



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 591 OF 2011

NORTIS INVESTMENTS LIMITED.....1ST PLAINTIFF

PHENNY HOLDINGS LIMITED.....2ND PLAINTIFF

VERSUS

MARY ABONDO ACHUNGO.....1ST DEFENDANT

ABDULAHI ABDI NOOR.....2ND DEFENDANT

MOHAMED SALAWAT DHIRIYE.....3RD DEFENDANT

COMMISSIONER FOR LANDS.....4TH DEFENDANT

JUDGMENT

The plaintiffs brought this suit against the defendants on 28th October 2011 seeking the following reliefs;

- a) General damages for fraud and deceit as against the 1st, 2nd and 3rd defendants.
- b) A permanent injunction restraining the 1st, 2nd and 3rd defendants by themselves and/or jointly or by their agents from entering, interfering, alienating or otherwise howsoever dealing with all that property known as L.R No. 209/9680, Nairobi (hereinafter referred to as “the suit property”).
- c) An order compelling the 1st defendant to rectify the title issued to the 2nd plaintiff in accordance with the agreement dated 24th July 2002.
- d) In the alternative, an order does issue to the 4th defendant to forthwith rectify the title for the suit property by deleting the words “as the nominee of Peter Omondi Achungo and Mary Abondo Achungo.
- e) An order does issue directing the 4th defendant herein to impose a government caveat upon the suit property barring any further dealings with the property.
- f) Costs of the suit and interest.
- g) Any other order that the court shall deem just and fit to grant.

In their plaint dated 28th October 2011, the plaintiffs averred that on or about 24th July 2002, the 1st plaintiff on the one part and the late Peter Omondi Achungo (hereinafter referred to as “the deceased”) and Mary Abondo Achungo (hereinafter together referred to as “the Achungos”) on the other part, entered into an agreement for sale whereby the Achungos as joint proprietors of the suit property sold the same to the 1st plaintiff or its nominee at a consideration of Kshs. 2,000,000/-. The plaintiffs averred that pursuant to the said agreement, the 1st plaintiff paid to the Achungos a sum of Kshs. 200,000/- as a deposit. The plaintiffs averred that the balance of the purchase price in the sum of Kshs. 1,800,000/- was to be paid on the completion date which was the seventh day of registration of the transfer of the suit property in favour of the 1st plaintiff or its nominee.

The plaintiffs averred that as at the time of entering into the said agreement with the Achungos, the Achungos had disclosed to the 1st plaintiff that in 1984 they had transferred the original title from which the suit property originated namely, L.R No. 209/9680, Nairobi

(hereinafter referred to as “the mother title”) to one, Surjeet Singh Basil(hereinafter referred to as “Basil”) on the understanding that Basil would subdivide the mother title into four(4) equal portions and retransfer the suit property to the Achungos or their nominee. The plaintiffs averred that unknown to the 1st plaintiff, one, Mark Omolo Ageng, deceased (hereinafter referred to only as “Ageng”) had caused a caveat to be registered against the title of the suit property on 23rd January 1991 to secure some monies he had advanced to the Achungos for the purchase of the suit property that the Achungos had not repaid.

The plaintiffs averred that the said Ageng subsequently obtained a court order in HCCC No. 4159 of 1991, Mark Omolo Ageng v Peter Omondi Achungo barring any transaction involving the suit property. The plaintiffs averred that as a result of the said order, the completion of the agreement for sale between the 1st plaintiff and the Achungos was delayed beyond reasonable expectation of the 1st plaintiff. The 1st plaintiff averred that in good faith, it continued to pay to the Achungos the balance of the purchase price such that as at the completion of registration of the transfer in favour of the 2nd plaintiff in September, 2011, it had paid to the Achungos a total sum of Kshs. 1,400,000/- inclusive of the deposit leaving a balance of Kshs. 600,000/- only.

The plaintiffs averred that at the time of drafting the instrument of re-transfer of the suit property, the advocates who were acting for both parties in the transaction misconstrued the instructions given to them by the parties and drew the document indicating that the suit property was being transferred to the 2nd plaintiff as a nominee of the Achungos and not as the purchaser nominated by the 1st plaintiff. The plaintiffs averred that this error was compounded by the 4th defendant who processed and issued a title to the 2nd plaintiff as a nominee of the Achungos which was factually incorrect. The plaintiffs averred that after the 2nd plaintiff collected the title in September, 2011, it immediately alerted the 1st defendant and the parties’ mutual advocate of the error and confirmed to the Achungos that it was able and willing to release the balance of the purchase price provided that the 1st defendant undertook to pursue the correction of the title with the 4th defendant.

The plaintiffs averred that the 1st defendant failed, refused and/or neglected to attend to the amendment of the title and demanded extra payment from the plaintiffs in default of which the 1st defendant would deem the 1st plaintiff to have breached the agreement for sale. The plaintiffs averred further that the 1st defendant subsequently served the 1st plaintiff with a rescission notice. The plaintiffs averred that the 1st defendant’s said rescission notice was misplaced and baseless.

The plaintiffs averred that in order to defraud the plaintiffs of their bargain, the 1st defendant entered into another agreement with the 2nd and 3rd defendants to sell to them the suit property at a consideration of Kshs. 25,000,000/-. The plaintiffs averred that the 2nd and 3rd defendants paid to the 1st defendant a sum of Kshs. 10,000,000/- as a deposit pending completion.

The suit was defended by the 1st and 4th defendants. The 1st defendant filed a statement of defence on 9th November 2011. The 1st defendant averred that the Achungos (the deceased and she) were the joint proprietors of the suit property.

The 1st defendant denied the plaintiffs’ claim that there was an error in the certificate of title that was issued to the 2nd plaintiff in respect of the suit property. The 1st defendant averred that the plaintiffs collected the said certificate of title from the land registry in September 2010 without her permission and kept it away from the 1st defendant and her family. The 1st defendant averred that the issue of amending the said certificate of title could not arise as there was no error in the certificate save for the fraudulent mention of the 2nd plaintiff as her nominee.

The 1st defendant averred that the agreement for sale between the 1st plaintiff and the Achungos had been rescinded. The 1st defendant averred that she was a stranger to the 2nd and 3rd defendants and had no dealings with them in relation to the suit property. The 1st defendant denied the allegations of fraud pleaded against her by the plaintiffs. The 1st defendant averred that the reliefs sought against her were not tenable. The 1st defendant averred that the suit property was to be re-transferred by Basil to the Achungos or their nominee.

The 1st defendant averred that the agreement between the Achungos and the 1st plaintiff provided in part that the suit property was sold to the 1st plaintiff with vacant possession on the completion date and against full payment of the purchase price. The 1st defendant averred that the agreement provided further that the completion date was to be the seventh day of registration of the transfer in favour of the 1st plaintiff and that if the 1st plaintiff was in default and unable to complete the transaction for any reason whatsoever on the completion date, the deposit if any refundable to the 1st plaintiff was to be paid to the 1st plaintiff by the Achungos as soon as the property was resold by the Achungos and full purchase price received.

The 1st defendant averred that on 10th August 2010, the plaintiffs with intent to defraud the Achungos caused the suit property to be transferred by Basil to the 2nd plaintiff as a nominee of the Achungos. The 1st defendant averred that the 2nd plaintiff proceeded to execute the instrument of re-transfer as the purchaser of the suit property without authority from the Achungos. The 1st defendant averred that Peter Omondi Achungo (the deceased) died on 3rd August 2010 and on 24th August 2010, the plaintiffs lodged the fraudulent transfer for registration and were issued with a certificate of title in the name of the 2nd plaintiff as a nominee of the Achungos. The 1st defendant averred that in perpetuation of the said fraud, the plaintiffs kept the said certificate away from the 1st defendant’s knowledge for over a year in the belief that it conferred an interest on the 2nd plaintiff. The 1st defendant averred that in furtherance of the said acts of fraud and in breach of the agreement of sale, the plaintiffs forcibly took over possession of the suit property and leased it to a third party.

The 1st defendant averred that following the 1st plaintiff’s claim that the agreement of sale had been completed, the 1st defendant and other members of the deceased’s family made several demands upon the 1st plaintiff to pay the balance of the purchase price as per the agreement of sale but the 1st plaintiff refused to do so claiming that it had paid the purchase price in full and as such there was nothing due to the Achungos. The 1st defendant averred that on 18th October 2011, the 1st defendant wrote to the 1st plaintiff rescinding the agreement of sale. The 1st defendant averred that the 1st plaintiff insisted that it would only vacate the suit property if paid a sum of Kshs. 15,000,000/- which

claim was fraudulent. The 1st defendant averred that the plaintiffs had no right or interest in the suit property to be protected by the reliefs sought. The 1st defendant averred further that the plaintiffs had approached the court with unclean hands and had engaged in falsehood and deliberate concealment of material facts. The 1st defendant averred that the plaintiffs' suit was an attempt to sanction fraud against the 1st defendant and urged the court to dismiss the same with costs.

The plaintiffs filed a reply to defence on 8th May 2012 in which they joined issue with the 1st defendant in her statement of defence save where the same consisted merely of admissions. The plaintiffs reiterated that there was an error in the certificate of title that was issued to the 2nd plaintiff and that the 1st defendant had a duty to instruct the parties' mutual advocates to correct the said error which she failed to do. The plaintiffs averred that the said certificate of title was collected by the parties' mutual advocates from the land registry and handed over to the plaintiffs in September 2011 in the presence of Ronald Achungo and Bob Achungo who were the sons of the Achungos. The plaintiffs averred that as soon as the said certificate of title was handed over to them, they pointed out the error thereon to those present and it was agreed that rectification of the title was necessary which the 1st defendant refused to facilitate unless she was paid a sum of Kshs. 10,000,000/-. In response to the 1st defendant's claim that she had rescinded the agreement of sale, the plaintiffs averred that a completed agreement of sale was not capable of rescission.

The plaintiffs averred that the 1st defendant failed to transfer the suit property to the 1st plaintiff in breach of the agreement of sale since the property was transferred to the 2nd plaintiff as a nominee of the Achungos. The plaintiffs averred that the 2nd plaintiff was not and will never be a nominee of the Achungos. The plaintiffs averred that it was the 1st defendant and not the plaintiffs who instructed the parties' mutual advocates to transfer the suit property to the 2nd plaintiff as a nominee of the Achungos. The plaintiffs averred that although the instrument of re-transfer of the suit property was submitted for registration on 24th August 2010, it was until 24th August 2011 that the re-transfer was registered due to the loss of the deed file and deed plan for the suit property.

The plaintiffs denied that they forcibly took possession of the suit property. The plaintiffs averred that the property was handed over to them by the 1st defendant through her sons. The plaintiffs averred that they were always ready and willing to pay to the 1st defendant the balance of the purchase price and that the only demand that they refused to comply with was in respect of additional payment over and above the agreed purchase price. The plaintiffs denied that they had at any time demanded payment of Kshs. 15,000,000/- as a condition for surrendering vacant possession of the suit property. The plaintiffs averred that the information regarding the 1st and 2nd defendants was given to the plaintiffs by the 1st defendant's advocates who were on record. The plaintiffs urged the court to enter judgment against the defendants as prayed in the plaint.

The 4th defendant filed a defence on 9th May, 2014. The 4th defendant denied the plaintiffs' claim in its entirety. The 4th defendant averred that at all material times, the 4th defendant acted in good faith in the transaction leading to the registration of the suit property in the name of the 2nd plaintiff as a nominee of the Achungos. The 4th defendant averred that the transaction was processed pursuant to the 4th defendant's statutory duties and obligations. The 4th defendant denied that it acted fraudulently. The 4th defendant averred that it simply acted on the documents that were presented by the advocates for the 2nd plaintiff for registration. The 4th defendant averred that the plaint disclosed no cause of action against the 4th defendant and urged the court to dismiss the suit with costs.

At the trial, the plaintiffs called three witnesses while the 1st and 4th defendants called one witness each. The plaintiffs first witness was Erick Nyamunga(PW1). PW1 told the court that he was a director of the 1st plaintiff and a company secretary of the 2nd plaintiff. PW1 gave the court the history of the transaction that the 1st plaintiff had with the Achungos relating to the suit property. PW1 essentially reiterated the contents of the plaint and the plaintiffs' reply to the 1st defendant's defence. It is not necessary to reproduce his entire testimony here. PW1 stated that the 1st plaintiff paid Kshs. 200,000/- as a deposit on the signing of the agreement of sale and that as at the time the suit property was transferred to the 2nd plaintiff, the 1st plaintiff had paid a total of Kshs. 1,400,000/- to the Achungos. PW1 told the court that he was given the certificate of title of the suit property by the parties' mutual advocates, Okwach & Company Advocates and that before he took the certificate of title, he was introduced to a tenant then in occupation of the suit property one, Chrispin Onala by a son of the Achungos by the name Ronald Achungo and he entered into a new tenancy agreement with the said tenant on 14th September 2011. He stated that he had contacted Ronald Achungo to meet him at the said advocates' office so that they could complete the transaction. He stated that he wanted the Achungos to give him vacant possession so that he could in turn pay them the balance of the purchase price.

He stated that after he was introduced to the said tenant as the owner of the suit property, he took the certificate of title to a bank to secure a financial facility and it was at that point that he was informed that the certificate of title had an error that required rectification and that he could not deal with the property without the permission of the Achungos. PW1 stated that he went back to Joe Okwach of Okwach & Company Advocates for assistance but he was not of any help as he claimed that he had closed his file on the matter. PW1 stated that he was referred to Ambrose Rachier Advocate whose firm prepared a deed of rectification of the said title for execution by the 1st defendant. He stated that Ronald Achungo told him that he could not persuade the 1st defendant to execute the said deed of rectification unless they entered into new negotiations for the purchase of the suit property. He stated that when he told Ronald Achungo that he was not ready to renegotiate the price for the suit property, Ronald Achungo returned to him the deed of rectification and left. He stated that it was after that that the 1st plaintiff received a letter dated 18th October 2011 from Lumumba Mumma & Kaluma Advocates purporting to rescind the agreement of sale of the suit property. PW1 stated that the plaintiffs had no alternative but to file this suit. He stated that on 11th November 2011, the plaintiffs' advocates deposited in court a sum of Kshs. 600,000/- which was the balance of the purchase price for the suit property. PW1 denied that the plaintiffs acquired the suit property fraudulently. He stated that the plaintiffs were not responsible for the errors on the certificate of title and the register for the suit property. PW1 produced the documents attached to the plaintiffs' list of documents dated 19th November 2012 as a bundle as plaintiff's exhibit 1.

The plaintiffs' second witness was Chrispin Ouma Onala (PW2). PW2 told the court that he was living on the suit property. He stated that in September 2011, Ronald Achungo, Bob Achungo and PW1 with his two friends visited him on the suit property during which Ronald Achungo introduced PW1 to him as the new landlord. PW2 stated that Ronald Achungo told him to discuss the terms of the new tenancy

with PW1. He stated that he had occupied the suit property for a long time and that the same was initially occupied by Mark Ageng (Ageng) who was his brother in law. He stated that he thereafter went with PW1 to the office of Joe Okwach advocate where a new tenancy agreement between him and PW1 was prepared and executed. He confirmed that he was still in occupation of the suit property.

The plaintiff's last witness was Francis Aoko Olalo (PW3). PW3 told the court that he was an advocate of the High Court of Kenya practicing as such as a partner in the firm of Rachier & Amolo Advocates. PW3 stated that on 12th October 2011, PW1 came to his office accompanied by Ronald Achungo who was introduced to him as the son of the 1st defendant. He stated that PW1 came with a certificate of title for the suit property and pointed out that there was an error in the certificate in that the 2nd defendant was registered as the owner of the suit property as a nominee of the Achungos. He stated that after perusing the title, he noted that there was an apparent error on the certificate. He stated that he was instructed to correct that error. He stated that PW1 and Ronald Achungo agreed that he should prepare a deed of rectification indicating the 2nd plaintiff as the owner of the suit property. He stated that he prepared the deed of rectification and released the same to PW1 who was to arrange for the same to be executed by the 1st defendant and then returned to him for registration. He stated that the said deed of rectification was never executed.

The 1st defendant's first witness was Ronald Achungo (DW1). DW1 told the court that the 1st defendant was his mother while the deceased was his father. He stated that the deceased died on 3rd August 2010. He confirmed that the 1st plaintiff entered into an agreement of sale dated 24th July 2002 with the Achungos in respect of the suit property. He confirmed that the purchase price was agreed at Kshs. 2,000,000/- and that the agreement was prepared by Okwach & Company Advocates. He stated that the 1st plaintiff took possession of the suit property on 14th September 2011 in unclear circumstances before paying the full purchase price. He stated that as at the time of taking possession of the suit property, the 1st plaintiff had only paid Kshs. 1,000,000/- to the Achungos. DW1 admitted that he visited the suit property with his brother Robert Achungo and PW1 on 7th September 2011. He stated that his brother and he had been asked by Mr. Okwach advocate to come to Nairobi to have a meeting with PW1. He stated that it was at that meeting that they were informed that the suit property had already been transferred to PW1. He stated that at that meeting, Mr. Okwach told them that the balance of the purchase price for the suit property payable by PW1 was Kshs. 1,000,000/- and that it was upon receipt of that payment that they were to give PW1 vacant possession of the suit property. DW1 stated that it was after that meeting that they proceeded to the suit property to check on its state. He stated that at the property, they found PW2 who had never been their tenant in occupation. He stated that as far as they were concerned, it was the family of Mark Ageng (Ageng) that was supposed to be in occupation of the suit property. DW1 denied that he handed over the suit property to PW1 during that visit. He stated that there was no way he could have handed over possession to PW1 while there was still up to a sum of Kshs. 1,000,000/- outstanding.

He stated that PW1 paid to them Kshs. 180,000/- on 27th September 2011 and Kshs. 220,000/- on 29th September 2011 following the death of his (DW1) stepmother. He stated that PW1 refused to pay the balance of the purchase price even after being called upon to do so. DW1 stated that on 29th September 2011 PW1 told him that the certificate of title that had been issued to him in respect of the suit property had an error that required correction and that it was on this date that PW1 deposited the further payment of Kshs. 220,000/- referred to earlier. DW1 stated that after this payment, PW1 never made any other payment. He stated that he saw a copy of the title for the suit property for the first time after the burial of his step mother when he visited Mr. Okwach's office to get more information on the error PW1 had talked about. DW1 stated that he was not aware of how PW1 got the title for the suit property and how the 2nd plaintiff became the owner of the property.

He stated that he was the one dealing with the transaction on behalf of his parents. He stated that the suit property was to be re-transferred to the Achungos or their nominee. He stated that the Achungos did not consent to the 2nd plaintiff becoming their nominee for the purposes of the re-transfer of the suit property. He stated that he told Mr. Okwach that since PW1 had refused to pay the balance of the purchase price, he was in default of his obligations under the agreement of sale. He stated that Mr. Okwach told him that since he was a mutual advocate for the parties, he could not act for them in the matter. He stated that it was after that that the 1st defendant instructed the firm of Lumumba Mumma & Kaluma Advocates to act for her and to rescind the agreement of sale. He stated that the plaintiffs thereafter filed this suit and deposited a sum of Kshs. 600,000/- in court without a court order. He stated that the suit property still belonged to the 1st defendant and that the 1st defendant was willing to refund to the 1st plaintiff the payments that it had made for the suit property less the rent that it had earned from the property. DW1 produced the documents attached to the 1st defendant's list of documents dated 8th November 2011 filed on 9th November, 2011 as a bundle as defence exhibit 1.

The next witness for the defence was the 1st defendant, Mary Abondo Achungo who gave evidence as (DW2). DW2 confirmed that the Achungos (the deceased and she) entered into a sale agreement with the 1st plaintiff in respect of the suit property. She stated that the deceased died in August, 2010. She produced copies of the deceased's death certificate and funeral programme as defence exhibits 2(a) and 2 (b) respectively. DW2 adopted her witness statement dated 8th November 2011 as part of her evidence in chief. She stated that she was a stranger to the 2nd plaintiff because it was not a party to the agreement of sale of the suit property. She stated that they did not authorize anyone to issue a title for the suit property in favour of the 2nd plaintiff. DW2 told the court further that she did not know the 2nd and 3rd defendants. She stated that she had never met them. She stated that she was not prepared to transfer the suit property to the 2nd plaintiff since she did not enter into an agreement with it. With regard to the 1st plaintiff, she stated that it did not complete the payment of the balance of the purchase price.

The last witness to testify was the 4th defendant's witness, Edwin Munoko Wafula (DW3). DW3 was a land registrar based in Nairobi. He adopted his witness statement dated 30th April 2014 filed in court on 9th May 2014 as his evidence in chief. He told the court that the suit property was registered in the name of the 2nd plaintiff as a nominee of the Achungos pursuant to an instrument of re-transfer dated 16th July 2010 drawn by Okwach & Company Advocates.

After the close of evidence, the parties made closing submissions in writing. The plaintiffs filed their submissions on 18th March 2021 while the 1st defendant filed her submissions on 6th May 2021. The 4th defendant did not file submissions. In their submissions, the plaintiffs framed the following issues for determination by the court;

1. Whether there was a delay in the completion of the transaction and who was liable for the same;
2. Whether the plaintiffs concealed a material part of the agreement for sale;
3. Whether there was any fraud on the part the plaintiffs;
4. Whether the purchase price was fully paid and the transaction completed and consummated;
5. Whether the plaintiffs took possession of the suit property and leased the same to a tenant forcefully and without the permission of 1st defendant;
6. Whether there is a fraudulent entry in the Green Card and if the Green Card is applicable to the RTA title, the subject matter hereof;
7. Whether the plaintiffs have an interest in the suit property;
8. Whether demands were made for the plaintiffs to pay the balance of the purchase price.
9. Whether a completed contract can be rescinded;
10. Whether the plaintiffs are entitled to the orders sought.
11. Whether the plaintiffs have complied with section 13 of the Government Proceedings Act and whether the court can waive the 30 days statutory notice period required under the Act;
12. Whether the court can direct the 4th defendant to forthwith register a government caveat on the suit property;
13. Whether the plaintiffs' suit against the defendants is maintainable.

On the first issue, the plaintiffs submitted that the cause for the delay that was pleaded by the plaintiff and explained through the testimony of PW1 was not denied by the 1st defendant in her defence. The plaintiffs submitted that the 1st defendant is deemed to have admitted that which was not expressly denied. The plaintiffs submitted further that it is unjust for the 1st defendant to rely on her own wrong doing as a basis for frustrating the plaintiffs by attempting to repudiate a completed sale agreement. The plaintiffs submitted that the 1st defendant did not deny in her evidence or otherwise the existence of Mark Omolo Ageng and the existence of a dispute between him and the Achungos that caused the inordinate delay. The plaintiffs submitted that the Achungos carry all the blame for the delay in the completion of the agreement of sale between the parties.

On the second issue namely, whether the plaintiffs concealed material facts to the court, the plaintiffs submitted that they did not conceal any term of the agreement to the court. On the issue whether there was fraud on the part of the plaintiffs, the plaintiffs submitted that it is not in dispute that the instrument of transfer was drawn by the parties' mutual advocate, Okwach & Company Advocates. This the plaintiffs submitted clearly indicates that there was a mutual agreement between the parties to execute the re-transfer. The plaintiffs submitted that since the vendor of the suit property was Basil, there was no way the Achungos could have signed the instrument of re-transfer as vendors of the suit property. The plaintiffs submitted that, if indeed the plaintiffs intended to defraud the 1st defendant of the suit property as alleged then in effect the 1st defendant is accusing the late Joe Wandago Okwach who was a Senior Counsel and an officer of this court of fraud and this is a matter which the 1st defendant should be extremely slow to do. The plaintiffs submitted that the 1st defendant concealed the fact that Mr. Okwach was also their advocate. The plaintiffs submitted that the 1st defendant cannot at this stage purport to withdraw her instructions which are clear from the evidence on record.

The plaintiffs submitted that the re-transfer the subject matter of these proceedings was executed by Basil who was described in the recital thereof as the Vendor. The plaintiffs submitted that the description of the 2nd Plaintiff as vendor in the signature page is a mere slip on the part of the parties' mutual advocate since it had already been described as a purchaser in the recital. The plaintiffs submitted that the title for the suit property was with Basil who signed the re-transfer in accordance with the 1984 agreement between him and the Achungos.

The plaintiffs submitted that the re-transfer dated 16th July 2010 was lodged with Registrar of Titles on the 24th August 2010 by the parties' mutual advocate, Okwach & Company Advocates and not by the 2nd plaintiff as alleged by the 1st defendant. The plaintiffs submitted that there was no way an advocate who was acting for both parties could have perpetuated a fraud in favour of one party as against the other. The plaintiffs denied that they were the ones who collected the certificate of title for the suit property from the land registry. The plaintiffs submitted that the certificate of title was collected by a representative of Okwach & Company Advocates who acted for both parties in the transaction on a date after 24th August 2011. The plaintiffs submitted further that the said certificate of title was released to the 2nd plaintiff by Mr. Joe Okwach Senior Counsel on 1st September 2011 in the presence of Ronald Achungo. The plaintiffs submitted that this was the first time the 2nd plaintiff noticed that the 2nd plaintiff had been named in the said certificate as a nominee of the Achungos.

The plaintiffs submitted further that they did not hold the certificate of title for a whole year without informing the 1st defendant of the existence thereof. The plaintiffs submitted that after the re-transfer was lodged for registration on 24th August 2010, the deed file at the land registry was misplaced and the original deed plan for the suit property also went missing from the deed file as a consequence of which the parties' mutual advocates, Okwach & Company Advocates were forced to engage the land registry and the Director of Surveys in

correspondence to enable a certified copy of the deed plan to be issued to facilitate the registration of the said re-transfer and processing of the title.

The plaintiffs submitted that this explains why it took a year for the re-transfer to be registered and title issued. The plaintiffs submitted further that it was not necessary for the certificate of title to be issued in the names of the Achungos first before it was transferred to the 2nd plaintiff. The plaintiffs submitted that that would have resulted in double payment of stamp duty, a matter which the 1st defendant fully understood and consented to. The plaintiffs reiterated that for the 1st defendant to allege fraud in the manner in which the re-transfer to the 2nd plaintiff was effected from Basil is to allege fraud on the part of Mr. Joe Okwach Advocate, which was never proved.

The plaintiffs submitted that the original certificate of title was released to the 2nd plaintiff by the parties' mutual advocate as a matter of right on account of the fact that the transfer of the suit property was effected openly and without fraud or any underhand dealings on the part of the plaintiffs. The plaintiffs submitted that there was no fraud on the part of the plaintiffs and that the 2nd plaintiff continues to hold the said certificate of title as the owner of the suit property pending rectification of the same by the court. On whether the purchase price was fully paid and the transaction completed, the plaintiffs submitted that they did not delay the payment of the full purchase price. The plaintiffs submitted that in accordance with the agreement for sale, the 1st plaintiff was only obliged to pay a deposit of Kshs. 200,000/-. The plaintiffs submitted that the 1st plaintiff went beyond this and paid a further sum of Kshs. 1,200,000/- between 8th March 2003 and 29th September 2011 in order to accommodate the Achungos who were persons very well known to PW1.

The plaintiffs submitted that the balance of the purchase price for the suit property of Kshs. 600,000/- which the plaintiffs are able and are willing to pay is supposed to be paid upon rectification of the title of the suit property to indicate that the 2nd plaintiff is the absolute owner of the property and not a nominee of the Achungos. The plaintiffs submitted that as evidence of good faith, they deposited the said balance of the purchase price with the Deputy Registrar of the court as an indication of their preparedness to pay the same once the court issues an order for rectification of the said title. The plaintiffs submitted that that the registration of the suit property in the name of the 2nd plaintiff is complete the Land Registrar having executed and sealed the certificate of title on 24th August 2011. The plaintiffs submitted that all that is pending is the rectification of the title by removal of the words "as nominees of Peter Omondi Achungo and Mary Abondo Achungo" after the 2nd plaintiff's name in the title. The plaintiffs submitted that they cannot pay the balance of the purchase price to the 1st defendant until the 2nd plaintiff is issued with an absolute title as per the sale agreement.

On whether the plaintiffs took possession of the suit property forcefully and leased the same to a third party, the plaintiffs submitted that after collecting of the title from Mr. Okwach on 7th September 2011, the 2nd plaintiff requested the 1st defendant to hand over vacant possession of the suit property and she agreed. The plaintiffs submitted that on 7th September, 2011, the 1st defendant sent her son, Ronald Achungo to accompany PW1 to the suit property where he was shown around the plot and introduced to a tenant by the name Chrispin Onala (PW2) who was a stranger to him. The plaintiffs submitted that the plaintiffs' assumption of possession was facilitated by the 1st defendant and that the takeover was peaceful, without any controversy whatsoever and without any measure of force or deception on the part of the Plaintiffs.

On whether the plaintiffs have any interest in the suit property, the plaintiffs submitted that the 2nd plaintiff is the registered proprietor of the suit property, and even has a certificate of title in its name save for the mistake that refers to it as the "nominee of late Peter Omondi Achungo and Mary Abondo Achungo". The plaintiffs submitted that the 2nd Plaintiff holds a valid title to the suit property on account of the re-transfer duly executed in its favour by Basil as vendor pursuant to the 1984 agreement between Basil and the Achungos. The plaintiffs submitted that the certificate of title issued to the 2nd plaintiff is conclusive evidence to all that the 2nd plaintiff is the absolute and indefeasible owner thereof save where there is evidence of fraud which in this case is non-existent. The plaintiffs submitted that the instrument of the re-transfer was registered without any fraud on the part of the plaintiffs and at the behest of the parties' mutual advocates Okwach & Company Advocates. The plaintiffs submitted that they have a direct interest in the suit property by virtue of the 2nd Plaintiff's holding of a valid and indefeasible title over the said property.

On whether the plaintiffs failed to pay the balance of the purchase price after demand, the plaintiffs submitted that they have never refused to remit the balance of the purchase price to the 1st defendant as alleged. The plaintiffs submitted that their position has been and remains that the 1st defendant has not delivered a clear title to the 2nd plaintiff. The plaintiffs submitted that it is for that reason that the plaintiffs cannot pay the balance of the purchase price to the 1st defendant without the intervention of the court.

On whether the agreement for sale of the suit property had been rescinded, the plaintiffs submitted that 1st plaintiff received the rescission notice dated 18th October, 2011. The plaintiffs submitted that equitable remedy of rescission is not available where a transfer has already been completed and all that is pending is the rectification of a mistake in the title. The plaintiff cited Njamumu v Nyaga[1983] KLR 282 and submitted that in any event, rescission of a contract to sell land can only arise where the party in default has been notified of the default and given an opportunity to rectify the same. The plaintiff submitted that the agreement between the parties had reached a stage where it was not possible to rescind the same. The plaintiffs submitted that even if rescission was possible, there was no notice of rescission as required in the above cited case until 18th October 2011 when the 2nd plaintiff requested for the rectification of its title. The plaintiffs submitted that a court of equity cannot rescind an agreement that has been completed.

On whether the court can grant the orders for the rectification of the certificate of title in issue, the plaintiffs submitted that, as measure of caution for the protection of the plaintiffs' interest, it is only fair and logical that the court directs either the 1st defendant or the 4th defendant to rectify the title for the suit property as prayed in the plaint. The plaintiffs submitted that should the 1st defendant decline or be unable to sign the deed of rectification, the court can direct the registrar of the court to sign the same on her behalf. In conclusion, the plaintiffs urged the court to allow the plaintiffs' claim and to dismiss the defendants' defence with costs.

The 1st defendant's submissions:

The 1st defendant submitted that the 1st plaintiff breached the agreement of sale between it and the Achungos by failing to pay the purchase price on time and also by taking possession of the suit property and benefitting from it unlawfully. The 1st defendant submitted that as a result of these acts of breach, the 1st defendant served upon the 1st plaintiff a letter rescinding the agreement on 18th October 2011. The 1st defendant submitted that the 1st plaintiff's demand for payment of Ksh. 15,000,000/= to vacate the suit property had no basis. The 1st defendant termed the demand as another attempt to defraud the 1st defendant and her family. The 1st defendant submitted that the plaintiffs have no proprietary interest in the suit property that can be protected by an order of injunction.

The 1st defendant submitted further that the plaintiffs have approached the court with dirty hands. The 1st defendant submitted that the plaintiffs have engaged in the concealment of material facts and have pedaled open falsehoods. The 1st defendant gave the particulars of the plaintiffs' act of concealment and falsehood as follows;

- a. Concealing from the court the fact that they are in breach of the sale agreement by;
 - i. Refusing to remit the balance of the purchase price on time while asserting that they have a title and the transaction has been consummated.
 - ii. Taking over forcible possession of the suit property before completing the payment of the purchase price.
- b. Concealing from the court the material facts of the agreement of sale to the effect that if the purchaser defaulted in the payment of the full purchase price 7 days after registration of the transfer then it could only have a refund of the part payment already made after the vendors' sale of the property to another buyer.
- c. Asserting that they had a title to the said property knowing the same to be false as the said title was fraudulently obtained.
- d. Taking forcible possession of the suit property contrary to the terms and conditions of the agreement which stipulated clearly that possession would only be taken upon payment of the full purchase price.
- e. Falsely alleging that it was impossible to rescind the agreement because the same had already been consummated and completed yet they have not paid the full purchase price after registration of the transfer.
- f. Concealing the fact that the 1st plaintiff is in default of the agreement for sale, and assuming that the 2nd plaintiff has a title to the suit property which title was fraudulently obtained.
- g. Causing fraudulent entries to be made on the records at the land registry in respect of the suit property as to when the registration of the alleged re-transfer was made.
- h. Proceeding to unlawfully cause the re-transfer of the subject property knowing well that one of the vendors, Peter Omondi Achungo had passed on and letters of administration had not been taken out in respect of his estate to enable the transfer of any of his properties
- i. Purporting to re-transfer the subject property into the name of the 2nd plaintiff without the consent and or authority of the 1st defendant and her late husband.
- j. Falsely claiming that Okwach & Co. Advocates made a mistake in the documentation leading to issuance of the certificate of title knowing well that the said Okwach and Co. Advocates had no authority of the vendors to transfer the subject property to the 2nd plaintiff.
- k. Falsely claiming that the Commissioner of Lands made an error on the certificate of title, a matter not falling within the mandate of the Commissioner of Lands and further notwithstanding that the certificate of title was issued pursuant to a fraudulent re-transfer executed by PW1, Erick Opon Nyamunga and his wife one, Rose Nyamunga without any or due authority.

The 1st defendant cited Anastacia Wangui Muriithi v Jean Wamarwanyamu [2019] eKLR where the court defined fraud as "a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his/her detriment". The 1st defendant submitted that since the plaintiffs concealed the fact of the re-transfer to the 1st defendant and the deceased, the plaintiffs committed fraud. The 1st defendant also cited Kisumu ELCC No. 417 of 2015, Samuel Odhiambo Oludhe & 2 others v Jubilee Jumbo Hardware Limited and another and Alice Chimutai Too v Nickson Kipkurui Korir and 2 others 2015 eKLR in support of her submissions that a title to land is not protected if it is procured through fraud or misrepresentation to which the person holding the title is proved to be a party; or where it is procured illegally, and procedurally, or through a corrupt scheme. The 1st defendant submitted that the 2nd plaintiff through PW1 was a party to the fraud, misrepresentation and concealment of facts that led to the issuance of the impugned certificate of title and as such the 2nd plaintiff cannot seek solace under the provisions of section 26 of the Land Registration Act, 2012 to shield its title to the suit property. The 1st defendant submitted that that section only protects innocent purchasers of property but not fraudulent and unscrupulous purchasers as in this case. The 1st defendant submitted that this suit is an attempt by the plaintiffs who did not have a good title to pass to themselves to have the fraudulent title held by them regularized.

The 1st defendant submitted that the registration of the re-transfer herein that was obtained through fraud, misrepresentation and concealment of material facts should be cancelled so that the suit property reverts to the 1st defendant. The 1st defendant submitted that the court cannot sanitize the plaintiffs' actions. The 1st defendant submitted that there was no privity of contract between the 2nd plaintiff and the Achungos. The 1st defendant submitted that the agreement of sale was between the 1st plaintiff and the Achungos. The 1st defendant submitted that the alleged sale of the suit property to the 2nd plaintiff is a falsehood pedaled by PW1 to play victim and to hoodwink the court.

The 1st defendant submitted that the title for the suit property still vests in the names of the Achungos and urged the court to so find. The 1st defendant submitted that after filing this suit and without an order of the court, or consent of the parties, PW1 fraudulently deposited Kshs. 600,000/- in this court in a purported show of good faith when he had adamantly refused to pay the said amount to the Achungos for a very long time. The 1st defendant submitted that PW1 did not need over 15 years to show good faith.

The 1st defendant submitted that there was no way the Achungos would have been involved in the signing of the deed of rectification of the certificate of title for the suit property when they were not involved in the execution of the re-transfer. The 1st defendant submitted that the execution of the said deed of rectification by them would be a perpetuation of the plaintiffs' fraud. The 1st defendant submitted that the evidence adduced and submissions made by the plaintiffs were full of contradictions. The 1st defendant submitted that on one hand, the plaintiffs contended that the suit property was already registered in the name of the 2nd plaintiff and as such the agreement for sale had been completed and could not be rescinded while on the other hand they have contended that they could not pay the balance of the purchase price because the property was yet to be registered in their names. The 1st defendant submitted that the plaintiffs cannot approbate and reprobate at the same time.

The 1st defendant submitted that there was no evidence that the delay in the registration of the re-transfer and errors in the dates in the land register and the certificate of title were occasioned by loss of the deed file and deed plan. The 1st defendant submitted that it was PW1 who collected the certificate of title from the land registry and that Mr. Okwach refused to deal with the alleged errors in the title because he did not want to be part of the scheme to defraud the 1st defendant of the suit property. The 1st defendant submitted that the agreement of sale between the 1st plaintiff and the Achungos was lawfully rescinded through a notice that was served upon the 1st plaintiff through the firm of Lumumba, Mumma and Kaluma Advocates in which the reasons for the rescission which included refusal to pay the balance of the purchase price, fraud and misrepresentation were given. The 1st defendant submitted that the rescission was in line with the terms of the agreement for sale particularly special condition (d) which provided for a refund of the purchase price.

The 1st defendant submitted that granting the orders sought by the plaintiffs herein will amount to the court sanctioning the illegal and fraudulent actions of the plaintiffs. The 1st defendant submitted that she reserves the right to sue the plaintiffs for fraud, damages, rent arrears and rectification of the register in respect of the property the subject of this matter. The 1st defendant submitted that the 1984 agreement between Basil and the Achungos as concerns the re-transfer was not followed by the plaintiffs while acquiring the illegal certificate of title. The 1st defendant submitted that the suit property was to be retransferred to the Achungos or their nominee. The 1st defendant submitted that they never signed the re-transfer neither did they give any authority for the property to be transferred to the 2nd plaintiff. The 1st defendant submitted that the re-transfer was a fraud and needs to be cancelled forthwith. The 1st defendant submitted that a title obtained fraudulently and through misrepresentation is not protected under section 23(1) of the Registration of titles Act, Chapter 281(now repealed). The 1st defendant submitted that it is absurd that the plaintiffs who have openly and fraudulently committed fraud to obtain title to the 1st defendant's property are now accusing the 1st defendant of fraud. The 1st defendant urged the court to allow her to re-sell the suit property and refund to the 1st plaintiff the purchase price it has paid.

In conclusion, the 1st defendant submitted that the plaintiffs by their fraudulent and illegal actions frustrated the sale transaction between the 1st plaintiff and the Achungos which stands rescinded. The 1st defendant reiterated that there was no privity of contract between the Achungos and the 2nd plaintiff and that there was no instrument by the Achungos appointing the 2nd plaintiff as their nominee for the purposes of the re-transfer. The 1st defendant reiterated that when the suit property was purportedly being re-transferred to the 2nd plaintiff, one of the owners thereof, Peter Omondi Achungo (the deceased) had passed on and no letters of administration in respect of his estate had been issued. The 1st defendant submitted that the plaintiffs' case is not proved on a balance of probabilities as required by the law and urged the court to dismiss the same with costs.

Determination:

I have considered the pleadings and the evidence tendered by the parties in support of their respective cases. I have also considered the submissions by the parties' advocates and the authorities cited in support thereof. The parties did not agree on the issues for determination by the court. Each party framed its own issues. From my perusal of the pleadings, the following in my view are the issues that arise for determination in this suit;

1. Whether there is an error in the certificate of title No. I.R 131524 in respect of L.R No. 209/9680/9(the suit property).
2. Whether the 1st and 4th defendants should be compelled to rectify the error if any in the said certificate of title.
3. Whether the agreement of sale dated 24th July 2002 was lawfully rescinded by the 1st defendant.

4. Whether the 1st defendant entered into an agreement with the 2nd and 3rd defendants for sale of the suit property.
5. Whether the plaintiffs are entitled to the reliefs sought in the plaint.
6. Who is liable for the costs of the suit?

Whether there is an error in the certificate of title No. I.R 131524 in respect of L.R No. 209/9680/9 (the suit property).

In Black's Law Dictionary, 10th Edition, the meaning of the word "error" is given as:

“An assertion or belief that does not conform to the objective reality; a belief that what is false is true or that what is true is false; MISTAKE.”

The certificate of title for the suit property was issued in the name of “PHENNY HOLDINGS LIMITED, As Nominee of PETER OMONDI ACHUNGO AND MARY ABONDO ACHUNGO”. The plaintiffs have contended that the words “As Nominee of PETER OMONDI ACHUNGO AND MARY ABONDO ACHUNGO” were inserted in the said certificate of title in error and as such should be removed from the title. To determine whether the said words found their way into the said certificate of title through an error, it is necessary to consider the transactions that gave rise to the said certificate of title. At all material times, the 1st defendant, Mary Abondo Achungo and Peter Omondi Achungo (deceased) (“the Achungos”) were registered as the owners of all that parcel of land known as L.R No. 209/9680, I.R No. 36951 measuring 0.5175 of a hectare (“the mother title”). On 28th November 1984, the Achungos transferred the mother title to Surjeet Singh Basil (Basil). It was agreed between the Achungos and Basil that Basil would subdivide the mother title into four portions in accordance with a subdivision scheme that the parties had agreed on and would “re-transfer” to the Achungos “and/or their nominee/s” one of the subdivisions that was marked as “Sub Plot D” on the said subdivision scheme. Following the completion of the subdivision of the mother title by Basil, the said Sub Plot D was registered as L.R No. 209/9680/9 (the suit property).

On 24th July 2002, the Achungos sold the suit property together with the buildings and improvements thereon to Nortis Investments Limited, the 1st plaintiff herein at a consideration of Kshs. 2,000,000/-. The agreement was prepared by Okwach & Company Advocates which acted for both parties in the transaction. On 16th July 2010, Basil re-transferred the suit property to the 2nd plaintiff herein, Phenny Holdings Limited as nominee of Peter Omondi Achungo and Mary Abondo Achungo. In the instrument of re-transfer that was also drawn by Okwach & Company Advocates, the 2nd plaintiff was referred to as the Achungos’ nominee. The re-transfer was executed by a director and secretary of the 2nd plaintiff as vendors. The said re-transfer was registered on 24th August 2011. Following the said registration, the 2nd plaintiff was issued with the certificate of title No. I.R 131524 dated 24th August, 2010 said to contain an error.

The question that I now need to answer is whether the registration of the suit property in the name of the 2nd plaintiff as a nominee of the Achungos was erroneous. The plaintiffs have contended that the suit property was supposed to be registered in the name of the 2nd plaintiff as the absolute owner thereof rather than as a nominee. The plaintiffs have claimed that the 2nd plaintiff was a nominee of the 1st plaintiff and not that of the Achungos. The plaintiffs had a duty to lay a basis for this contention. The plaintiffs did not place before the court any evidence linking the 2nd plaintiff to the agreement of sale of the suit property between the 1st plaintiff and the Achungos.

The agreement of sale dated 27th July 2002 between the 1st plaintiff and the Achungos did not refer to a nominee. There is no indication in the said agreement that the parties had agreed that the 1st plaintiff could appoint a nominee for the purposes of transfer of the suit property. In the agreement between the Achungos and Basil, it was agreed that the suit property would be re-transferred to the Achungos or their nominee/s. There is no evidence that the Achungos nominated the 2nd plaintiff as their nominee pursuant to the agreement that they had with Basil. There is also no evidence that the Achungos had instructed Okwach & Company Advocates to have the suit property re-transferred to the 2nd plaintiff. I am of the view that if the parties had agreed that the 1st plaintiff could appoint a nominee for the purposes of the transfer of the suit property, that would have been included in the agreement of sale between them or they would have entered into a deed of variation of the agreement to include that arrangement. The agreement of sale between the Achungos and the 1st plaintiff was in writing. The same could not be varied verbally.

In the absence of evidence that the 2nd plaintiff was privy to the agreement of sale between the Achungos and the 1st plaintiff, the transfer of the suit property to the 2nd plaintiff was not erroneous but unlawful as it was in breach of the agreement between the Achungos and the 1st plaintiff. I see no error at all in the 2nd plaintiff having been registered as the owner of the suit property “as nominees of Peter Omondi Achungo and Mary Abondo Achungo”. As stated earlier, Basil could only transfer the suit property to either the Achungos or their nominee/s or risk a suit for breach of contract. Since the 2nd plaintiff was not the Achungos, the property could only be transferred to it by Basil as a nominee of the Achungos. I believe that the words “as nominee of Peter Omondi Achungo and Mary Abondo Achungo” were inserted in the re-transfer to give Basil comfort that the transaction was in accordance with the agreement that he had with the Achungos. I doubt if Basil would have executed the instrument of re-transfer without those words unless he was furnished with a deed appointing the 2nd plaintiff as the Achungos nominee for the purposes of the re-transfer.

Having made a finding that the transfer of the suit property to the 2nd plaintiff was unlawful as it had no contractual basis, whether or not the 2nd plaintiff should have been registered as the owner of the suit property as “as nominee of Peter Omondi Achungo and Mary Abondo Achungo” is inconsequential. I am in agreement however that if the Achungos had nominated the 2nd plaintiff to be registered as the owner of the suit property pursuant to the agreement that they entered into with Basil, it would not have been proper to register the 2nd plaintiff as holding the property as a nominee of the Achungos. In the absence of evidence of such appointment or legal basis for the 2nd plaintiff's

registration as the owner of the suit property, the 2nd plaintiff's claim that its registration as owner of the property as a nominee of the Achungos was erroneous is baseless since the 2nd plaintiff should not have been registered as the owner of the property in the first place.

Due to the forgoing, it is my finding that the registration of the 2nd plaintiff as the owner of the suit property and as a nominee of the Achungos was not erroneous but unlawful.

Whether the 1st and 4th defendants should be compelled to rectify the error if any in the said certificate of title.

I have made a finding that there is no error in the certificate of title for the suit property in the name of the 2nd plaintiff. What is in existence is an unlawful certificate of title which should be cancelled rather than being rectified. I am in agreement with the 1st defendant's contention that to rectify the said certificate in the manner sought by the plaintiffs would be to sanction an illegality. If the court was to order the rectification sought, it would be granting an approval to the registration of the suit property in the name of the 2nd plaintiff which was not privy to the contract between the 1st plaintiff and the Achungos. The court would also in effect alter the agreement between the Achungos and Basil that provided that the re-transfer of the suit property would be to the Achungos or their nominee/s. As mentioned earlier, there is no evidence that the 2nd plaintiff was nominated by the Achungos as the transferee of the suit property. Rectifying the certificate of title by removing the words "as nominee of Peter Omondi Achungo and Mary Abondo Achungo" would make the 2nd plaintiff the absolute owner of the suit property. That is a status the court cannot confer upon the 2nd plaintiff in the absence of any evidence that the agreement between the Achungos and the 1st plaintiff authorized the transfer of the suit property to be made to the 1st plaintiff or its nominee/s and that the 1st plaintiff had nominated the 2nd plaintiff as a nominee transferee. None of those was established. There would therefore be no basis upon which the certificate of title for the suit property can be rectified to confer absolute ownership of the suit property upon the 2nd plaintiff. I am of the view that the said certificate of title should be cancelled so that a fresh valid re-transfer is effected by Basil to the Achungos or their nominee/s. If the Achungos nominate the 2nd plaintiff as a transferee, the property would be transferred to the 2nd plaintiff. If no such nomination is made, Basil will re-transfer the property to the Achungos who will thereafter transfer the property to the 1st plaintiff under the agreement of sale dated 24th July 2002 if the agreement is still subsisting. I am alive to the fact that what I have proposed as the way forward out of the situation the parties find themselves will subject them to more expense. However, in view of the stance that each of the parties has taken in these proceedings, there is no other way of dealing with the matter.

I have also noted that although the re-transfer pursuant to which the said certificate of title was issued was registered on 24th August 2011, the certificate of title in the name of the 2nd plaintiff was issued on 24th August 2010 and registered on the same date. Although the reasons that were given by the plaintiffs for the delay in registration of the re-transfer from the evidence on record were convincing, no satisfactory explanation was given for the issuance and registration of a certificate of title before the registration of the re-transfer and how the certificate would have been issued without a deed plan that was said to be lost or misplaced. I am of the view that these anomalies cannot be corrected through the rectification of the certificate of title sought by the plaintiffs but through the cancellation of the certificate and issuance of a new title.

Before concluding on the issue, I wish to add that the 1st defendant was not a party to the instrument of re-transfer of the suit property by Basil to the 2nd plaintiff. Since the 1st defendant was not a party to the said instrument of re-transfer, I am unable to see how the 1st defendant can be a party to the rectification of the alleged error whose origin was the said document. As I have stated earlier, the 1st defendant can only execute a new instrument of transfer pursuant to the agreement of sale between the Achungos and the 1st plaintiff. The court cannot compel the 1st defendant to rectify a document which she was not a party to. I have perused the deed of rectification dated 12th October 2011 that was prepared by PW3. What the plaintiffs lost sight of in the said deed of rectification was the fact that the alleged error in the certificate of title that they were trying to correct originated from the instrument of re-transfer dated 16th July 2010. The rectification if any ought to have started with the said instrument of re-transfer. There is no reference at all in the said deed of rectification to the said instrument of re-transfer. The parties who executed the said instrument of re-transfer were the 2nd plaintiff and Basil. These were the same parties who should have signed the deed of rectification. It is not clear why the 1st defendant was being dragged into the purported rectification. The certificate of title could not be rectified in isolation to the underlying documentation that gave rise to it.

The plaintiffs have prayed in the alternative that if the 1st defendant fails or refuses to correct the alleged error, the court should order the 4th defendant to forthwith carry out the rectification. Even the 4th defendant in my view cannot rectify an error in a certificate of title whose origin is in the conveyancing documents unless the said documents are in themselves rectified. In the absence of a deed of rectification of the instrument of re-transfer executed by those who were parties to it, there is no basis upon which the 4th defendant can rectify the said certificate of title.

Due to the forgoing, it is my finding that the 1st and 4th defendants cannot be compelled or ordered to rectify the certificate of title dated 24th August 2010 because there is no basis upon which such order can be made. In any event, the court has already found that there is no error in the said certificate of title.

Whether the agreement of sale dated 24th July 2002 was lawfully rescinded by the 1st defendant.

Clause 4 of the agreement of sale between the 1st plaintiff and the Achungos provided that the agreement was subject to the 1989 Law Society Conditions of Sale (LSK Conditions) so far as the same were not inconsistent with the terms of the agreement. On 18th October 2011, the 1st defendant served the 2nd plaintiff with a notice purporting to rescind the said agreement of sale dated 24th July 2002 between the Achungos and the 1st plaintiff. The reason for the rescission that was given in the notice was the 2nd plaintiff's failure to discharge its obligations under clause 5 of the agreement as read with special condition A by failing to pay the agreed purchase price within the prescribed period. The plaintiffs' advocates responded to the said letter of rescission through their advocates letter dated 11th November 2011 in which

the said advocates contended that the agreement between the 1st plaintiff and the Achungos had been completed and as such the same could not be rescinded. On the 1st defendant's claim that the 2nd plaintiff had failed to pay the balance of the purchase price, the plaintiffs claimed that the payment had not been made because of the error in the certificate of title that was issued to the 2nd plaintiff which the 1st defendant had refused to attend to even after she was requested to do so.

As I mentioned earlier, the 1st defendant contended that there was no privity of contract between the Achungos and the 2nd plaintiff in relation to the sale of the suit property. The court has already upheld that contention by the 1st defendant. Since the agreement of sale dated 24th July 2002 was between the Achungos and the 1st plaintiff, it is not clear on what basis the notice of rescission of the said agreement was being served upon the 2nd plaintiff. The Law Society Conditions of Sale provides as follows in Condition 4(7);

“4. Completion

(7) This sub-condition applies unless a Special Condition provides that time is of the essence in respect of the completion date:

(a) In this condition “completion notice” means a notice served in accordance with this sub-condition;

(b) If the sale shall not be completed on the completion date, either party (being then himself ready, able and willing to complete) may after that date serve on the other party notice to complete the transaction in accordance with this sub-condition. A party shall be deemed to be ready, able and willing to complete:

(i) If he could be so but for some default or omission of the other party;

(ii) notwithstanding that any mortgage on the property is unredeemed when the completion notice is served, if the aggregate of all sums necessary to redeem all such mortgages (to the extent that they relate to the property) does not exceed the sum payable on completion.

(b) Upon service of a completion notice it shall become a term of the contract that the transaction shall be completed within Twenty-One (21) days of service and, in respect of such period, time shall be of the essence of the contract.

(c) If the purchaser does not comply with a completion notice:

(i) the purchaser shall forthwith return all documents delivered to him by the vendor and at his own expense procure the cancellation of any entry relating to the contract in any register;

(ii) without prejudice to any other rights or remedies available to him, the vendor may forfeit and retain any deposit paid and/or resell the property by auction, tender or private treaty.

(e) If on any such re-sale contracted within Six (6) months after the completion date the vendor incurs a loss, the purchaser shall pay to the vendor liquidated damages. The amount payable shall be the aggregate of such loss, all costs and expenses reasonably incurred in any such re-sale and any attempted re-sale and interest at the contract rate on such part of the purchase money as is from time to time outstanding (giving credit for the amount of the forfeited deposit (if any) and for all sums received under any re-sale contract on account of the re-sale price) after the completion date;

(f) If the vendor does not comply with a completion notice, the purchaser, without prejudice to any other rights or remedies available to him, may give notice to the vendor forthwith to pay to the purchaser any sums paid by way of deposit or otherwise under the contract and interest on such sums at the contract rate from Four (4) working days after service of the notice until payment. On compliance with such notice, the purchaser shall not be entitled to specific performance of the contract but shall forthwith return all documents delivered to him by the vendor and, at the expense of the vendor, procure the cancellation, of any entry relating to the contract in any register;

(g) Where, after service of a completion notice, the time for completion shall have been extended by agreement or implication, either party may again invoke the provisions of this condition which shall then take effect with the substitution of “ten (10) days” for “twenty-one (21) days” in paragraph (c) of this sub-condition.”

The agreement between the Achungos and the 1st plaintiff provided that the purchase price for the suit property was Kshs. 2,000,000/- of which a sum of Kshs. 200,000/- was paid on execution of the agreement and the balance was to be paid on completion of the agreement. The agreement provided that the completion date was seventh day of registration of the transfer of the suit property in the 1st plaintiff's name. From what I have stated earlier, the suit property was not registered in the name of the 1st plaintiff. It was instead registered on 24th August 2011 in the name of the 2nd plaintiff with whom the Achungos had no contract. The balance of the purchase price would have become payable upon registration of the suit property in the name of the 1st plaintiff. Since that was not done, the Achungos were not entitled to payment of the balance of the purchase price.

Assuming that the 2nd plaintiff was a nominee of the 1st plaintiff which I have held not to be the case and that the transfer of the suit property to the 2nd plaintiff was in accordance with the terms of the agreement dated 24th July 2002 between the Achungos and the 1st defendant, can the letter of rescission by the 1st defendant's advocates to the 2nd plaintiff be valid? In the circumstances, the completion date of the

agreement of sale between the Achungos and the 1st plaintiff would have been on 31st August 2011 which was the seventh day after registration of the suit property in the name of the 2nd plaintiff. It was on this date that the Achungos would have become entitled to the balance of the purchase price.

The agreement of sale between the parties did not provide that the time was of the essence in respect of any of the parties' obligations under the agreement of sale. That being the case, in the event that the plaintiffs failed to pay the balance of the purchase price on 31st August 2011, the 1st defendant was required to serve upon the plaintiffs a completion notice under condition 4(7) of the Law Society Conditions of Sale. It was that notice that would have made time of the essence in respect of the plaintiffs' obligations to pay the balance of the purchase price. Upon receipt of the said completion notice, the plaintiffs would have been under obligation to complete the agreement by making payment of the balance of the purchase price within 21 days of service of the notice. It was upon the expiry of 21 days of service of such notice without compliance that the 1st defendant would have been entitled to rescind the agreement of sale. There is no evidence that prior to her advocates letter dated 18th October 2011 purporting to rescind the said agreement of sale the 1st defendant had served the plaintiffs with a completion notice under condition 4(7) of the Law Society Conditions of Sale. The purported letter of rescission itself could not qualify as a completion notice in that it purported to rescind the agreement of sale with immediate effect instead of calling upon the plaintiffs to complete the agreement within 21 days in default of which the same would stand rescinded. It follows from the foregoing that even if the 2nd plaintiff had assumed the 1st plaintiff's contractual obligations under the agreement of sale dated 24th July 2002 and as such the letter dated 18th October 2011 was rightfully addressed to it, the purported rescission of the said agreement of sale by the 1st defendant was premature and as such ineffective to bring to an end the agreement of sale between the 1st plaintiff and the Achungos.

For the foregoing reasons, it is my finding that the agreement of sale dated 24th July 2002 between the Achungos and the 1st plaintiff was not lawfully rescinded by the 1st defendant. I wish to add in conclusion on this issue that I did not at all find merit in the plaintiffs' argument that the agreement of sale had been completed and as such could not be rescinded. In my view, so long as the balance of the purchase price remained unpaid by the plaintiffs, the agreement remained uncompleted and as such could be rescinded.

Whether the 1st defendant entered into an agreement with the 2nd and 3rd defendants for sale of the suit property.

No evidence was placed before the court in proof of the plaintiffs' claim that the 1st defendant had entered into another agreement for sale of the suit property with the 2nd and 3rd defendants. From the evidence on record, the suit property is registered in the name of the 2nd plaintiff and there is a caveat registered against its title by the Land Registrar. I am unable to see in the circumstances how the 1st defendant would have sold the property to the 2nd and 3rd defendants. No agreement or correspondence between the 1st defendant and the 2nd and 3rd defendants regarding the alleged sale was placed before the court. It is my finding that the alleged sale of the suit property by the 1st defendant to the 2nd and 3rd defendants was not proved.

Whether the plaintiffs are entitled to the reliefs sought in the plaint.

I have set out earlier in this judgment the reliefs sought by the plaintiffs. For the reasons that I have given above, the plaintiffs have not proved their case against the defendants. The plaintiffs are therefore not entitled to any of the reliefs sought in the plaint. As I mentioned earlier, I would have cancelled the certificate of title dated 24th August 2010 if I had been asked to do so having found that the title was issued unlawfully. Neither the plaintiffs nor the defendants asked me to grant such relief. In the circumstances, my hands are tied. Having held that the plaintiffs' case is not proved, the suit is for dismissal.

Who is liable for the costs of the suit?

The costs of and incidental to a suit is at the discretion of the court as provided in section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya. The plaintiffs have not proved their claim against the defendants. No reason has been given to warrant denying the defendants their costs for defending the suit. The 2nd and 3rd defendants did not defend the suit and as such I will not award them costs although the case against them was not proved. The 1st and 4th defendants are however entitled to the costs of the suit.

Conclusion:

In conclusion, the plaintiffs' suit is dismissed with costs to the 1st and 4th defendants. The Deputy Registrar shall on request return to the plaintiffs' advocates a banker's cheque for Kshs. 600,000/- dated 7th November 2011 drawn in favour of the Deputy Registrar High Court of Kenya forwarded to the court by the plaintiffs' advocates under cover of a letter dated 11th November, 2011 which cheque was not banked by the court and is lying in the file.

DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF JANUARY 2022

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Kyalo Mbobu for the Plaintiffs

Mr. Ochieng h/b for Ms. Owino for the 1st Defendant

N/A for the 2nd, 3rd and 4th Defendants

C. Nyokabi - Court Assistant