REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AD LAND COURT AT NAIROBI

HIGH COURT CIVIL SUIT NO. 745 OF 2001(O.S)

LILIAN WAIRIMU NGATHO……..….1ST PLAINTIFF

ELIZABETH MURUNGARI NJOROGE……..2ND PLAINTIFF

VERSUS

MOKI SAVINGS CO-OPERATIVE

SOCIETY LIMITED…….…….....…….1ST DEFENDANT

LUCY WANJIRU KIRUHI…….2ND DEFENDANT

RULING

Introduction

This ruling is on the applications made by several Applicants seeking similar orders, and which emanate from the judgment of this Court delivered by Ojwang J. (as he then was) on 30/7/2010, wherein the subject matter of the suit was L.R. NO. 5964/1. The Applicants herein are purchasers of various parcels of land being sub-divisions of L.R. NO. 5964/1 and therefore seek order of joinder as Defendants or Interested Parties to the suit. Secondly, they have also prayed for orders that the Court does review and set aside the delivered by Ojwang J. (as he then was) on 30/7/2010 and that consequential orders emanating therefrom be set aside and this suit be heard *de novo*.

The Case by the 1st Set of Applicants

The first set of Applicants is represented by the firm of Masore Nyang'au& Co. Advocates, and comprise of Joyce Waringa Njuguna, Susan Mugure Njuguna, Beatrice Njeri Gachukia, James Njoroge Mwangi, and, Samuel Karimi Karige and Florence Gathoni Karimi. The Applicants filed separate applications on diverse dates and averred that they are registered proprietors of the various parcels sub-divisions of L.R. NO. 5964/1 and that they are innocent purchasers for value and without any notice that the title of the 1st Defendant or any other subsequent transferee had any defect. Further, that no proof of fraud has been established against them to necessitate the cancellation of the title contrary to the provisions of section 23 of the Registration of Titles Act.

The Applicants aver that they will be condemned unheard, pursuant to the order that their titles be cancelled, upon proof of the Plaintiffs' case against the Defendants' but without proof of the their knowledge of the said fraud. Thus, the Applicants aver that they ought to have been made a party, at the instance of the Plaintiffs, at the commencement of the suit as their presence before the court would enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. The

Applicants contend that they not aware of the existence of this suit and the judgment.

The Applicants further aver that they will suffer irreparable loss if they are not made a party to this suit and orders preserving their interests in land not issued promptly, hence making it necessary to be joined as a party to the suit. The Applicants aver that the Defendants no longer have any interest in this case as the decree is being executed against them. It is therefore just, constitutional and reasonable that the order sought be granted.

Susan Mugure Njuguna in her Notice of Motion and supporting affidavit both dated 5/6/2012 deponed that she has been the registered proprietor of L.R. No. 22926/1 from 27/6/2011. She further deponed that she has since put up a 5-storey building on the property. It was her disposition that she conducted an official search at the lands registry as a requirement for obtaining a loan at Equity Bank and that the search revealed a Court Order issued in HCJR Misc. Appl No. Elc 96/2010 and HCCC No. 745/2001 (OS) registered against her title. She stated that on perusal of the Court files, she confirmed the existence of the suit and noted that the same had already been heard and judgment entered. She deponed that prior to the perusal of the files, she had no knowledge of an existing suit capable of affecting her title, neither was she aware that her title had any defect. She attached a copy of her title.

Joyce Waringa Njuguna in her Notice of Motion and supporting affidavit both dated 5/6/2012 deponed that she has been the registered proprietor of L.R No. 22925/120 since 28th June 2012 and that she purchased the said property from Hannah Mukami Kiruhi. The Applicant deponed that she has developed the said property by putting a building on the plot. It was her disposition that she was prompted by her neighbor to conduct an official search for purposes of confirming whether there was a caution registered on her parcel and that the search revealed that two orders obtained in the High Court had been registered against the title. She further deponed that a perusal of the said court files revealed that a case had been heard and judgment already delivered in which title to her parcel of land together with others derived from LR. No. 5664/1 were declared null and void. She attached a copy of her title as her evidence.

Beatrice Njeri Gachukia in her Notice of Motion and supporting affidavit both dated 5/6/2012 deponed that she purchased L.R No. 22926/4 from the administratix of the estate of Hannah Mukami Kiruhi and was registered as proprietor of the same on 7/5/2009. She stated further that she has extensively developed the said property by putting up a high-rise building which has tenants. It was her disposition that she was made aware of the order of cancellation of her title by her neighbor Susan Mugure Njuguna after she completed developing the same. She also attached a copy of her title.

James Njoroge Mwangi filed a Notice of Motion and swore a supporting on 14/8/2012, and deponed that he purchased L.R No. 22926/10 from Lucy Wanjiru Kiruhi (the 2nd Defendant) and L.R No. 22926/11 from one Teresia Wangare Kinyanjui, whom the deponent alleges to have purchased the same from the 2nd Defendant. He also stated that he is the registered proprietor of L.R. 22925/153 and L.R. 22925/145 which he bought from the 2nd Defendant. He deponed that he has extensively developed L.R 22926/11 which has 22 tenants.. It was his disposition that all the transactions at the land registry proceeded without any caveat or caution and therefore he was unaware of the existence of this suit. Further, that he got the information about cancellation of his titles from his neighbours;Susan Mugure Njuguna and Beatrice Njeri Gachukia. He attached copies of his titles and photographs.

A Notice of Motion was filed by Samuel Karimi Karige on 11/9/2012 and he swore a supporting affidavit on the same date, wherein he and Florence Gathoni averred that they purchased L.R. No 22925/86 from the 2nd Defendant in 2010. Further, that there was no order forbidding such transaction at the time of purchase and transfer. It was their deposition that they came to learn about the court order cancelling their title from their neighbours. They attached a copy of their title.

The counsel for the 1st set of Applicants filed submissions dated 17th June 2013 wherein he argued that the Plaintiffs were aware even before the institution of the suit that the Applicants had acquired interests in the suit land and had therefore become potential parties under Order 1 Rule 3 and Order 1 Rule 10(2) of the Civil Procedure Rules. Further under Order 1 Rule 10(2) joinder of a party can be done at any stage

of the proceedings and that the Applicant's applications are therefore competently before the court. The counsel also argued that section 34 of the Civil Procedure Act barred the Applicants from filing a separate suit. Lastly, the counsel relying on the provisions of sections 1A and 1B of the Civil Procedure Act and Articles 50 (1) and 159(2) of the Constitution, submitted that the duty of the court is to do justice.

The Case by the 2nd Set of Applicants

The second set of Applicants are represented by the firm of Kibatia & Company Advocates and comprise of Venansio Mbataru Kariuki, Micheal Mbira Ngigi, Sammy Thumbi Nyambari, George Murigu Githuku, and Francis Kariuki Macharia who filed separate applications on diverse dates and averred that they only recently learnt that judgment was delivered in this suit on 30/7/2010 wherein the Court ordered cancellation of titles derived from L.R. 5964/1. The Applicants aver that they are bona-fide purchasers for value and without notice and that they had no knowledge that the said title had any defect. The Applicants also stated that they have since substantially developed the plots and the orders now in force are highly prejudicial and injurious, and if executed will amount to condemning them unheard. Consequently, they will suffer irreparable loss and damage.

Venansio Mbataru Kariuki filed a Notice of Motion dated 28/8/2012 and a supporting affidavit sworn on the same date, wherein he deponed that he is the registered proprietor of L.R. Nos 22925/130,131,133,138 and 139, having purchased the said parcels of land in 2001 from Hannah MukamiKiruhi and the 2nd Defendant. He further deponed that upon obtaining titles he embarked on developing the same for commercial and residential use. The Applicant averred that he has constructed a petrol station on L.R. 22925/133 valued at Kshs. sixty five (65) million and that there is an ongoing residential/commercial property valued at Kshs. twenty two (22) million on L.R. 22925/130-131. Further, that plot Nos. L.R. No. 22925/130 & 131 are already charged with commercial banks for loan facilities of Kshs. 15.1 million.

It was his disposition that in April 2012, he applied for a further loan facility to Co-operative Bank of Kenya limited of Kshs.10 million, and he was informed that his loan could not be processed because there was a court order registered against his title emanating from JR Misc. Application No. 96 of 2010. The Applicant deposed that on perusal of the Court file, he learnt that judgment was delivered on 30/7/2010 in which title to his parcels of land were declared null and void. He attached the copies of his titles and photographs of the developments on the said parcels of land.

The Notices of Motion by Francis Kariuki Macharia, George Murigu Githuku, Sammy Thumbi Nyambari and Micheal Mbira Ngigi were all dated 18/10/2010 and they all swore individual supporting affidavits on the same date, wherein they deponed that they respectively purchased the following parcels of land L.R. No. 22925/118, L.R. No. 22925/85, L.R. Nos. 22925/144 and 149 and L.R. No. 22925/116. Further that they purchased the said parcels of land in 2004 from Hannah Mukami Kiruhi and the 2nd Defendant after doing all the requisite searches at the Lands Registry and confirmed that the land was free from all encumbrances.

They further deponed that they have been in peaceful possession of the parcel since the date of purchase peacefully and never involved in any suit. It was their disposition that they came to learn about the Court order registered against their titles in when they conducted official searches at the Lands Registry as a requirement for obtaining a loan facility. They averred that the Defendants withheld material facts by not notifying the court of the existence of new titles and as a result, they was condemned unheard. The said Applicants attached copies of the titles, photographs and valuation reports of their respective parcels of land.

The counsel for the 2nd set of Applicants filed submissions dated 17/6/2013. It was counsel's submission that the Applicants have ably demonstrated that they have sufficient interest to be enjoined in the suit as their properties are directly affected by the decree issued whereas they never participated in the suit. Counsel cited the case of **Joseph Njenga Njoroge v Kabiri Mbiti ,Civil Appeal No. 87/1983** where the Court of Appeal found that the heir of a deceased but who was not a party to the proceedings had a right to apply for review and set aside some orders that had been issued by the court.

In response to the submission made by the Plaintiff on *lis pendens,* counsel submitted that the Plaintiffs could not invoke the principle of caveat emptor, closely linked to *lis pendens* for reasons that there is no evidence to show that the Applicants were aware of the pending litigation at the time of purchase. Counsel referred the Court to the case of **Francis Mureithi Gathuku v Patrick Kiarie Kagwanja& Others, HCCC No. 456/2005** on the need for a prohibitory order for the doctrine to apply.

The Case by the 3rd Set of Applicants

The 3rd Set of Applicants, namely: David Mwangi Grace Gaceca, Simon Gathii Macharia, James Nduati Kuria, James Mathu Wakaba, Beth Wairimu Kahiu, James Maragua Weru, and Justin Willy Kariuki Mwangi were all represented by the firm of Njiru Boniface & Co. Advocates all filed separate applications on diverse dates.

David Mwangi Grace Gaceca filed a Notice of motion dated 19/9/2012 and in his supporting affidavit sworn on the same date averred that he purchased L.R. No. 22925/143 from the 2nd Defendant and he attached a copy of his title.

Simon Gathii Macharia, James Mathu Wakaba James Nduati Kuria, all filed Notices of Motion dated 16/11/2012 and swore individual supporting affidavits on the same date. Simon Gathii Macharia deponed in his affidavit that he purchased L.R. No. 22925/89 from Alice Wanjiku Mukui(now deceased) and the property was transferred to him in 2006. James Nduati Kuria in his affidavit deposed that he purchased L.R. No. 22925/101 from the 2nd Defendant and the property transferred to him in 2006. James Mathu Wakaba in his affidavit deposed that he purchased L.R. No. 22925/92 from Godfrey Kimondo Kiruhi. The Applicants attached copies of their titles and photographs of the said properties.

Beth Wairimu Kahiu deponed in her Notice of Motion dated 11/9/2012 and supporting affidavit sworn on the same date that she purchased L.R. No. 22925/125 from Hannah Mukami Kihuri (now deceased) and the property was transferred to her in 2000. She annexed a copy of the transfer dated 9/10/2000 and a copy of her title to the said land.

James Maragua Weru's Notice of Motion was dated 20/11/2012 and he swore an affidavit on the same dated wherein he deponed that he purchased parcels No. 22925/109, 22925/113, 22925/112 and 22926/12 from the 2nd Defendant, and that the parcels were transferred to him in 2008.

Lastly, Justin Willy Kariuki Mwangi in his Notice of Motion dated 26/7/2013 and supporting affidavit sworn on the same date deponed that he is registered proprietor of L.R. No. 22925/94 which he purchased from George Kimondo Kiruhi, and that the property was transferred to him in 2007. He attached copies of his title to the said parcels of land.

The said Applicants in their depositions stated that they learnt of an inhibition registered in November 2011 against their properties pursuant to an order of the court issued in JR Misc. Civil Application No. ELC 96 of 2010 and the other issued in HCCC No. 745 of 2001(O.S.). They deponed he orders therefrom directly affected their property without being given an opportunity to ensure that their interests were safeguarded.

The counsel for the 3rd set of Applicants filed submissions dated 26/7/2013. Counsel submitted that the privilege of filing an application for review is not limited only to the parties in the suit but to any person who is aggrieved by a decree or order and referred the court to the decision by Odunga J. in the case of **Leonard GikaruWachira v Southern Travel Services Limited & Another Nairobi Misc. Civil Application No. 63/2012** in this regard. Counsel submitted that the 3rd set of Applicants were indeed aggrieved persons who fall under the provision of Section 80 and Order 45 Rule 1 of the Civil Procedure Act and Rules, respectively, in that at the time the suit was concluded on 30/7/2010, the Applicants were registered proprietors of their respective parcels of land.

Counsel further submitted that the Applicants had heavily developed their parcels of land and that unless

the said Judgment is not reviewed and set aside, the Applicants will be under threat of financial loss. Further, that the damage that the dispossession is likely to cause to the Applicants is incalculable in terms of financial and psychological damage. It was his submission that the Applicants had not been given an opportunity to be heard which was a violation of the rule of natural justice. Counsel submitted that the Plaintiffs and Defendants consciously excluded the Applicants from the suit as their presence in the suit would have afforded them special protection as innocent purchasers for value. Therefore, that their exclusion occasioned a miscarriage of justice.

The Case by the 4th Set of Applicants

James Njau Njoroge, Cecilia Nduruka and Richard GichiniNjoroge filed a a joint application dated 11/12/2012 and were represented by the firm of Njiru Boniface & Co. Advocates. Their application is premised on grounds that the Judgment of the Court delivered on 30/7/2010 affects their interest as the rightful heirs and administrators of the Estate of Wanjiku Njau the previous registered owner of the Land Parcel No. 5964/1.

It is their averments that they and the Plaintiffs have been involved in a dispute involving the Estate of the Late Wanjiku (High Court Succession Cause No. 1074/1998) and that they have always been in support of the claim by the late Kihuri Kimondo and Hannah Mukami Kihuri as well as the administrator of the estate of Hannah Mukami Kihuri. These Applicants contend that Wanjiku Njau sold Land Parcel No. 5964/1 to Kihuri Kimondo.

The Applicants also averred that the High Court nullified the Grant issued to Lilian Wairimu Ngatho and Joseph Ndirangu Kiruthu on 30/9/1999 and that to the best of their knowledge no Grant has ever been confirmed to the Plaintiffs and further, the issue as to whether the suit property belongs to the Estate of the Wanjiku Njau has never been determined. The Applicants also stated that they were never involved in or notified of the proceedings concerning Land Parcel No. 5964/1 by the Plaintiffs.

James Njoroge Njau swore a Supporting Affidavit on 11/12/2012 wherein he deponed that Cecilia Nduruka and the late Naomi Nduruka were objectors to the Grant of Letters of Administration fraudulently obtained by Lillian Wairimu Ngatho and Joseph Ndirangu Kiruthu in Nairobi H.C. Succession Cause No. 1074/1998 (Estate of Halima Wanjiku Njau). He deponed that following the objection, the Letters of Administration were revoked by the Court on 30/9/1999. It was his disposition that following the revocation of the Letters of Administration, he and the late Naomi Nduruka on the one hand and the Plaintiffs herein on the other, filed parallel applications for Letters of Administration which were both granted thereby having two Grants existing at the same time.

Further, that the Court revoked the Grant that had been granted to him and the late Naomi Nduruka and upheld that which was given to the Plaintiffs. However, he deponed that the said Grant has never been confirmed. The deponent stated that the Plaintiffs also failed to prosecute their application filed in the Succession Cause on the ownership of Land Parcel No. 5964/1 and proceeded to institute a fresh suit HCCC No. 745/2001 without a determination being made on whether L.R. No. 5964/1 belonged to the estate of Wanjiku Njau.

The Plaintiffs' Response

The 2nd Plaintiff filed Replying Affidavits sworn on different dates in response to the applications filed by the 1st, 2nd and 3rd set of Applicants as follows:20/6/2012, 19/9/2012, two affidavits on 18/10/2012, two affidavits on 1/2/2013, and 12/8/2013.

The 2nd Plaintiff deponed that the transfers in favour of the Applicants referred were registered when the suit was either pending in court or had been concluded and the Registrar of Lands served with the decree in the matter. She deponed that in any event, the said transfers were null and void as the same was done whilst the suit was pending thus contrary to the principle of *Lis Pendens*. Further that there was also a Stay order issued in Nairobi Misc. Application No. 662/2000 whereby the issuance of titles in respect of L.R. No. 5964/1 had been stayed.

It was her disposition that the allegations by the applicants that they had purchased their parcels from Hannah Mukami Kiruhi (now deceased) or Lucy Wanjiru Kihuri had not been supported by any proof. In any event, she deponed, the said Hannah had no good title to pass to the Applicants since the said sale transactions and transfers were done using a limited grant of letters of administration and as such she had no powers to dispose of properties of the estate with the use of a Limited Grant. The deponent contended that the registration of the court order emanating from JR ELC No. 96/2010 was lawfully and in compliance with court orders. Further, that judgment was entered on 30/7/2010 and the same has never been appealed against, and that joinder to the suit at this stage is therefore inconceivable.

The deponent stated further that the Applicants continued to develop the parcels in defiance of the court order as they were notified of the pending suits and resultant orders through print media by way of advertisements of Caveat Emptor notices and also by conspicuously displaying notices on the suit property. She deponed that consequently the Applicants are not innocent purchasers for value without notice as they allege.

On points of law, the 2nd Plaintiff on advice of her counsel deponed that the Applicants have been caught up with the doctrine of laches since their application for joinder has been made after delivery of judgment and the decree already executed. She deponed that it was inconceivable that the Applicants sought orders for joinder, setting aside of judgment, stay of execution and a *de novo* hearing all in the same application. The 2nd Plaintiff deponed that the provisions of Order 1 Rule 10 was only applicable before conclusion of proceedings and that the overriding objective of the court, invoked by the Applicants was not available to them as there was no explanation offered as to why joinder was not sought since the institution of the suit in 2001.

In respect to the provisions of section 34 of the Civil Procedure Act, the 2ndPlaintiff deponed that it is not available to the Applicants for reasons that the same refers to questions arising between parties to a suit which a Decree was passed whereas the Applicants were not parties in Nairobi HCCC No. 745 of 2001 (O.S.). Similarly, that section 63(e) of the Civil Procedure Act is irrelevant as it allows the Court to make interlocutory orders in a suit as it may appear just and convenient, whereas the suit herein is not at an interlocutory stage as it has been concluded, judgment delivered and a Decree issued. As regards Order 40 Rule 7 of the Civil Procedure Rules deals, the 2nd Plaintiff deponed that the provision is in respect to setting aside, varying or discharge of temporary injunctions given in an interlocutory application and not a final order such as the ones granted in the judgment, subject matter of these applications.

The 2nd Plaintiff annexed documents in support of her response to the applications, including: a copy of an order dated 27/6/2000 in Misc. Civil Appl. No. 662/2000 staying the issuance of leasehold titles in respect to L.R. No. 5964/1 and subsequent titles derived therefrom, specifically L.R. No. 22925/121 Folio 269 Register No. 78 and 79, until final determination of the matter; a copy of a letter dated 17/10/2000 forwarding the court order to the Lands Registry; a copy of Limited Grant of Letters of Administration (*ad litem*) of the estate of Hannah Mukami Kiruhi granted to Lucy Wanjiru Kiruhi; and copies of excerpts of ***The Daily Nation*** newspaper showing the advertisements of Caveat Emptor of the following dates: 14/2/2000, 15/2/2000, 16/2/2000, 10/3/2000, 26/5/2000, 24/11/2000, 28/11/2000, 14/2/2001.

The 2nd Plaintiff's response to the 4th set of Applicants was in a Replying Affidavit sworn on 28/1/2013 wherein she deponed that the Applicants had not shown their interest in the suit, and thus should not be joined to the proceedings. She refuted that the Applicants were lawful heirs of the Estate of Wanjiku Njau and that their Grant was revoked and an appeal lodged against the revocation was dismissed by the Court of Appeal. It was her disposition that indeed their Grant had not been confirmed stating that all the assets had not been inventoried and are subject matters of the litigation. She deponed further that the Court in its judgment delivered on 30/7/2010 found that L.R. No. 5964/1 belonged to the Estate of Wanjiku Njau, which finding has not been appealed against.

Counsel for the Plaintiffs reiterated the contents of the Replying Affidavits and submitted extensively on the issues that arose in the pleadings in submissions dated 16th July 2013. On joinder, counsel reiterated that Order 1 Rule 10(2) provided for parties to be joined during an existence to a suit and not thereafter.

Counsel relied in this respect on the decision by Koome J. (as she then was) in the case of **Republic v Permanent Secretary for Energy ex-prate Interstate Petroleum Ltd (2011) eKLR.**

It was his submission that the Court in its judgment did not order joinder of parties even where the Defendants herein notified the court of the existence of third parties. Counsel submitted this was therefore an issue of appeal and that that the Court should be cautious so as not to sit on an appeal on a judgment of a court of concurrent jurisdiction.

On whether the Court could grant an order for stay of execution of the decree emanating from the judgment delivered on 30/7/2010, counsel submitted that the Applicants had failed to satisfy the requirements of Order 42 Rule 6(2) that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay. Also such party must furnish security as a pre-condition for grant of an order for stay. It was his submission that the Applicants had failed to demonstrate the loss they would suffer of the decree is issued. Further that by filing applications 2 years after judgment had been delivered was an unreasonable delay and also no single party had furnished security.

As to whether the judgment delivered by the Court on 30/7/2010 should be reviewed or set aside, counsel referred to the provisions of section 80 and the Order 45 of the Civil Procedure Act and Rules, and submitted that the Applicants have not met any of the conditions set out in the said provisions as they had, first, lodged a notice of appeal on 6/8/2010 and therefore an appeal having been preferred, an application for review could not be entertained. Secondly, the Applicants had not demonstrated any new and important matter of evidence which they discovered to warrant the court to review its judgment. Counsel submitted that the Applicants knew or ought to have known of the existence of the suits from the advertisements and correspondence with the Lands Registry.

Lastly, counsel submitted, there was no error on the face of the record to warrant a review of the court's order. Counsel relied on the case of **National Bank Ltd v Ndungu Njau Civil Appeal No. 211/1996** cited with approval in **Jane Wanjiru Gitau v Kenya Power & Lighting Co. Ltd (2006) eKLR** that the error or omission must be self-evident and should not require an elaborate argument to be established. Counsel also referred the Court to the case of **Mawji v United States International University (1976) 1 KLR** on the application of the doctrine of lis pendens.

The Defendants' Position

The Defendants did not respond to any of the Applicants' Notices of Motion

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Applicants and Plaintiffs. The provisions of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside. It is not in dispute that the Applicants have proprietary interests over parcels of land sub-divisions of L.R. No. 5964/1, subject matter of the judgment, and have demonstrated that they are directly affected by the judgment of the court.

I therefore find that the Applicants have *locus standi* to bring the application herein which locus is granted to them as aggrieved parties, and is separate from the issue of their joinder as parties to this suit. Their applications are therefore competently before the court. I am also guided by the Court of Appeal's decision in **Ngororo V Ndutha & Another [1994] KLR 402** that any person, though not party to a suit, whose direct interest is affected by a judgment is entitled to apply for review.

There are thus three issues for determination as follows:

1. Whether the judgment delivered herein on 30/7/2010 is amenable the review and/or setting aside and if so, whether the consequential decrees arising therefrom should be set aside and this suit is

heard *de novo*.

2. Whether the Applicants can be joined as parties to this suit after judgment has been delivered.

On the first issue on whether the judgment herein can be reviewed and/or set aside, Order 45 Rule 1 (b) spells out conditions that must be met in an application for review of a decree or order as follows:

i. There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made,
ii. mistake or error apparent on the face of the record,
iii. or for any other sufficient reason,
iv. the application must be made without unreasonable delay.

Is there new or important matter or evidence that the applicant has since discovered which was not within his knowledge at the time the decree was passed? The Applicants' entire claim is that they did not make any representations in the suit as they had no knowledge of its existence, and could therefore not produce their evidence at the hearing. They have demonstrated to the court that the decree passed by this Court on 30/7/2010 adversely affects them as its effect is to invalidate their titles. Some Applicants contend that they purchased the properties and executed transfers before the commencement of the suit and as such the title, subject matter of the suit had no defect.

The Plaintiff's in response claim that they Applicants knew or ought to have known the existence of the suit for reasons that first, most of the Applicants purchased their parcels during the pendency of the suit, and others after the suit had been heard and determined. Secondly, the Applicant also annexed a copy of a court order in Misc. Appl. No. 662/2000 issued on 27/6/2000 directed to the Commissioner of Lands and the Chief Lands Registrar barring processing of any further titles/ certificate of leases in relation to on L.R. No. 5964/1 and subsequent titles L.R. No. 22926/1 – 13, 22925/1 – 132 and 22927. Thirdly, the court order was published on various dates on ***The Daily Nation*** newspapers as Caveat Emptor notices which the Plaintiff submits was sufficient notice upon any party who had any interests.

It is my finding that the Caveat Emptor advertisements placed in the ***The Daily Nation*** newspapers were sufficient notice to the Applicants that the title from which they derived their respective titles had a defect or is subject to litigation. In addition, the Plaintiff therefore discharged its duty to notify the Applicants of the on-going litigation with respect to the suit properties.

More importantly however, the fact of third parties being on the suit properties was known to the Defendants which is the party that sub-divided the original parcel of land, and sold the sub-divisions to the Applicants or other third parties from whom the Applicants purchased the same. This was done by the Defendants while knowing that this and previous suits were in court. It was incumbent upon the Defendants to join the third parties and/or inform them about the suit involving their investments on the suit property. The Applicants' claim in these circumstances is against the Defendants.

In addition the issue of the Applicants having been sold the land was raised during the hearing of the suit and in my view conclusively addressed in the judgment. I will reproduce the relevant part of the judgment *in extenso* for an appreciation of its meaning and import:

> **"…Although the Defendants' position was that third parties had already acquired later titles, out of the original title-transfer to the second defendant, no evidence was adduced to this effect; but it is on the basis of that factual allegation that the defendants' advocate contended that this Court was being asked to act in vain, for the original title was now non-existent.**
>
> **More significantly, in a plurality of High Court and Court of Appeal decisions bearings on the suit land, it is consistently recorded that the transfer of title to that land, from Wanjiku Njau to 1st Defendant and then to 2nd Defendant, was secured through fraud.**

As the several learned Judges who attributed fraud to the land-transfer transactions had good cause for doing so, as set out in the several rulings and judgements, this Court takes Judicial Notice of that fact: fraud has been the main factor in effecting the transfer of the suit land from the late Wanjiku Njau. A second, and no less important, objection in law is that the transfer were taking place in defiance of the Court's injunctive orders. On 4th November, 1992 Mr. Justice Akiwumi had prohibited dealings with the suit land; and on 30th September, 1999 Mr. Justice Etyang made status quo orders, pending grant and confirmation of letters of administration in respect of the estate of Wanjiku Njau.

The only question remaining is whether the title of Wanjiku Njau's land, fraudulently transferred and wrongly registered in the names of others parties, cannot be restored to the estate of Wanjiku Njau.

The first inclination of this Court is to nullify transaction of fraud, such as have been established in the course of litigation. Even as the plaintiffs ask for such a solution, the defendant rest their case, ultimately, on a decision of the Court of Appeal, John W. Wepukhulu v. Secretary, Board of Governors, Buru Buru Secondary School, Civil Appeal No. 310 of 2002 (2005) eKLR; and they claim that the said decision will protect wrongly transferred and registered title, to the advantage of third parties. But if there are such third parties, they are not represented by counsel for the defendants herein; and this Court will only be concerned with the relative merits of the Plaintiffs' and the defendants' cases.

A reference to the rights of "third parties", in the manner aforesaid, is forensically quite attractive: ultimately, such third parties would be said to be innocent purchasers for value, without notice of any defect in the vendor's title. A person in such a category, conventionally, is the darling of equity; and the Court would protect his or her claim against challenge on account of tainted earlier dealings with the property. In the instant case, however, there is no evidence giving a basis for this Court to provide any such special protection.

It is already clear from the lines of assessment in this judgement, that I find no merits in the defendants' case, and, in principle, I would find in favour of the plaintiffs. The only question remaining is: what form ought the plaintiffs' dispensation to take?...."

It is my view that the court framed the issue before it to be as follows **'t<u>he only question remaining is whether the title of Wanjiku Njau's land, fraudulently transferred and wrongly registered in the names of others parties, cannot be restored to the estate of Wanjiku Njau"</u>** (emphasis mine), and made a decision to nullify the titles of these other parties. The court ordered in this regard that the 1st Defendant had no authority to transfer to the suit property tot eh 2nd Defendant as the 1st Defendant had not acquired a good title, and that consequently, the subsequent titles derived from the original title L.R No 5964/1 Nairobi were invalid. These subsequent titles include the titles held by the Applicants, whose existence had been brought to the Court's attention.

As to whether there is any other sufficient cause to review and/or set aside the judgment herein, of relevance in this regard are the facts that the court took judicial notice of in its judgment including previous findings of the fraudulent dealing with L.R No 5964/1 by this court and the Court of Appeal, and the existence of injunctive orders restraining the Defendants from any further dealings with L.R No 5964/1. While this court sympathises with the Applicants' predicament, it would also be inequitable in the circumstances of this application to reopen the hearing of a dispute that has been in this court since 1991 when the Plaintiffs filed their first case. It is my view that there must be finality to the litigation on this dispute in this court. This court therefore declines to grant the prayer to review and/or set aside the judgment delivered herein on 30/7/2010, and also declines to grant the consequential prayers sought for the foregoing reasons.

Lastly, on the issue of joinder of the Applicants as interested parties or defendants herein, *t*he Applicants averred that they have substantial interest in the suit for reasons that they are purchasers of parcels of

land, sub-divisions of L.R. No. 5964/1, and therefore any orders made in respect to L.R. No. 5964/1 may have effects, adverse or otherwise to them.

The Plaintiff, in response avers that even though the Applicants have substantial interest in the suit, an application for joinder at this stage is of no use for reasons that the case has been concluded, Judgment has been entered, the decree extracted and served upon the relevant authorities. The Plaintiff contends that execution of the decree has already taken place as the order emanating from the said judgment has been registered against L.R. No. 5964/1 and subsequent titles therefrom.

Order 1 Rule 10(2) of the Civil Procedure Rules provides as follows:

> **(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.(Emphasis mine)"**

The provisions of Order 1 Rule 10(2) state that joinder of a party can be made "at any stage of the proceedings". "Proceedings" are defined in **Black's Law Dictionary Ninth Edition** at page 1324 as "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment". A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising.

Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the Civil Procedure Rules is to claim some relief from the said party, and therefore such joinder can only be made during the pendency of a suit. As this court has declined to set aside the judgment herein, there is no suit pending before this court, and the Applicants cannot therefore be joined as parties at this stage.

The upshot of the foregoing is that the various Notices of Motion brought by the Applicants fail. The Applicants shall individually bear the costs of their respective Notices of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____31st ___ day of

_____January____, 2014.

P. NYAMWEYA

JUDGE