to the Witness statement dated the 9th June 2022; which statement was thereafter adopted and constituted as her [DW8], Evidence in chief.
68. Other than the foregoing, the witness also alluded to the various documents attached to the List and Bundle of documents which documents were thereafter admitted and constituted as Exhibits D1 to D17, respectively.
69. Other than the foregoing, it was the testimony of the 2nd Defendant that same was familiar with the 1st Defendant which was a Cooperative society[Society], ran and managed by members of her family.
70. Additionally, the witness herein testified that same was conversant with the facts pertaining to the purchase and acquisition of the suit property, which was transferred to and registered in the name of the 1st Defendant and thereafter transferred to and registered in the name of the 2nd Defendant, namely, Hannah Mukami Kiruhi.
71. It was the further testimony of the witness that same was aware that Hannah Mukami Kiruhi, now Deceased, sought for and obtained the requisite permission to subdivide the suit property into various plots and thereafter same sold and disposed of assorted Plots to and in favor of various Defendants.
72. Other than the foregoing, it was also the testimony of the witness that upon the death of Hanah Mukami Kiruhi, same (witness) procured and obtained Grant of Letters of administration and thereafter same sold assorted Plots to and in favor of the 9th and the 10th Defendant, respectively.
73. Other than the foregoing, it was the testimony of the witness [DW8], that Hannah Mukami Kiruhi, now Deceased, was the wife of Kiruhi Kimondo, now deceased.
74. Other than the foregoing, the witness herein adopted the contents of the witness statement dated the 9th June 2022; and which was duly constituted as her Evidence in chief. Besides, the witness also alluded to the List and bundle of documents dated the 12th July 2022, containing 29 documents and which the witness sought to adopt and produce before the Honourable court.
75. Suffice it to point out that the Documents at the foot of the List dated the 12th July 2022; were thereafter admitted and constituted as Exhibits D1 to D29, respectively.



76. On cross examination by Learned counsel for the 3rd to 7th Defendants, the witness herein averred that same is the lawful and Legal administratrix of the Estate of Hannah Mukami Kiruhi, now deceased.
77. Besides, the witness also averred that prior to and/or before the death of Hannah Mukami Kiruhi, now deceased, same had entered into and executed several sale agreements with various purchasers, some of whom have been sued as co-Defendants herein.
78. It was the further testimony of the witness that by the time Hannah Mukami Kiruhi, died same had been registered as the proprietor and/or owner of L.R No. 5964/1, [otherwise referred to as the suit property].
79. Whilst under further cross examination, the witness herein stated that same was conversant with a company known as Githurai Ting'ang'a Company Ltd. Furthermore, the witness stated that the said company had acquired a portion of the suit property measuring 7.5 acres of the suit property.
80. On the other hand, it was the testimony of the witness that other than the portion measuring 7.5 acres which was acquired by the said company, the remainder portion of the suit property belonged to and was registered in the name of Hannah Mukami Kiruhi, now deceased.
81. Whilst under further cross examination, the witness averred that by the time same (witness) was pointed as the Legal Administratrix of the Estate of the Deceased, there were portions of the suit property that had not been sold.
82. Additionally, it was the testimony of the witness that upon her appointment as the Legal administratrix of the Estate of Hanna Kiruhi, now Deceased, same sold various portions of what was hitherto the suit property to assorted purchasers and thereafter the various Plots which were sold were transferred and registered in the names of the purchasers.
83. On the other hand, it was the further testimony of the witness [DW8], that before same sold the various plots to the purchasers, the purchasers, carried out and/or undertook official searches at the Land Registry and that there was no encumbrance registered over and in respect of the suit property or at all.
84. It was the further testimony of the witness that same was never served with any court order to stop the sale. In any event, the witness added that same only got to know of the existence of the instant suit when she [witness] was informed by some of the purchasers about a caveat that had been registered against their titles.
85. Whilst under further cross examination, the witness herein stated that the people/purchasers who bought portions of the suit property obtained good titles over and in respect of their properties. At any rate, the witness added that the sale of the various Plots to the various purchasers were lawful and legitimate.
86. Other than the forgoing, it was the further testimony of the witness that the 3rd to 7th Defendants herein do not owe the Estate of Hannah Mukami Kiruhi, now deceased, any monies/debt on account of the Plots which were sold to them, namely, 3rd to 7th Defendants.
87. On cross examination by Learned counsel for the 8th to 12th Defendants, the witness herein admitted and acknowledged that same [DW8], was familiar to 8th to 12th Defendants. For good measure, the witness pointed out that the 8th to 12th Defendants are part of the purchasers who bought portions of the suit property from Hannah Mukami Kiruhi, now deceased and herself (witness).



88. Furthermore, the witness testified that same (witness) sold portions of the suit property to various Defendants, long after she procured and obtained certificate of confirmation of Grant. In any event, the witness added that upon the sale, (witness) was paid the entire purchase price.
89. Whilst under further cross examination, the witness herein stated that the true Legal Administrator of the Estate of Wanjiku Njau, now Deceased, are the 19th, 20th and 21st Defendants; and not the Plaintiffs herein.
90. In any event, the witness also stated that same (witness) is also aware that the administration of the Estate of Wanjiku Njau, now Deceased, is still the subject of pending court cases, with a view to ascertaining the true and Legitimate administrators.
91. Other than the foregoing, it was the testimony of the witness that same was privy to and or conversant with the various cases which had been filed by Wanjiku Njau, now deceased, against the 1st Defendant and Hannah Mukami Kiruhi. Nevertheless, the witness stated that most of the said cases were dismissed.
92. Furthermore, the witness averred that the title over and in respect of the suit property was surrendered to the Government with a view to facilitating the subdivision thereof. In any event, the witness added that thereafter the suit property was lawfully sub-divided into various Plots, which were sold to assorted purchaser, inter-alia, some of the Defendants herein.
93. Other than the foregoing, the witness herein pointed out that neither herself nor the Estate of Hannah Mukami Kiruhi, now deceased, is laying any claim against the 8th to 12th Defendants or at all.
94. On cross examination by Learned counsel for the Plaintiffs, the witness herein testified that same got know of the existence of the instant suit in the year 2011; when one of the purchasers complained to her concerning the registration of a caveat over a Plot that had been sold by the witness.
95. Additionally, the witness [DW8], averred that upon receipt of the compliant, same (witness) went to the Land Registry and procured a search, which confirmed the registration of a caveat over the title of the suit property.
96. It was the further testimony of the witness that upon confirming the existence of the caveat, same (witness) proceeded to and instructed an Advocate to deal with the issue pertaining to and concerning the registration of the caveat over the suit property.
97. Whilst under further cross examination, the witness [DW8], herein contended that same was appointed and constituted as the Legal Administratrix of the Estate of Hannah Mukami Kiruhi, now deceased, in the year 2005. Furthermore, the witness averred that same thereafter procured and obtained a Certificate of confirmation of Grant.
98. Be that as it may, the witness admitted that same has neither availed nor produced a copy of the Certificate of confirmed Grant before the Honourable court. Nevertheless, the witness contended that the Grant of Letters of administration in respect of the Estate of Hannah Mukami Kiruhi, now deceased, was confirmed in the year 2005.
99. On the other hand, it was the testimony of the witness [DW8], that the 1st Defendant herein was a Family Enterprise, which was owned and managed by the Kiruhi family. Further and in any event, the witness confirmed that Hannah Mukami Kiruhi, was part of the 1st Defendant society.
100. Whilst under further cross examination, the witness stated that the suit property was registered in the name of the 1st Defendant, before same was thereafter transferred and registered in favor of



Hannah Mukami Kiruhi , now deceased. Further and in addition, the witness acknowledged that the consideration for the transfer of the suit property from the 1st Defendant to Hannah Mukami Kiruhi, now deceased, is indicated to have been Kes.1, 500, 000/= only.

101. Other than the foregoing, it was also the testimony of the witness, that same (witness) was aware that there was a balance of the purchase price which was due and payable to Wanjiku Njau, now deceased.
102. Whilst under further cross examination, the witness herein contended that the Plaintiffs' herein are neither the lawful and legitimate administrators of the Estate of Wanjiku Njau, now Deceased, nor are same authorized under law to maintain the instant suit/ proceedings . Nevertheless, when pressed further, the witness herein admitted that same had no documents to show that the Plaintiffs' are not the legitimate administrators of the Estate of Wanjiku Njau, now Deceased.
103. It was the further testimony of the witness that the suit property was subdivided in the years 1990/1991, into two portions; and thereafter one portion was transferred to and registered in the name of M/s Githurai Ting'anga Company Ltd, pursuant to and in compliance with the Judgment of Court Appeal.
104. Furthermore, the witness stated that the remainder portion of the suit property was transferred and registered in the name of Hannah Murkami Kirui, now deceased, which was thereafter sub-divided into various Plots, that were ultimately sold to and in favor of the various Defendants.
105. Whilst under further cross examination, the witness admitted that there are various entries in the Certificate of title showing/reflecting court orders. Nevertheless, the witness added that there is also an entry speaking to the withdrawal of the various court orders.
106. Additionally, the witness averred that the withdrawal of the entries on the Certificate of title was by consent of the Parties. In any event, the witness added that the withdrawal was done in the year 1997.
107. Other than the foregoing, it was also the testimony of the witness [DW8], that there is a balance of the purchase price that remains due and owing to the Estate of Wanjiku Njau, now deceased.
108. On the other hand, the witness herein also stated that same was not privy to and/or aware of caveat Emptors, which were contained at the foot of the various Newspapers advertisement.
109. Be that as it may, the witness [DW8] added that when same became aware of the said Notices, she [Witness], instructed an Advocate to pursue the issue and take necessary actions/ measures.
110. With the foregoing testimony, the 2nd Defendant's case was duly closed.

c. The 3rd Defendant's Case:

111. The 3rd Defendant's case revolves and gravitates on the Evidence of one witness, namely, Beatrice Njeri Gachuki. For coherence, same testified as DW1.
112. It was the evidence of the witness herein that same entered into a sale agreement with one, Hannah Mukami Kiruhi, now deceased, pertaining to and concerning a portion of the suit property.
113. On the other hand, the witness herein [DW1], also adverted to a witness statement dated the 23rd February 2023; and which witness statement the witness sought to adopt and rely on as her Evidence in chief. In this respect, the witness statement dated the 23rd February 2022; was thereafter admitted and constituted as the Evidence in chief of the witness.



114. Other than the foregoing, the witness also alluded to a List and Bundle of documents dated the 23rd February 2022, containing three [3] documents. For coherence, the witness thereafter sought to adduce and tender evidence the various documents as part of her Exhibits.
115. Suffice it to point out that the documents at the foot of the List dated the 23rd February 2022; were thereafter marked as Exhibits D1 to D3 on behalf of the 3rd Defendant.
116. Other than the foregoing, the witness also alluded to the Statement of Defense and Counterclaim dated 23RD day of February 2022; and sought to adopt and rely on the contents thereof.
117. On cross examination by Learned counsel for the Plaintiffs, the witness herein stated that same bought her Plot in the year 2007. However, the witness added that the transaction over and in respect of the plot in question was finalized in the year 2009.
118. Whilst under further cross examination, the witness averred that same was ultimately issued with a Certificate of lease relating to and in respect of the Plot bought and/or purchased by herself.
119. Other than the foregoing, it was the testimony of the witness that same bought her plot from one Lucy Wanjiru Kiruhi, [DW8], who was the Legal administratrix of the Estate of Hannah Mukami Kiruhi, now Deceased. In any event, the witness added that prior to and before entering into the sale agreement, same carried out and undertook due diligence over and in respect of the plot in question.
120. It was the testimony of the witness that towards and in respect of the due diligence, same bought an official search as well as the Registry Index Map. Nevertheless, the witness admitted that she [DW1], has neither tendered nor produced a copy of the documents alluded to.
121. Other than the foregoing, the witness herein also averred that after the plot was transferred and registered in her name, she sought for and obtained Development approval and thereafter commenced construction of the named plot
122. Furthermore, the witness testified that she commenced the Building on her Plot in the year 2009 and completed the construction in the year 2011.
123. Whilst under further cross examination, the witness [DW8] testified that she procured and obtained a loan facility using the Certificate of title in respect of her Plot and that the entry relating to the charge was duly endorsed and entered against her Certificate of title.
124. On the other hand, the witness [DW1], also averred that same did not acquire the transfer in respect of the property by fraud or at all.
125. With the foregoing testimony, the 3rd Defendant's case was closed.

d. The 5th Defendant's Case:

126. The 5th Defendant's case similarly revolves around the Evidence of one [1] witness, namely, Susan Mugure Njuguna. Same testified as DW2.
127. It was the evidence of the witness that same is the 5th Defendant herein and that by virtue of being the 5th Defendant, same is conversant with the facts of this case.
128. Furthermore, the witness [DW2], also alluded to the witness statement dated the 8th March 2022; and thereafter sought to adopt and rely on the contents of the witness statement.
129. Pursuant to and at the instance of the witness, the witness statement dated the 8th March 2022; was duly admitted and constituted as the Evidence- in- chief of the Witness.



130. Other than the foregoing, the witness [DW2], also adverted to a List and bundle of documents dated the 8th March 2022, containing three [3] sets of documents. In this respect, the witness sought to adopt and rely on the named documents as part of her Evidence before the Honourable court.
131. Suffice it to point out that the documents at the foot of the List of documents dated the 8th March 2022; were thereafter admitted and marked as Exhibits D4 to D6, respectively, on behalf of the 5th Defendant.
132. Furthermore, the witness alluded to the Statement of Defense and Counterclaim dated the 8th March 2022; and similarly, sought to adopt and rely on the contents thereof.
133. On cross examination by Learned counsel for the Plaintiff, the witness pointed out that same bought/purchased her property in the year 2011. Besides, the witness added that thereafter the property was transferred and registered in her name on the 27th June 2011.
134. Whilst under further cross examination, the witness averred that same bought the property from a Company and not from the 2nd Defendant herein.
135. Furthermore, the witness stated that though same bought the property from a Company known as M/s Chesko Ltd, the property was however, transferred unto her (witness) by Hannah Mukami Kiruhi, now Deceased.
136. On the other hand, the witness testified that prior to purchasing her property, same carried out and undertook a search over the property and that there was no caveat and/or encumbrance by the time of the sale.
137. Other than the foregoing, the witness also testified that upon the purchase and acquisition of the suit property, same [DW2], commenced to and constructed a building on the suit property.
138. On the other hand, it was also the testimony of the witness that same also applied for and obtained a Loan facility using the title of the property in question.
139. With the foregoing testimony, the 5th Defendant's case was duly closed.

e. The 6th Defendant's Case

140. The 6th Defendant's case revolves around the Evidence of one witness, namely, James Njoroge Mwangi. Same testified as DW3.
141. It was the testimony of the witness [DW3], that same is privy to and conversant with the facts pertaining to and in respect of the subject suit.
142. Furthermore, the witness averred that over and in respect of the subject matter, same has since recorded a witness statement dated the 21st February 2022. In any event, the witness sought to adopt and rely on the said witness statement as his Evidence in chief.
143. Pursuant to and at the instance of the witness, the witness statement dated the 21st February 2022; was duly admitted and constituted as the Evidence in chief of the witness.
144. Additionally, the witness alluded to the List and Bundle of documents dated the 23rd February 2023, containing two [2] documents and thereafter sought to adopt and to rely on the named documents as further evidence on behalf of his case.
145. Suffice it to point out that the documents at the foot of the List of Documents dated the 23rd February 2022; were thereafter admitted and marked as Exhibits D7 to D8, respectively, on behalf of the 6th Defendant.



146. Other than the foregoing, it was the testimony of the witness [dw3], that same bought and acquired his property in the year 2008 and thereafter same was transferred and registered in his name.
147. Additionally, it was the testimony of the witness that at the time when he [Witness], bought/purchase the property, there was no encumbrance and/or endorsement of a court order on the Register of suit property.
148. Furthermore, it was the testimony of the witness that upon the transfer of registration of the suit property in his name, same commenced and constructed a six [6], storey building thereon.
149. On cross examination, by Learned counsel for the Plaintiffs, the witness herein confirmed that same is the lawful owner and proprietor of the property known as L.R No. 22926/11.
150. On the other hand, it was the testimony of the witness that the property in question was transferred and registered in his name on the 12th August 2008. Furthermore, it was the testimony of the witness that same bought and acquired the suit property from Lucy Wanjiru Kiruhi [DW8], who effected the transfer and registration of the property unto him (witness).
151. Other than the foregoing, it was the testimony of the witness that upon acquisition of the suit property same erected and/or constructed a building thereon, which building is complete.
152. With the foregoing testimony, the 6th Defendant's case was duly closed.

f. 8th Defendant's Case:

153. The 8th Defendant's case revolved around the Evidence of one witness, namely, Venesio Mbataru Kariuki. For coherence, same testified as DW4.
154. It was the testimony of the witness that same is conversant with the facts of the instant matter and further that same has since recorded a witness statement dated the 13th May 2022. Furthermore, the witness thereafter sought to adopt and rely on the contents of the witness statement.
155. Suffice it to point out that the witness statement was thereafter adopted and constituted as the Evidence in chief of the witness.
156. Additionally, the witness also adverted to a List and Bundle of documents dated the 13th May 2022, containing 37 documents and which the witness sought to adopt and to rely on as further Evidence on his behalf.
157. Instructively, the documents at the foot of the List and Bundle of documents dated the 13th May 2022; were thereafter admitted and marked as Defense Exhibits D9 to D46, respectively, on behalf of the 8th Defendant.
158. Besides, the witness also alluded to the Statement of Defense and Counterclaim dated the 12th April 2022 and thereafter sought to adopt and rely on the contents thereon.
159. Other than the foregoing, it was the testimony of the witness that same bought and acquired three [3] different Plot(s) and which Plots are, namely, L.R No's 22925/130, 22925/131 and 22925/133, respectively and thereafter the plots in question were amalgamated and became one property.
160. It was the further testimony of the witness that upon the acquisition of his properties, same sought for and obtained change of user from residential to commercial and thereafter proceeded to and constructed a Petrol station, which Petrol station was operationalized/commissioned in the year 2003.



161. On cross examination by Learned Counsel for the Plaintiffs', the witness pointed out that the Sale agreement in respect of L.R No. 22925/130, was entered into on the 28th November 2009. Further, the witness added that the sale agreement was duly signed by Hannah Mukami Kiruhi.
162. In respect of L.R No. 22925/131, the witness testified that the transfer was carried out and/or undertaken by his advocates, namely, Mr. Otieno Okeyo Advocate.
163. Other than the foregoing, the witness testified that upon the transfer and registration of the suit property in his name, same commenced to and undertook assorted constructions, inter-alia, the constructions of Flats/Apartments and a Petrol station, which the witness confirms are complete and operationalized.
164. On further cross examination, the witness also stated that his property falls within the properties that were listed/captured in the caveat Emptor. In addition, the witness averred that the caveat Emptor is dated the 28th November 2000.
165. Whilst under further cross examination, the witness testified that there were no Caveat Emptors at the Land Registry at the time when same purchased and acquired the title to his name. Furthermore, the witness also pointed out that same was neither privy to nor aware of any court order restraining the transfer and registration of the properties in his name.
166. Finally, the witness herein averred that same was neither served with nor notified of the existence of any court orders during the time when same was constructing on his property, or at all.
167. With the foregoing testimony, the 8th Defendant's case was duly closed.

g. The 9th Defendant's Case:

168. The 9th Defendant's case similarly revolves of one witness, namely, Michael Mbira Ngigi. For coherence, same testified as DW5.
169. It was the testimony of the witness that same is privy to and conversant with the facts of the instant matter. Furthermore, the witness also averred that as pertains to the instant matter, same has recorded and filed a witness statement dated the 13th May 2023, which the witness thereafter sought to adopt and rely on as his Evidence in chief.
170. Pursuant to and at the instance of the witness, the witness statement dated the 13th May 2023; was thereafter adopted and admitted as the Evidence- in- chief for and on behalf of the Witness herein.
171. Other than the foregoing, the witness [DW5], also adverted to the List and Bundle of documents dated the 13th May 2022; and same sought to adopt and rely on the various documents alluded thereto. Instructively, the documents at the foot of the List of documents under reference were thereafter admitted and constituted as Exhibits on behalf of the 9th Defendant.
172. Additionally, the witness also alluded to the Statement of Defense and counterclaim dated the 12th April 2022; and sought to adopt and rely on the contents thereof, together with the relief(s) sought thereunder.
173. On cross examination by Learned counsel for the Plaintiffs', the witness pointed out that his property is L.R No. 22925/116. Furthermore, the witness added that same bought the named property in the year 2004.
174. Whilst under further cross examination, the witness pointed out that at the time when same bought and acquired the named property, same (witness) was not privy to or knowledgeable of the owner of the



property in question. Nevertheless, the witness added that the transaction pertaining to the purchase, acquisition and registration of the name property was undertaken through his transaction advocate, namely, M/s Otieno Okeyo & Company Advocates.

175. Other than the foregoing, the witness [DW5], testified that prior to and before the purchase of the said property, a search was carried out and/or undertaken by his transaction advocates and it transpired that the property was devoid of any incumbrance or restriction .
176. Additionally, the witness testified that after the acquisition and registration of the named property, same (witness) procured and obtained Development Approvals and thereafter commenced to and constructed a storey building thereon. In this respect, the witness [DW5], added that the construction on the suit property was completed and that same is under occupation.
177. On the other hand, upon being referred to Exhibit P21, the witness admits that in the year 2004; when he [DW5], bought and acquired his property there was already a caveat Emptor that was registered on the Certificate of title in respect of the suit property. Further and in addition, the witness acknowledged that indeed the details of the named property are contained and reflected at the foot of the Caveat Emptor.
178. On cross examination by Learned Counsel for the 2nd, 13th to 22nd Defendants, the witness herein [DW5], clarified that at the time when same bought his property, there was no court case. Besides, the witness also stated that there was no court order to stop the sale and or transfer in respect of the property.
179. Additionally, it was the testimony of the witness that after same bought and acquired his property, same commenced to construct thereon and that the building under reference was completed.
180. On cross examination by Learned counsel for the 3rd to 7th Defendants, the witness herein pointed out that though same has been shown a copy of the Newspaper cutting, the title number of his plot is neither captured nor reflected in the Newspaper cutting.
181. With the foregoing testimony, the case for the 9th Defendant was duly closed.

h. The 10th Defendant's Case:

182. The 10th Defendant's case similarly revolves around one witness, namely, Francis Kariuki Macharia. Same testified as DW6.
183. It was the testimony of the witness that same is conversant with the facts of the instant matter and that furthermore, same has since recorded a witness statement dated the 13th May 2022. In this respect, the witness thereafter sought to adopt and rely on the contents of the witness statement.
184. Pursuant to and at the request of the witness, the witness statement dated the 13th May 2022; was duly adopted and admitted as the Evidence- in chief of the witness.
185. Other than the foregoing, the witness also alluded to the List and Bundle of documents dated the 13th May 2022; containing assorted documents, which the witness sought to adopt and to rely on as Further Evidence in support of his (witness) case.
186. Suffice it to point out that the various documents at the foot of the List of documents dated the 13th May 2022; were thereafter adopted and admitted as Exhibits for and on behalf of the 10th Defendant.



187. On the other hand, the witness also adverted to the Statement of Defense and Counterclaim dated the 12th April 2022; and thereafter sought to adopt and to rely on the contents thereon, together with the reliefs sought thereunder.
188. On cross examination by Learned counsel for the Plaintiffs, the witness herein averred that same started the process of purchasing/acquiring the named property in the year 2001. Furthermore, the witness added that the process towards the purchase and acquisition of the property was being carried out through the transaction advocates, namely, M/s Otieno Okeyo & Company Advocates.
189. Whilst under further cross examination, the witness stated that the transfer in respect of his property was executed by Hannah Mukami Kiruhi, now Deceased. Further and in any event, the witness added that the purchase price at the foot of the property was Kes.530, 000/= only.
190. Other than the foregoing, the witness herein testified that upon acquisition of the property, namely, L.R No. 22925/18, same sought for and obtained Development approvals and thereafter commenced to and constructed a building thereon. Furthermore, the witness added that the building which was constructed on the named property was completed and is currently under occupation.
191. On cross examination by Learned counsel for the 2nd, 13th to 22nd Defendants, the witness herein averred that at the time when same bought and acquired the property namely, L.R No. 22925/18, there was no court order that was registered over and in respect of the certificate of title of the suit property.
192. Other than the foregoing, the witness averred that same paid the entire purchase price and was thereafter placed in occupation of the designated plot/property by the vendor.
193. At any rate, it was the further testimony of the witness that upon the acquisition of the property in question, same entered upon, took possession and constructed an apartment thereon.
194. On cross examination by Learned counsel for the 3rd to 7th Defendants, the witness herein averred that the tile number, namely, L.R No. 22925/118, is neither captured nor reflected in the Caveat Emptor, which was shown unto him by Learned counsel for the Plaintiffs.
195. Furthermore, the witness added that the title number of his property, namely 22925/118, does not appear in the Caveat Emptor. In any event, the witness averred that same was neither aware nor informed of the existence of the Caveat Emptor.
196. With the foregoing testimony, the 10th Defendant's case was closed.

i. The 12th Defendant's Case:

197. The 12th Defendant's case similarly gravitates and revolves around the Evidence of one witness, namely, Sammy Thumbi Nyambare. Same testified as DW7.
198. It was the testimony of the witness that same is a retired Public Servant and currently a Farmer. In any event, the witness added that same is conversant with the facts of the instant case.
199. Furthermore, the witness averred that same has since recorded a witness statement dated the 13th May 2022; and which witness statement, same (witness) sought to adopt and rely on as his Evidence in chief. For good measure, the witness statement under reference was thereafter adopted and admitted as the Evidence in chief on behalf of the witness herein.
200. Other than the foregoing, the witness also alluded to the List and bundle of documents dated the 13th May 2022, containing four [4] documents and thereafter same sought to adopt and rely on and to produce the various documents as Exhibits before the Honourable court.



201. Pursuant to and at the instance of the witness, the documents at the foot of the List dated the 13th May 2022; were thereafter admitted and constituted as Exhibits on behalf of the named witness.
202. On the other hand, the witness also adverted to the Statement of Defense and Counterclaim dated the 12th April 2022; and sought to adopt and rely to the contents thereof, together with the reliefs sought thereunder;
203. On cross examination by Learned counsel for the Plaintiffs, the witness averred that same bought and acquired two [2] properties, namely, L.R No's 22925/144 and 22925/149, respectively. Furthermore, the witness also averred that same bought and acquired the named properties around the years 2009/2010.
204. Whilst under further cross examination the witness testified that same bought and acquired the named properties through his transaction advocates, namely, M/s Otieno Okeyo & Co Advocates. Further and in any event, the witness averred that same bought the property at Kes.1, 200, 000/= only.
205. On cross examination by Learned counsel for the 2nd, 13th to the 22nd Defendants, the witness stated that same bought and acquired the named properties through the transaction advocate. In any event, the witness also averred that at the time when same bought and acquired the named properties there was no caveat and/or restriction, registered over the suit property.
206. With the foregoing testimony the 12th Defendant's case was duly closed.

j. The 20th Defendant's Case

207. The 20th Defendant's case revolves and gravitates upon the Evidence of one witness, namely, Cecilia Nduruka Njau. Same testified as DW9.
208. It was the testimony of the witness [DW9], that same is knowledgeable of and conversant with the facts of the instant matter. Furthermore, the witness added that same is also conversant with one Wanjiku Njau, now deceased, who was hitherto the registered proprietor of the suit property.
209. On the other hand, the witness has averred that same has since recorded and filed a Replying affidavit sworn on the 29th November 2021; and whose contents same (witness) has sought to adopt and rely on as her Evidence in chief.
210. Pursuant to and at the instance of the witness, the contents of the Replying affidavit sworn on the 29th November 2021; were admitted and constituted as the Evidence in chief for and on behalf of the witness [DW9].
211. On cross examination by Learned counsel for the 3rd to 7th Defendants, the witness herein stated that same is a sister of Wanjiku Njau, now deceased. Besides, the witness added that by virtue of being a sister to Wanjiku Njau, now Deceased, same is therefore conversant with the facts of the instant matter.
212. Other than the foregoing, the witness [DW9], averred that same is privy to the fact that the suit property, which hitherto belong to Wanjiku Njau, now deceased, was sold to various persons.
213. Whilst under further cross examination, the witness testified that the Plaintiffs' herein are not part of the family of Kimumu Njau, now deceased. In this regard, the witness averred that the Plaintiffs herein ought not to be the administrators of the Estate of Wanjiku Njau.
214. Whilst under further cross examination, the witness [DW9], averred that same is privy to and knowledgeable with the fact that the suit property was sold to Kiruhi Kimondo, now deceased.



However, the witness added that same is aware that Wanjiku Njau, now Deceased, was not paid the entire purchase price.

215. On cross examination by Learned counsel for the 8th to 12th Defendants, the witness herein averred that same (witness) has gone to court to seek for the cancelation of the Grant of Letters of administration which was issued in favor of the Plaintiffs herein.
216. On cross examination by Learned counsel for the Plaintiffs, the witness [DW9], averred that the Grant of letters of administration in respect of the Estate of Wanjiku Njau was issued to and in favor of the Plaintiffs.
217. Other than the foregoing, the witness [DW9], averred that same was aware that the suit property was sold to Kiruhi Kimondo, now deceased.
218. With the foregoing testimony, the 20th Defendant's case was duly closed.

k. The 21st Defendant's Case:

219. The 21st Defendant's case similarly revolves around the testimony of one witness, namely, Richard Gichini Njoroge. Same testified as DW10.
220. It is the testimony of the witness that same was hitherto a Civil servant, but now retired. Furthermore, the witness stated that same is conversant with the facts of this matter and furthermore, that same has since recorded/ Sworn a Replying affidavit, pertaining to and concerning the facts of the instant case.
221. On the other hand, the witness thereafter sought to adopt and rely on the contents of the Replying affidavit sworn on the 23rd November 2021; and which Replying affidavit was thereafter constituted and admitted as the Evidence- in chief of the witness.
222. On cross examination by Learned counsel for the 3rd to 7th Defendants, the witness herein [DW10], averred that same attended a meeting at the home of Wanjiku Njau, now deceased wherein an agreement was made that the balance of the purchase price which was outstanding was to be paid to the 19th, 20th and 21st Defendants herein.
223. It was the further testimony of the witness that the balance of the purchase price was never to be paid to and or in favor of the Plaintiffs herein.
224. With the foregoing testimony, the 21st Defendant's case was duly closed.
225. Other than the foregoing, Learned counsel for the 2nd, 13th to the 22nd Defendants also proceeded to and closed the Defense case for and on behalf of the named Defendants.

The Parties Submissions:

226. At the close of the Defense case, the advocates for the respective Parties covenanted to file and exchange written submissions. Consequently, the Honourable court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
227. Pursuant to and in compliance with the directions of the court, Learned counsel for the Plaintiffs' proceeded to and filed two [2] sets of written submissions. For coherence, both submissions are dated the 25th October 2023.
228. Nevertheless and for good measure, the latter set of written submissions is titled as the Plaintiff's Supplementary written submissions. Further, same are contended to be filed in response to the submissions filed by and on behalf of the Defendants.



229. On the other hand, the 2nd, 13th to the 22nd Defendants filed written submission dated the 5th November 2023; and in respect of which same, have raised and highlighted eight [8] pertinent issues for consideration by the Honourable court.
230. On behalf of the 3rd to 7th Defendants, the written submissions are dated the 14th November 2023; and similarly the same has highlighted/ amplified a total of eight [8] salient issues for consideration and determination by the Honourable court.
231. On the part of the 8th to 12th Defendants, the written submissions are dated the 14th November 2023; and same have enumerated/ highlighted six [6] issues for consideration and determination by the Honourable court.
232. Suffice it to point out that the various sets of written submissions, [whose details have been alluded to in the preceding paragraphs], form part of the record of the Honourable court. Consequently, same shall be taken into account whilst crafting the instant Judgment.
233. Be that as it may, even though I have not reproduced and/or rehashed the written submission filed by and on behalf of the Parties, it is appropriate to underscore that the advocates for the respective Parties filed elaborate and comprehensive submissions and similarly cited and a plethora of decisions in support of their respective positions.
234. Owing to the comprehensive nature of the written submissions filed by and on behalf of the respective Parties, it is appropriate to acknowledge and appreciate the depth of the research put into the written submissions filed before the Honourable court.

Issues for Determination:

235. Having reviewed the pleadings filed by and on behalf of the respective Parties and upon taking into account the Evidence tendered [both oral and documentary], and upon consideration of the written submissions filed by and on behalf of the Parties, the following issues do emerge and are thus worthy of determination;
- i. Whether the Further amended Originating Summons dated the 4th February 2022; is competent and legitimate, taking into account the causes of action being propagated thereunder.
 - ii. Whether the suit beforehand, [which revolves around fraud and forgery], was time barred by the time same was commenced and/or filed by the Plaintiffs.
 - iii. Whether the Plaintiffs herein have in any event established, demonstrated and proved the cause of action of fraud/ Forgery (sic) to the requisite standard or otherwise.
 - iv. Whether the Defendants and in particular, the 3rd to 18th and 22nd Defendants are bona-fide Purchasers' for value without notice or otherwise.
 - v. What Reliefs, if any, ought to be granted.



Analysis and Determination

Issue Number 1

Whether the Further amended Originating Summons dated the 4th February 2022; is competent and legitimate, taking into account the causes of action being propagated thereunder.

236. Before venturing to analyze the issue herein before mentioned, it is worthy to observe and underscore that the dispute beforehand touches on and or concerns the manner in which L.R No. 5964/1 (hereinafter referred to as the suit property) was transferred to and registered in the name of the 1st Defendant, before same was thereafter transferred to and in favor of one Hannah Mukami Kiruhi, now deceased.
237. Furthermore, it is common ground that prior to the impugned transfer and registration of the suit property in favor of the 1st Defendant, the suit property herein belonged to and was registered in the name of Wanjiku Njau, now deceased, and whose Estate is represented by the Plaintiffs herein.
238. Other than the foregoing, there is also no gainsaying that Wanjiku Njau, now deceased was desirous to sell and dispose of the suit property and in this respect, same entered into and executed a sale agreement in the year 1989. For good measure, the sale agreement was duly executed by both Wanjiku Njau, now Deceased, and a representative of the 1st Defendant society, respectively.
239. Furthermore, it was also contended that pursuant to and upon the execution of the Sale agreement Wanjiku Njau, now Deceased, was paid a deposit of Kes.237, 500/= only, representing 10% [percentage], of the purchase price and thereafter the remainder sum was to be paid to and in favor of the vendor in accordance with the terms of the sale agreement.
240. Be that as it may, it was contended that the title over and in respect of the suit property was subsequently transferred to and registered in the name of the 1st Defendant albeit prior to and before the payment of the entire purchase price. For coherence, it is the transfer and registration of the suit property in favor of the 1st Defendant herein prior to and or before the payment of the purchase price, which is the subject of the instant matter.
241. Suffice it to point out that the Plaintiffs' have contended that the impugned transfer to and in favor of the 1st Defendant herein and the subsequent transfer by the 1st Defendant to the 2nd Defendant, was informed by fraud and breach of contract.
242. Pertinently, it is the Plaintiffs' case that the transfer and registration of the suit property in favor of the 1st Defendant was neither sanctioned nor authorized by Wanjiku Njau, now deceased.
243. In any event, the Plaintiffs' have further averred that upon the discovery of the transfer and registration of the suit property in favor of the 1st Defendant without her involvement, Wanjiku Njau, now deceased proceeded to and filed two suits, namely, Nairobi HCC No. 3973 of 1991 and 3868 of 1992, respectively, wherein same (Wanjiku Njau, now deceased) sought to invalidate the transactions touching on and/or concerning the transfer of the suit property in favor of the 1st and 2nd Defendants respectively.
244. From the foregoing, it is evident and apparent that the cause of action at the foot of the instant matter touches on and concerns fraud.
245. Other than the foregoing, the Plaintiffs' have also adverted to and espoused a cause of action pertaining to and concerning breach of contract, insofar as it is contended that the transfer and registration of the



suit property in favor of the 1st Defendant, was undertaken prior to and before the fulfilment of the contractual obligations at the foot of the sale agreement.

246. At any rate, it is not lost on this Honourable court that part of the reliefs and questions to be determined, [which have been espoused at the foot the further amended originating summons], advert to and concern whether the transfer complained of was fraudulent; and whether the 1st Defendant breached the terms of the sale agreement.
247. Arising from the foregoing, it is therefore common ground that the primary causes of action being ventilated at the foot of the Further amended originating summons touched on and/or concerned fraud, fraudulent transaction and breach of contract.
248. Owing to the foregoing, the question that does arise and which is worthy of determination; is whether or not the kind of causes of actions, which have been adverted to at the foot of the Further amended originating summons, can be canvassed by way of an Originating summons or otherwise.
249. To start with, it is important to underscore that Originating summons is a mechanism and/or process which is established for the purposes of ventilating and/or adjudicating upon questions of fact and law which are neither complex nor disputed. For coherence, originating summons is a process that cannot be invoked and adverted to where the issues in controversy are complex and convoluted; and thus require serious interrogation and investigations through the process of adduction of Evidence in chief and cross examination.
250. To this end, it is important to point out that the circumstance where originating summons can be invoked and be applied are indeed provided for and circumscribed under the law. Instructively, the provisions of Order 37 Rule 1 of the Civil Procedure Rules 2010, [formerly Order XXXVI of the Civil Procedure Rules, now repelled]), explicitly captured the kind of causes of actions and reliefs that could be ventilated vide Originating summons.
251. Other than the foregoing, it is also imperative to underscore that where the provisions of the law have not explicitly prescribed the mode and mechanism for approaching the Jurisdiction of a court, then it behooves the Claimant, the Plaintiff herein not excepted, to abide by and/or comply with the provisions of Order 3 Rule 2 of the Civil Procedure Rules, 2010.
252. For good measure, it is instructive to reproduce the provisions of Order 3 Rule 2 of the Civil Procedure Rules, 2010.
253. Same are reproduced as hereunder

[Order 3, rule 1] Commencement of suit and case track allocation.

1.

- (1) Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed,

SUBPARA (2)

The claim shall indicate at the heading the choice of track; namely “small claims”, “fast track” or “multi-track”.

254. Similarly, it is also important to advert to the provisions of Section 19 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, which essentially also bespeaks the position that suits ought to be filed/ commenced in the manner prescribed under the law.



255. For brevity, the provisions of Section 19 (supra) are reproduced as hereunder;

19. Institution of suits

Every suit shall be instituted in such manner as may be prescribed by rules.

256. Pertinently, the provisions of the Civil Procedure Act and the Rules made thereunder, [whose details have been highlighted in the preceding paragraphs], underscore that it is imperative and peremptory that suits before the courts of law, the instant suit not excepted, must be filed in accordance with the Rules.

257. At any rate, an argument may arise and indeed, often do arise, that the mechanism and/or vehicle utilized and/ or applied in approaching the Jurisdiction of a court relates to procedure and not otherwise; and hence, where the incorrect mechanism is applied, the courts of law ought to excuse same, on account of the provisions of Article 159(2)(d) of the Constitution 2010.

258. Nevertheless, it is worth pointing out that the mechanism that is adopted and applied in approaching the Jurisdiction of the court is not a procedural issue but a substantive one, which essentially goes to the root of the Jurisdiction of the court and hence where inappropriate mechanism is deployed, the entire process is negated and invalidated.

259. To buttress the foregoing exposition of the law, it suffices to adopt and reiterate the ratio decidendi espoused by the Court of Appeal in the case of Scope Telematics International Sales Limited versus Stoic Company Limited & another [2017] eKLR, where the court held and observed as hereunder;

“The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, in overlooking a statutory imperative and the above authorities, the learned Judge cannot be said to have exercised his discretion properly. There can be no other interpretation of Rule 2. The application should have been anchored on a suit. It was not about what prejudice the appellant or and 2nd respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective.

260. Back to circumstances where Originating summons can be invoked and deployed in approaching the Jurisdiction of the court. Suffice it to point out that elsewhere hereinbefore, this court has espoused a position that Originating summons cannot be deployed where the facts in controversy are complex and convoluted.

261. In this respect, it is worthy to recall that there are a plethora of decisions of the Court of Appeal, which underscore the limited and circumscribed circumstances/scenario where Originating summons can be utilized, or deployed.

262. Firstly, the circumstances where Originating summons cannot be applied were adverted to, highlighted and elaborated upon in the case of Kenya Commercial Bank Ltd vs Osebe (1982)eKLR, where the court stated and held thus;

“And I would also refer to the following passage from a judgment of my own in Salehmohamed Mohamed v PH Saldanha (3), Kenya Supreme Court (Mombasa) Civil Case



No 243 of 1953, (unreported), where the scope and general purpose of procedure by way of originating summons were being considered:

“Such procedure is primarily designed for the summary and ‘Ad hoc’ determination of points of law or construction or of certain questions of fact, or for the obtaining of specific directions of the court, such as trustees, administrators, or (as here) the Courts’ own execution officers. That dispatch is an object of the proceedings is shown by Order XXXVI, which provides that they shall be listed as soon as possible and be heard in chambers unless adjourned by a judge into a court.”

Even clearer is the statement he quoted from Newbold JA’s judgment in *Bhari v Khan* [1965] EA at p 101.

Moreover, strange results would follow if a judge were free to determine issues not properly before him, see Newbold JA (as he then was) in *Bhari v Khan* at page 105 letters B to C and Duffus JA at page 108 letter D. Moreover, the originating summons procedure is not for the purpose of obtaining decisions on disputed questions of fact - see *Re Sutcliffe* [1942] 1 Ch at 455 per Bennett J followed by Madan J in *Official Receiver v Sukhdev* [1970] EA at p 248.

263. Furthermore, the position adverted to in the decision highlighted in the preceding paragraph was revisited and amplified by the Court of Appeal in the case of *Kibutiri versus Kibutiri* [1983] eKLR, where the court held thus;

“It must have been obvious at an early stage that the dispute between the parties could not be resolved on an originating summons. One or other of the advocates involved, or both of them, should have invited the judge to refuse to pass any order on the summons, under rule 10 of order XXXVI, and to refer the parties to a suit in the ordinary course. I would order that the parties bear their own costs of the proceedings in the High Court.”

264. The Honourable Court further proceeded and stated as hereunder;

“To summarize, I would allow this appeal, and leave the parties to bear their own costs both in this court and in the High Court. Finally, I would like to advise judges who have to deal with an originating summons to consider the judgments of this court in *Kenya Commercial Bank Ltd v James Osebe* (Civil Appeal No 60 of 1982) and in particular the judgment of Hancox Ag JA in which the law and practice relating to originating summonses, and their scope, are extensively reviewed. Potter JA. I fully agree with the judgment of Law JA, which I have had the advantage of reading in draft, and I concur in the orders proposed by him.”

265. Other than the foregoing, it is also worthy to recall the position that was espoused by the Court of Appeal in the case of *John W Wepukhulu versus Secretary, Board of Governors, Buru Buru Secondary School* [2005] eKLR, where the court held and stated as hereunder;

The procedure of Originating Summons is designed for the summary or ad hoc determination of points of law, construction of certain specific facts or obtaining of specific directions of the court such as trustees, administrators or the courts execution officers. The procedure should not be used for the determination of matters that involve a serious question or determination of disputed questions of fact.

See *Kenya Commercial Bank LTD Vs. Osebe* [1982] KLR 296. What happened in the trial court is that the issues of fact were fully determined by way of trial by production of



oral evidence. Though no objection was raised as to the appropriateness of the Originating Summons before the trial commenced or at the first instance, the fact remains that the dispute before the learned Judge was outside the ambit of the Originating Summons and the procedure was wrong. There was no point, therefore, for the learned Judge to allow the parties to waste their time and canvass their dispute through a faulty procedure he disapproved of. However, we agree with the learned Judge that the dispute between the parties herein could not appropriately be determined by way of an Originating Summons.

266. Most recently, the appropriateness or otherwise of Originating summons in canvassing/ ventilating dispute involving complex and convoluted issues of facts and law, was re-visited by the Court of Appeal in the case of Muchanga Investments LTD versus Safaris Unlimited (africa) LTD & 2 others [2009] eKLR, where the court stated and observed as hereunder;

“From the foregoing, it is clear to us that the Originating summons was not properly grounded in law, taking into account documentary evidence before the Court. Again with respect, there was nothing for the superior court to defer for determination at a future date and we think in the circumstances, it did exercise its discretion wrongly. A court of law would not be entitled in our view to abdicate its cardinal role of making a determination.”

267. Additionally, the Court ventured forward and reiterated the hackneyed legal position by stating thus;

“This Court, in the case of Mucheru V Mucheru [2002] 2 EA 455 held that the procedure of Originating Summons is intended to enable simple matters to be dealt with in a quick and summary manner. Surely an inquiry of rights pertaining to caveat is not a complicated matter. This Court has also in a stream of authorities, approved Sir Ralph Windham CJ’s holding in Saleh Mohammed Mohamed V Ph Saldanha 3 Kenya Supreme Court (Mombasa) Civil Case Number 243 of 1953 (UR) where his Lordship said:-

“Such procedure is primarily designed for the summary and “ad hoc” determination of points of law construction or of certain questions of fact, or for the obtaining of specific directions of the court such as trustee administrators, or (as here) the courts own executive officer. That dispatch is an object of the proceedings is shown by Order XXXVI, which provides that they shall be listed as soon as possible and be heard in chambers unless adjourned by a judge into court.”

268. Arising from the foregoing position, there is no gainsaying that Originating summons, is a process and a procedure that can only be invoked and deployed in circumscribed circumstances and not otherwise.

269. Further and in addition, it is also not lost on this Honourable court that prior to and before invoking and deploying originating summons as the requisite vehicle for approaching the Jurisdiction of the court, it behooves the Claimant to discern and decipher the nature reliefs that are intended to be sought at the foot of (sic) the originating summons, the volume of documents to be relied upon and the complexity of the issues to be canvassed before court.

270. Before departing from the issue herein, there are two [2] aspects that deserve mentions and a short discourse. Firstly, it is worthy to recall that there has been a growing tendency by litigant(s) and Legal counsel alike, that the Rules of procedure, including the ones that regulate the mechanism of approaching the court, must not be complied with and/or adhered to, simply because of the import and tenor of the provisions of Article 159(2)(d) of *the Constitution* 2010.



271. Nevertheless, my short answer to the contention that the Rules of procedure can now be disregarded with abandon is discernable from the holding of the Court of Appeal in the case of *Kakutia Maimai Hamisi versus Peris Pesi Tobiko & Others* (2013) eKLR, where the court held thus;

“A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of *Mumo Matemu vs. Trusted Society Of Human Rights Alliance & 5 Others* Civil Appeal No. 290 of 2012 as follows;

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases.”

272. Similarly, the Supreme Court of Kenya has also had an occasion to speak to a situation where the procedure is intertwined with the substance of subject matter and by extension, the implication of failing to comply with the established Procedure.

273. For good measure, the Supreme court highlighted/ amplified the position in the case of *Moses Mwiggi & 14 others versus Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR, where the court held thus;

(65) This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

274. To my mind, the invocation and deployment of originating summons by the Plaintiffs herein for purposes of canvassing the nature of issues that have been espoused before the court, inter-alia, fraud, forgery, breach of contract, cancellation of title and determination of whether the Doctrine of bona fide purchase for value is applicable; was irregular, un-procedural and thus invalid for all intents and purposes.

275. Secondly, there is the question as to whether an affidavit constitutes a pleading and thus amenable to be amended and if not, whether a purported amended Supporting affidavit is legally tenable or otherwise.

276. Instructively, the Further amended Originating summons dated the 4th February 2022, (which is the operative pleading beforehand) is supported by a Further amended affidavit and in my humble view, an affidavit cannot legally be amended or at all.

277. Furthermore, it is worthy to underscore that an affidavit is evidence on oath and to the extent that same is Evidence, same cannot therefore lend itself to amendment, either in the manner undertaken by the Plaintiffs or at all.

278. In my humble albeit considered view, the amendment of the supporting affidavit, which anchors the Further originating summons, renders same illegal and invalid and thus the entire Further amended originating summons beforehand is vitiated to core.



279. In a nutshell, I come to the conclusion that the cause of action, inter-alia, fraud, forgery, breach of contract and cancelation of the titles attendant to the various subdivisions, which have been adverted to at the foot of the Further amended originating summons, fall outside the purview of originating summons.
280. Essentially, even though the advocates for the Parties proceeded to and canvassed the dispute beforehand vide viva voce evidence, such a process, does not however validate what was otherwise a nullity ab initio. [See the Dictum in *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169] .

Issue Number 2

Whether the suit beforehand, [which revolves around fraud and forgery] was time barred by the time same was commenced and/or filed by the Plaintiffs.

281. It is instructive to recall that the impugned transfer and registration of the suit property to and in favor of the 1st Defendant which is contended to have been fraudulently undertaken transpired and/or occurred in September 1989. For good measure, the contents of paragraph 7 of the Further amended supporting affidavit sworn on the 4th February 2022 bespeaks the position.
282. For the sake of clarity, it suffices to reproduce the contents of paragraph 7 and same states as hereunder;

Paragraph 7

That the 1st Defendant/Respondent fraudulently transferred the suit in its name in or around September 1989 even before the full purchase price had been paid to the vendor, the late Wanjiku Njau.

283. Furthermore, it has similarly been contended that arising from (sic) the fraudulent transfer of the suit property by the 1st Defendant, Wanjiku Njau, now deceased, was constrained to and indeed filed various suits against both the 1st and 2nd Defendants wherein same (Wanjiku Njau) sought, inter-alia, to invalidate/revoke the offensive transfer and registration of the suit property in favor of the 1st and 2nd Defendants herein.
284. To this end, it is appropriate to take cognizance of paragraphs 14, 15 and 16 of the Further amended supporting affidavit.
285. For brevity, the said paragraphs are reproduced as hereunder;

Paragraph 14

That in July 1991, the late Wanjiku Njau sued the two Defendants in this matter in HCC NO. 3973 of 1991 seeking inter-alia, a declaration that the 1st and 2nd Transfer in respect of the suit premises were null and void having been effected through fraud and forgery.

Paragraph 15

That the late Wanjilku Njau sued the Defendant herein together with Barclays of Kenya in HCC No. 5868 of 1992 seeking similar reliefs as in the said HCC No 3973 of 1991.

Paragraph 16

That all the above suits were fraudulently withdrawn without the consent or authority of the late Wanjiku Njau and with absolutely no explanation or reasons and in the most un-procedural manner



286. From the foregoing deposition, it is evident and apparent that Wanjiku Njau, now deceased, and by extension her Estate, represented by the Plaintiffs herein, were privy to and knowledgeable of the timeline when [sic], the impugned fraud arose and/or occur.
287. Furthermore, there is no gainsaying that immediately, Wanjiku Njau, now deceased, discovered what was touted as fraud, same proceeded to and filed two [2] separate suits impleading fraud.
288. Even though the named suits are said to have been withdrawn fraudulently and in un-procedural manner, it is imperative to point out that the cause of action for fraud arose when the deceased discovered [sic] the fraudulent transfer and thus the computation for determining whether the instant suit is timeously filed or otherwise must be discerned from when (sic) fraud was discovered.
289. To my mind, what is contended to have been fraudulent transpired and was duly discovered by Wanjiku Njau and by extension her Estate in the year 1991, when same indeed filed the first suit. Consequently, there is no gainsaying that by the time the current suit was being filed in the year 2009, the plea of fraud and forgery were time barred.
290. To this end, it suffices to cite and invoke the provisions of Section 4(2) of the *Limitation of Actions Act* Chapter 22 Laws of Kenya, which underscores the timelines for filing a Case, espousing a cause of action founded on fraud.
291. For ease of reference, Section 4(2) (supra) are reproduced as hereunder;
4. Actions of contract and tort and certain other actions
- (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
- (a) actions founded on contract;
- (b) actions to enforce a recognizance;
- (c) actions to enforce an award;
- (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
- (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date.
292. Without belaboring the point, I form and hold the firm opinion that by the time the instant suit was being filed on the 8th May 2001, the cause of action impleaded thereunder, [namely, Fraud, Forgery and Breach of Contract, respectively], were statutorily time barred.
293. Further and in addition, I hold the firm opinion that insofar as the suit was time barred , the entire proceedings attendant thereto are therefore rendered redundant, otiose and thus bad in law.



294. As pertains to the effects and implications of limitation on a cause of action, it suffices to take cognizance of the holding of the Court of Appeal in the case *Gathoni versus Kenya Co-operative Creameries Ltd*[1982] eKLR, where the court stated thus;

“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.”

295. Most recently, the effects of limitation of actions on a suit filed out of time was highlighted/ amplified by the Court of Appeal in the case of *Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) versus Rosaline Njeri Macharia & another* [2016] eKLR, where the court held and observed as hereunder;

(33)] With regard to the third issue, namely whether the suit was statute barred under the *Limitation of Actions Act*, the suit was filed on 19th July 2007. By dint of paragraphs 24, 25, 26, 28, 29 and 30 of the plaint, the cause of action was pleaded to have accrued on 27th July 1999 when the alleged breach of contract occurred. As the breach was of a contract relating to lending of money whose security instrument is contested, section 4(1)(a) of the Limitations of Actions Act, Cap 22 requires that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. In this appeal, the “suit” having been instituted in 2007 when the accrual of the cause of action was in July 1999, it was clearly filed outside the six-year period and consequently was time barred, if indeed it was a suit. That answers the third issue.

296. Irrespective of whichever angle that one looks at the suit/proceedings before the court, which essentially canvasses the plea of fraud, forgery and breach of contract, there is no denying that the causes of action impleaded by and on behalf of the Plaintiffs, are statute barred by dint of Section 4(1) and (2) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

297. Consequently and in view of the foregoing, my answer to issue number two [2], is to the effect that the Plaintiffs’ suit is barred and prohibited by the *Limitation of Actions Act* and hence the Plaintiffs’ are permanently non-suited.

Issue Number 3

Whether the Plaintiffs herein have in any event established, demonstrated and proved the cause of action of fraud/ forgery (sic) to the requisite standard or otherwise.

298. Other than the position that a suit for fraud and or forgery, must be filed and/or brought to court within three [3] years from either the occurrence of the fraud or from the discovery thereof, it is also important to underscore that whosoever wishes to implead fraud is called upon to comply with the law underpinning suits pertaining to fraud.

299. Instructively, the position of the law as pertains to suits propagating and/or espousing fraud is underpinned by the provisions of Order 2 Rule 10(1) of the Civil Procedure Rules 2010, which provides as hereunder;

[Order 2, rule 10.] Particulars of pleading.



10.

- (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing —
 - (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
 - (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

300. From the foregoing, there is no gainsaying that it was incumbent upon the Plaintiffs herein, if at all, same were keen to propagate the cause of action anchored on fraud, to first and foremost implead fraud and thereafter supply the particular upon which the plea of fraud is predicated and/or otherwise anchored.
301. Notably, it is only upon sufficiently pleading fraud and supplying the particulars thereof, that a Claimant, [the Plaintiffs herein not excepted], would be at liberty to tender and adduce before the court evidence towards proving (sic) fraud, which would have been appropriately pleaded and particularized.
302. To this end, it suffices to cite, restate and reiterate the dictum of the Court of Appeal in the case of *Virani t/a Kisumu Beach Resort versus Phoenix of East Africa Assurance Company Ltd* [2004] eKLR, where the court held thus;

“Firstly, there is no denying that there were no particulars supplied in the defence pleading under Order VI rule 8(1) which requires in mandatory terms that:

“every pleading shall contain the necessary particulars of any claim defence or other matter pleaded including, without prejudice to the generality of the foregoing: –

- (a) particulars of anyfraud on which the party relies.
- (b) Where a party pleading allegesfraudulent intention..... particulars of the facts on which the party relies.”

In the absence of such pleading, the insurer is not at liberty to agitate the allegation of fraud or fraudulent intention. Fraud is a serious quasi – criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt. Sufficient notice and particulars must therefore be supplied to the party charged for rebuttal of such allegation.”



303. Additionally, the legal position that fraud must be suitably pleaded and thereafter particularized, before one can endeavor to adduce evidence in proof thereof, was re-visited by the Court of Appeal in the case of Kuria Kiarie & 2 others versus Sammy Magera [2018] eKLR, where the court stated thus;

“25. The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

“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.” [Emphasis added].

The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules.

26. As regards the standard of proof, this Court 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.”

27. We have examined the appellants' amended defence for any pleading on particulars of fraud or illegality but there is none. The claims were therefore stillborn and no evidence could be tendered”

304. Lastly, there is the question of the standard of proof as pertains to the plea of fraud and it is not lost on this court that whoever desires the court to make a positive finding on a plea of fraud, must tender cogent, plausible and credible evidence, capable of persuading the court on a standard beyond the balance of probabilities, but not beyond reasonable doubt.

305. Simply put, the standard of proof in matters pertaining to fraud, which is a quasi -criminal offence, is on the intermediate standard.

306. Be that as it may, I beg to state and observe that the totality of the evidence that was placed before the Honourable court, fell short of establishing/discharging the standard of proof requisite to warrant a finding of fraud as against the 1st and 2nd Defendants, respectively.



307. Pertinently, even if the matter was to be determined on the basis of whether or not the plea of fraud adverted to and espoused by the Plaintiffs', was to be determined on the basis of the quality of the evidence tendered, I would still have returned a verdict that fraud has neither been established nor proved, as by law required.

Issue Number 4

Whether the Defendants and in particular, the 3rd to 18th and 22nd Defendants are bona-fide Purchasers' for value without Notice or otherwise.

308. It suffices to point out that upon being served with the Further amended originating summon dated the 4th February 2022, the 3rd to 7th Defendants duly entered appearance and filed Statement of Defense and counterclaim, variously dated the 8th March 2022; and in respect of which the named Defendants sought for, inter-alia declaration that same are bona fide purchasers' for value as pertains to the designated plots, arising from the Suit Property, namely, L.R No. L.R No. 5964/1.
309. Similarly, the 8th to the 13th Defendants also entered appearance and thereafter filed a Statement of Defence and counterclaim dated the 12th April 2022; and wherein same also alluded to, inter-alia, declaration of bona fide purchase for value' as well as General and punitive damages as against the Plaintiffs' herein.
310. Instructively, it is worthy to recall that the 3rd to 7th Defendants' and the 8th to 12th Defendants, are persons who bought and/.or purchased their respective portions of land from the 2nd Defendant, one Hannah Mukami Kiruhi, now deceased; and the 2nd Defendant herein, respectively.
311. Furthermore, it was the testimony of the various Defendants that at the time when same bought and/or purchased their respective portions, there was no encumbrance and/or caveat entered against and/or registered in the certificate of title pertaining to and concerning the suit property.
312. Other than the foregoing, it was the testimony of the various Defendants that subsequent to the purchase, acquisition and ultimate registration of their various properties, same duly entered upon and took possession thereof.
313. Other than the foregoing, it was the further testimony of the various Defendants that upon taking possession of their designated properties, same sought for and obtained Development Approval(s) from the City County of Nairobi, now defunct; and the City County Government of Nairobi and thereafter same proceeded to and erected assorted developments, inter-alia, apartment and petrol station.
314. Further and in addition, evidence abound that during the time when the various Defendants undertook the construction of the assorted development(s) on their designated portions, same were neither notified of any illegality, impropriety and/or defect in the title of their predecessor, namely, the 2nd Defendant herein.
315. Other than the foregoing, it is also important to point out that during her testimony the 2nd Plaintiff herein, who testified as PW1, is on record as confirming that same neither served the court order on the developers on the portions of the suit property or all.



316. For the sake of brevity, it is imperative to reproduce a segment of the testimony by PW1, whilst under cross examination by Learned counsel for the 3rd Defendant. For coherence, same stated as hereunder;
- “I did not give/serve the developers/land because I am not the one who sold to them. I do not know the 3rd to the 7th Defendants were aware of the court orders. The 2nd Defendant could not have transferred the land to the 3rd to the 7th Defendant at all. The 3rd to the 7th Defendants do not have any debt payable to Wanjiku Njau, now deceased”.
317. Whilst under cross examination by learned counsel for the 8th to the 12th Defendants, PW1 testified and stated as hereunder;
- “The 8th to 12th Defendants were not part of any fraud, if any, that was perpetrated by the 1st Defendant. I have not produced any complaint that was lodged at the directorate of criminal investigations. I do confirm that the 8th to the 12th were not aware of any court order.
318. From the foregoing testimony by PW1, what becomes explicit and/or crystal clear is to the effect that the 3rd to the 7th Defendant; and the 8th to 12th Defendants, respectively, who bought and acquired portions of the suit property, were neither privy to nor knowledgeable of [sic] any fraud that may have been perpetrated by the 1st and 2nd Defendants against Wanjiku Njau, now deceased.
319. Additionally, it is also evident and PW1 does confirm that the 3rd to 7th Defendants; and the 8th to 12th Defendants, were similarly never served with any court order barring and/or prohibiting any dealings over and in respect of the suit property or any portion thereof.
320. Arising from the foregoing, the question that does suffice and which the court must grapple with, is whether or not the various Defendants and more particularly, the 3rd to the 12th Defendants/counter claimers, who acquired portions of the suit property, did so in good faith and without knowledge of any defect in the title of their predecessor, namely, Hannah Mukami Kiruhi, now deceased and the 2nd Defendant herein, respectively.
321. Before endeavoring to answer the foregoing question, it is imperative to recall and reiterate that the title of the suit property was transferred from the name of Wanjiku Njau, now deceased, to the 1st Defendant; and thereafter to the Hannah Mukami Kiruhi, now deceased.
322. Nevertheless, even though the Plaintiffs herein have contended that the transfer and registration of the suit property in the name of the 1st Defendant and thereafter in the name of Hannah Mukami Kiruhi, now deceased, was fraudulent; there is no gainsaying that the court has since found and held that the plea of fraud which was adverted to by and on behalf of the Plaintiffs was/is time barred.
323. Pertinently, having found and held that the Plaintiffs plea of fraud touching on and/or concerning the transfers of the suit property, was time barred, it is therefore obvious that the title to and in favor of the 1st Defendant and by extension Hannah Mukami Kiruhi, over and in respect of the suit property, was indefeasible as at the year 2001.
324. Consequently and in the premises, Hannah Mukami Kiruhi, now deceased and her Legal administratrix, therefore had the requisite mandate and/or capacity to subdivide and alienate the suit property or any portions thereof.
325. In any event, taking into account the fact that the suit property had been transferred and registered in the name of the 1st Defendant and thereafter in the name of Hannah Mukami Kiruhi, now deceased and coupled with the fact that the restriction hitherto registered on the title of the suit property, had



been removed upon the withdrawal of the previous suit; it is safe and sound to hold that Hannah Mukami Kiruhi therefor held a valid title to and in respect of the suit property.

326. To the extent that I have found and held that Hannah Mukami Kiruhi, now deceased, held an apparent valid title to and in respect of the suit property, it then means that the subdivision arising therefrom, were therefore lawful and legitimate and hence the sale and disposition thereof to the various Defendants, must similarly attract a veil of legality.
327. Be that as it may, I am also alive to the evidence that was tendered by and on behalf of the 2nd Plaintiff herein (PW1) and whose import has been reproduced herein before and who essentially, confirmed that the Defendants were neither privy to nor Party to any fraud affecting the acquisition of the suit property.
328. Arising from the foregoing, it is therefore instructive to state and observe that the various Defendants and in particular, the 3rd to the 12th Defendants, who bought and acquired portions of the suit property, therefore did so in good faith and for valuable consideration.
329. Notably, to the extent that the 3rd to the 12th Defendants, were neither knowledgeable of or privy to any fraud, [if any], touching on the acquisition of the suit property, it then means that any allegations of fraud, irregularity and/or illegality, if any, cannot be deployed to invalidate the subdivisions and ultimate transfer in the names of the named Defendants.
330. Simply put, there is no gainsaying that the 3rd to the 12th Defendants and by extension any other Defendant who bought from the 2nd Defendant herein are indeed bona fide purchasers for value without notice of any defect in the title of Hannah Mukami Kiruhi, now deceased or the 2nd Defendant.
331. To underscore the position that the 3rd to the 12th Defendants were/are indeed bona fide purchasers for value, without notice of any defect in the title of their predecessor, it suffices to state and reiterate the holding of the Court of Appeal in the case of Arthi Highway Developers Limited versus West End Butchery Limited & 6 others [2015] eKLR, where the court held 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:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

332. Instructively, the import, tenor and scope of what constitutes a bona fide purchase for value and the requisite ingredients to be established before a court of law can proclaim a person as a bona fide purchaser for value, was also re-visited and highlighted in the case of Mwangi James Njehia versus Janetta Wanjiku Mwangi & another [2021] eKLR, where the Court of Appeal stated and held thus;



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.”

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.

333. Most recently, the Supreme Court of Kenya had occasion to consider the import, tenor and scope of what underpins the Doctrine of bona fide purchase for value without notice in the case of *Dina Management Limited versus County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment), where the court stated and held as hereunder;

“90. The Black’s Law Dictionary 9th Edition defines a bona fide purchaser as: “One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

91. The Court of Appeal in Uganda in *Katende v Haridar & Company Ltd* [2008] 2 EA 173, defined a bona fide purchaser for value as follows: “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 he 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.”

92. On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No. 28 of 2005* [2015] eKLR stated as follows: “...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”

334. To my mind, the totality of the evidence that has been placed on record by and on behalf of the 3rd to 12th Defendants herein, pertaining to and concerning the manner in which same acquired their respective titles, bespeak of acquisition undertaken in good faith and for valuable consideration, which consideration was duly paid to and in favor of the land owner as at the time of the sale thereof.
335. Furthermore, it is also not lost on this Honourable court that even the 2nd Plaintiff, namely, PW1, also testified and confirmed that the various purchasers and in particular the 3rd to the 12th Defendants, were neither privy to nor knowledgeable of any fraud, if at all, that may have been perpetrated by the 1st Defendant and (sic) Hannah Mukami Kiruhi, now deceased, against Wanjiku Njau, who was hitherto the registered proprietor of the suit property.
336. In a nutshell, I come to the conclusion that the 3rd to the 12th Defendants, who are the only persons who filed and/or mounted the counterclaims, as pertains to the subject matter, truly fit within the prescription of bona fide purchasers for value without notice of any defect in the title of their predecessor or at all.

Issue Number 5

What Reliefs, if any, ought to be granted.

337. The Plaintiffs’ herein filed the Further amended originating summons dated the 4th February 2022, and in respect of which same sought for the determination of a plethora of questions/reliefs, touching on and concerning the suit property.
338. Be that as it may, whilst discussing issues numbers 1, 2 and 3, elsewhere hereinbefore, the court has since found and held inter-alia that the Plaintiff’s claim touching on and concerning the suit property, was/is time barred by dint of the provisions of Section 4(1) and (2) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
339. Additionally, this court has also found and held that the Plaintiffs’ herein also failed to establish and demonstrate that the transfer of the suit property from Wanjiku Njau, now deceased to the 1st Defendant herein, was informed by fraud and/or forgery, either in the manner adverted to at the foot of the Further amended originating summons or at all.



340. Arising from the foregoing, it is the finding and holding of this court that the Plaintiffs herein have not been able to prove their claims based on fraud, forgery and/or breach of contract, either as impleaded or at all. Consequently, it suffices to state and underscore that the Plaintiff's suit, is bereft of merits.
341. On the other hand, the 3rd to the 12th Defendants herein filed various counterclaims and in respect of which same sought for, inter-alia, declarations that same bought and acquired various portions of the suit property, in good faith and for valuable consideration.
342. Premised on the foregoing, the 3rd to the 12th Defendants, implored the Honourable court to find and hold that same are truly bona fide purchasers for value albeit without notice of any defect in the title of their predecessor, namely, Hannah Mukami Kiruhi, now deceased or the 2nd Defendant herein.
343. Suffice it to point out, that whilst discussing issue number four, which was itemized and highlighted in the body of the Judgment hereof, this court has since found and held that the plea of bona fide purchase for value, has been duly established and proven.
344. Pertinently, the court therefore finds and holds that the doctrine of bona fide purchase for value truly and rightfully applies to and in favor of the 3rd to the 12th Defendants and by extension such other Defendants, who purchased their respective portions from Hannah Mukami Kiruhi, now deceased and the 2nd Defendant, respectively.
345. Other than the claim based on the Doctrine of bona fide purchase for value, the 8th to 12th Defendants have also impleaded the claim for General and Punitive damages as against the Plaintiffs herein.
346. Nevertheless, it is worthy to recall and reiterate that during the testimony by and on behalf of the various Defendants and in particular the 3rd to the 12th Defendants herein, it was admitted and conceded that indeed same entered upon, took possession of and thereafter developed their respective portions of lands/properties.
347. To my mind, other than the fact that the Plaintiffs herein filed and/or commenced the instant suit, wherein same sought to impugn the legitimacy and/or propriety of the titles that were transferred to and registered in the names of the various Defendants, it is common ground that the Plaintiffs herein have neither entered upon nor interfered with the occupation, possession and use of the suit properties by the Defendants.
348. Besides, it is also important to underscore that the Plaintiffs herein also procured and obtained various orders from the court and which orders were thereafter registered against the title of the suit property, ex-post facto, the transfer and registration of the various sub-division of the various Defendants, inter-alia, the 3rd to the 12th Defendants.
349. Arising from the foregoing, it is common ground that the various Defendants and in particular, the 3rd to the 12th Defendants have had the benefits/ privileges attendant to ownership of their respective properties and thus neither of the said Defendants has established and demonstrated any scintilla of trespass, to warrant and award of general damages, either as sought or at all.
350. Furthermore, the 8th to 12th Defendants have also impleaded the claim for punitive damages as against the Plaintiffs. However, it is instructive to point out and underscore that other than laying a claim for punitive damages, no evidence was tendered and or placed before the Honourable court to underpin the claim for such damages either as provided for under the law or otherwise.
351. Without belaboring the point, it suffices to underscore that whosoever seeks to procure and obtain an award under the heading of punitive damages, must, inter-alia, demonstrate that the acts complained



of, were arbitrary, whimsical and/or oppressive. However, in respect of the instant matter, no scintilla or iota of evidence was tendered before the court.

352. Notably, the ingredients to be satisfied before an award for punitive damages can issue and/or be granted, were highlighted and elaborated upon by the Court of Appeal in the case of *Municipal Council of Eldoret versus Titus Gatitu Njau* [2020] eKLR, where the court state and held thus;

25. The respondent prayed for exemplary damages. As stated by this Court in *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR:

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:

- i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,
- ii) cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
- iii) where exemplary damages are expressly authorized by statute”.

26. In his judgment the learned Judge in awarding the exemplary damages relied on the authority of *Rookes v Barnard* (1964) 1 All ER 367, which espouses principles already set out above. The case has been cited with approval in our jurisdiction in *Obongo v Kisumu Council* (1971) EA 91; *C A M v Royal Media Services Limited* [2013] eKLR, *Ken Odondi & 2 Others v James Okoth Omburah T/A Okoth Omburah & Company advocates* [2013] eKLR.

27. The learned Judge awarded the respondent exemplary damages and justified the award as follows:

“Exemplary damages are at the discretion of the court and the amount to be awarded must depend on the surrounding circumstances of each case. In our case, the defendant flagrantly disobeyed an order stopping them from demolishing a building...They may have thought that since such damages may not be awarded, then they will walk away without paying a cent. If they thought so, then they are very wrong. The court cannot allow the defendant to benefit from its conduct. In my opinion, a sum of Kshs. 15 Million in exemplary damages will be fair in the circumstances. In arriving at this figure, I have taken note of the need to deliver a message to all, that court orders must be obeyed, and I have further taken into consideration the value of the property that was demolished and the general conduct of the defendant, who never at any one time, attempted to make amends or apologize to the plaintiff for its deplorable conduct.”

353. To surmise, this court is neither persuaded nor satisfied that the 8th to the 12th Defendants have placed before this court any material and/or evidence, or at all, to warrant a finding that same are truly entitled to an award of punitive (better still, referred to as exemplary) damages.



Final Disposition

354. Having analyzed and addressed all the thematic issues, [which were highlighted in the body of the Judgment], it must have become crystal clear that by the time the Plaintiffs herein approached the Jurisdiction of the court vide originating summons dated the 8th May 2001, the cause of action premised on fraud, forgery and breach of contract, had long been barred under the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
355. Other than the foregoing, there is also no gainsaying that the other aspects of the claims that were mounted by and on behalf of the Plaintiffs', inter-alia, the contention that the withdrawal of the previous suit, that had hitherto been filed by Wanjiku Njau, now deceased, were fraudulent; are issues that could only be adverted to and/or canvassed in the said suit and not in a new suit. [See the provisions of Section 34 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya].
356. Having come to the foregoing conclusion, it is now safe and sound to bring the entire Judgment to a close and essentially, to render the final verdict, as pertains to the rights of the Parties beforehand.
357. In a nutshell, the court therefore proceeds to and hereby makes the following orders;
- i. The Plaintiff's suit vide Further amended Originating Summons dated the 4th February 2022, be and is hereby dismissed.
 - ii. The counterclaim by and on behalf of the 3rd to the 7th Defendants; and the 8th to the 13th Defendants, respectively, be and are hereby allowed on the following terms;
 - a. A declaration be and is hereby issued that the 3rd to the 12th Defendants and such other Defendants who bought from Hannah Mukami Kiruhi, now deceased and the 2nd Defendant, respectively, are bona fide purchasers for value without notice.
 - b. The restrictions, caveat and/or encumbrance, if any, indorsed and entered against the suit property, namely, L.R No. 5964/1 and by extension the subdivisions arising therefrom, be and are hereby canceled and/or revoked.
 - c. An order of Permanent injunction be and is hereby issued to restrain the Plaintiffs herein, either by themselves, agents, servants, employees and/or any other person acting under their instructions from interfering with the Defendants ownership and/or interest to and in respect of L.R No. 5964/1, or any subdivisions arising therefrom or at all.
 - iii. Costs of the suit be and are hereby awarded to the Defendants, with the exception of the 1st Defendant herein.
 - iv. Costs of the counterclaim be and are hereby awarded to the 3rd to the 12th Defendants, only.
 - v. The costs in terms in clauses of (iii) and (iv) shall be agreed upon and in default, same to be taxed by the Deputy Registrar of the court.
 - vi. Any relief not expressly provided for/ granted, is hereby declined.
358. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF DECEMBER 2023.

OGUTTU MBOYA,

JUDGE.



In the Presence of:

Mr. Eboso h/b for Mr. Kuria for the Plaintiffs.

Mr. Ong'ato for the 2nd the 13th to 22nd Defendants.

Mr. Masore Ny'ang'au for the 3rd to the 7th Defendants.

Mr. Karuga Maina for the 8th to the 12th Defendants.

