



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 220 OF 1992**

**ANGELO COSTABIR .....1<sup>ST</sup> PLAINTIFF**  
**IDRIS HAJI OSMAN.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HUSSEIN ALI ODEY }  
AMINA ALI ODEY }  
FATUMA ALI ODEY }The Representatives of**  
**AHMED ALI ODEY (deceased).....1<sup>ST</sup> DEFENDANT**  
**JUSTUS NYAMU GATONDO.....2<sup>ND</sup> DEFENDANT**  
**GERALDINE JAMES t/aFLAVE ENTERPRISES.....3<sup>RD</sup> DEFENDANT**  
**WOOLWICH INVESTMENT LTD.....4<sup>TH</sup> DEFENDANT**  
**REGISTRAR OF GOVERNMENT LANDS.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

The failure to deliver this judgment on 10<sup>th</sup> December 2009, as promised or so soon thereafter and the ensuing delay in doing so is attributable to my abrupt transfer from Nakuru High Court in December 2009, a disruptive stint at the Meru High Court during which, for failure to secure suitable accommodation in Meru, I resided at a private members’ club in Nanyuki, commuting daily to and from Meru during the working week and traveling to Nakuru week-ends where my personal effects remained until May 2010.

A second transfer to the Milimani Commercial Court in October 2010, compounded the delay owing to the enormous workload which weighed down on the only three judges at the division, which was started with 7 judges and only recently been allocated eight. An unsuccessful attempt as my part to get time off the cause list to write this judgment early in the year was, communicated to the counsel on record. It is not lost to all involved that mater itself is convoluted, making it impossible for a decision to be written alongside other work, hence my reason for taking time off and dedicating a good part of one week for the purpose. The delay is greatly regretted and the patience demonstrated by the parties and their advocates much appreciated.

The 1<sup>st</sup> Plaintiff, Angelo Costabir claims a purchaser’s interest over the parcel of land known as **L.R. No. 330/357 Nairobi** (hereinafter referred to as “*the suit property*”), which he claims to have bought from Ahmed Ali Odey (now deceased) and for which he demands specific performance of the sale contract and that the personal representatives of the deceased, Hussein Ali Odey, Amina Ali Odey and Fatuma Ali Odey be ordered to transfer and deliver the property to him, after certain conveyances of the same, registered in favour of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are annulled, cancelled and struck out of the

Register, by the 5<sup>th</sup> Defendant.

Presently, the 4<sup>th</sup> Defendant is the registered owner of the suit property. The register shows that it acquired the same from the 3<sup>rd</sup> Defendant, who in turn had acquired the same from the 2<sup>nd</sup> Defendant, in a sequence of transactions which the Plaintiffs contend are fraudulent, wrongful and illegal. The 5<sup>th</sup> Defendant is sued, through the Attorney General, for breach of statutory duty in allowing the registration of the said conveyances while 1<sup>st</sup> Plaintiff had not withdrawn a caveat he had lodged against the title, claiming a purchase's interest.

The suit was filed under a Plaint dated 15<sup>th</sup> January 1992 as amended thrice, first on 24<sup>th</sup> July 1992, then on 18<sup>th</sup> February 1993 and further amended on 18<sup>th</sup> September 1996. In it the 1<sup>st</sup> Plaintiff states that he bought the suit property pursuant to an agreement for sale dated 9<sup>th</sup> July 1991 entered between himself and the deceased, also referred to as "*the deceased Vendor*" in this judgment. The said agreement, which was produced as an exhibit by mutual consent, is shown to have been executed before Leonard Gethoi Kamweti Advocate, who testified in these proceedings as PW2. The agreement shows that he agreed purchase price was KShs. 3 Million, and that KShs, 1,157,520.80 had been paid to the firm of Salim Dhanji & Company Advocates (Then acting for both the vendor and the purchaser) at the time of execution.

The suit is defended on the following pleadings:-

1. The 1<sup>st</sup> Defendant's Further Amended Defence of 23<sup>rd</sup> August 1993
2. 2<sup>nd</sup> Defendant's Defence dated 11<sup>th</sup> March 1999
3. The 4<sup>th</sup> Defendant's Defence dated 27<sup>th</sup> February 1997
4. The 5<sup>th</sup> Defendant's Defence to the 2<sup>nd</sup> Plaintiff Further Amended Plaint dated 6<sup>th</sup> October 1999.

As between the Plaintiffs and the 1<sup>st</sup> Defendant, issues were agreed on 15<sup>th</sup> September 1993, and the relevant statement thereof filed on 22<sup>nd</sup> September 1993. As between the Plaintiffs and the 4<sup>th</sup> Defendants issues were agreed and a separate statement thereof filed on 10<sup>th</sup> June 2003, the same day a Statement of Issues signed by counsel for the Plaintiff and the Principal State Counsel for the 5<sup>th</sup> Defendant was filed.

Just as the record does not contain a Defence filed by the 3<sup>rd</sup> Defendant, there appears not to have been any agreed issues filed in respect to dispute between him/her and the Plaintiffs. No mention of a Defence is made in the submissions filed on behalf of 3<sup>rd</sup> Defendant. Not being aware of the 3<sup>rd</sup> Defendant's objection to the issues as drawn and agreed between the Plaintiffs and the rest of the Defendants, I am comfortable to state the agreed issues as follows:-

1. Whether an agreement for sale dated 9<sup>th</sup> July 1991 was entered into between the 1<sup>st</sup> Plaintiff and the deceased.
2. Whether the said agreement was executed by the deceased.
3. What were the terms of the said agreement
4. Whether the deceased was in breach of the said agreement and if so in what respect.
5. Whether the 1<sup>st</sup> Plaintiff is entitled to the reliefs claimed
6. Whether the deceased was indebted to the 2<sup>nd</sup> Plaintiff for KShs. 884,051.50 as prayed.
7. Whether the 2<sup>nd</sup> Plaintiff is entitled to the reliefs claimed.
8. Whether the 2<sup>nd</sup> Defendant had title to the suit premises capable of transfer to the 3<sup>rd</sup> Defendant and in turn to the 4<sup>th</sup> Defendant.
9. Whether the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were bona fide purchasers for value without notice.
10. Whether the transfer/disposal of the suit premises by the 2<sup>nd</sup> Defendant was fraudulent, wrongful and illegal as alleged and if so whether the purported transfer/disposal of the suit premises to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants is null and void.
11. What order should be made as to costs?

Notably, in the submissions filed for 3<sup>rd</sup> Defendant the issues relevant to its case have been set out as follows:-

1. Whether the Plaintiff is entitled to the relief claimed against the 3<sup>rd</sup> Defendant.
2. Whether the 3<sup>rd</sup> Defendant is a bona fide purchaser for value without notice and whether the conveyance to the 3<sup>rd</sup> Defendant herein was fraudulent.
3. What orders are to be made as to costs.

The trial before me (which was a de novo hearing following the transfer and subsequent retirement of the judge initially seized of the matter), lasted close to 5 years, mainly due to the system of not allocating hearing dates on a day to day basis and my abrupt transfers from Nairobi to Kisumu and Nakuru High Courts within a span of 1 year (February 2007 and February 2008). Applications were also made by various counsel both orally and formally while the trial was on going, causing further delays.

The 1<sup>st</sup> Plaintiff testified on his own behalf as PW1 and called three independent witnesses as follows:-

1. Mr. Leonard Gethoi Kamweti, Advocate (PW2)
2. Mrs. Elizabeth Gicheha, (Land Registrar) (PW3)
3. Mr. Terence Paes (PW4)

In his evidence in chief, PW1 testified that he had known the deceased for several years before their transaction over the suit premises in 1991. He stated that on 4<sup>th</sup> July 1991, the deceased visited him at his home and offered to sell the suit property to the 1<sup>st</sup> Plaintiff for KShs. 3.5 million, which was negotiated down to KShs. 3 million. On 8<sup>th</sup> July 1991, the two approached the firm of Salim Dhanji & Company for purposes of drawing up the requisite transfer documents. While conducting a search of the property the advocates discovered that there was an impending sale of the property by a creditor, Kenya Commercial Finance Co. Limited (KCFC) in respect of a debt of about KShs. 1.3 million, which sale was to take place within 24 hours, unless the debt was paid in full. To redeem the property, the PW1 paid to the creditors advocates, M/S Oraro & Rachier Advocates a sum of KShs. 1,157,520/= upon execution of the sale agreement dated 9<sup>th</sup> July 1991, with the said sum being acknowledged in the agreement as part payment of the purchase price. The execution of the agreement by the agreement by both parties was attested to by PW2.

At the signing of the agreement, the deceased intimated that the title documents had been stolen, and signed a written statement to that effect. This led to the advocates register a caveat on behalf of the 1<sup>st</sup> Plaintiff on 10<sup>th</sup> July 1991, after which they embarked on drawing the requisite Conveyance. Salim Dhanji & Co. also entered into correspondences with the advocates for Kenya Commercial Finance Co. Limited leading to the lifting of a prohibition registered over the property by the creditor, pursuant to a decree obtained in **H.C.C.C. No. 2456 of 1982 (Kenya Commercial Finance Co. Ltd –vs- Hassan Ali Odey & Ahmed Ali Odey)**. PW1 fell ill in October 1991, had an open heart surgery and was treated in India until 28<sup>th</sup> December 1991 when he returned to Kenya, only to find that the deceased had not executed the Conveyance. The latter had failed to present himself to the advocates for that purpose and his whereabouts were then unknown. Several letters were sent to him by the advocates between September and November 1991, to no avail. PW1 proceeded to search for the deceased from the date of his return only to find him very ill in January 1992. He visited him at his house during the three days prior to his death and tried to obtain his signature on the Conveyance as the deceased was too weak to sign the instrument. PW1 testified that it was the deceased who had asked that the Conveyance be taken to him for signing at home since he was too ill to present himself at the advocate's offices. He died before doing so. When shown the indenture dated 20<sup>th</sup> July 1995 ("*Exhibit P.67B*") purported to have been signed by the deceased to transfer the suit property to the 2<sup>nd</sup> Defendant, PW1 expressed the view that it could not have been possible for the deceased to execute the indenture in 1995 when he had died in 1992.

Under cross-examination, PW1 testified that the deceased was in a hurry to redeem the property from the imminent sale by KCFC hence his willingness to use Salim Dhanji & Company as advocates for both himself and the purchaser, knowing fully well that they were the 1<sup>st</sup> Plaintiff's advocates. According to PW1, it was the deceased who asked Mr. Dhanji to act for him in the transaction. He told the court that the circumstances necessitated the taking of the Conveyance to the deceased at home to obtain his signature. When cross examined by counsel for the 4<sup>th</sup> Defendant, PW1 testified that at no time did he form the opinion that the deceased was avoiding to sign the transfer document. During re-examination, PW1 reiterated that he never applied to remove the caveat registered on his behalf on 10<sup>th</sup> July 1991, and denied any knowledge of the persons registered as owners of the suit property in 1995.

PW2 testified that he first met both the deceased and PW1 on 9<sup>th</sup> July 1991 at the offices of Salim Dhanji & Company where he worked. He drew up the sale agreement of that date. On 10<sup>th</sup> July 1991, the deceased furnished PW2 with a notification of sale served on him on instructions from Kenya Commercial Finance Co. Limited and a photocopy of the Folio page of the Land Register in respect of the suit premises containing 8 entries. He confirmed that he was personally seized of the transaction between the Plaintiff and the deceased, whereupon the deceased intimated to him that the title documents had been lost. PW2 prepared a statement to that effect which the deceased signed (Exhibit P. 30) as well as a caveat in respect of the 1<sup>st</sup> Plaintiff's purchaser's interest, which he caused to be registered against the title. He testified also that he prepared all the documentation necessary for the transfer of the suit property to the 1<sup>st</sup> Plaintiff, including the unexecuted indenture exhibited at pages 51-54 of the Plaintiffs bundle of exhibits.

PW2 testified that he attested to the execution of the sale agreement of 9<sup>th</sup> July 1991, by the deceased and the 1<sup>st</sup> Plaintiff, negotiated and secured the lifting of the notification of sale and prohibition by Kenya Commercial Finance Co. Limited, discussed the debt owed to the 2<sup>nd</sup> Plaintiff by the deceased with the creditor's advocates J. N. Njage & Company, who disclosed that they held the original title documents and would release them once the 2<sup>nd</sup> Plaintiff's debt of KShs. 762,752,55 was cleared. PW1 undertook to clear this debt as well as part of the agreed purchase price of KShs. 3 million. Correspondence to this effect was produced as part of the Plaintiff's bundle.

PW2 testified further that he prepared a withdrawal of caveat application (to remove the 2<sup>nd</sup> Plaintiff's creditor's caveat) and gave the same to the deceased to secure the 2<sup>nd</sup> Plaintiff's signature but the same was never returned. Despite a promising to return to PW2's offices to execute the Indenture in favour of the 1<sup>st</sup> Plaintiff, PW2 testified that the deceased never returned. Several letters and completion notices were sent to him in view of the completion date of October 1991, to no avail, culminating in the demand notice of 11<sup>th</sup> November 1991, (at Page 50 of the Plaintiff's bundle). PW2 confirmed PW1's testimony that he was the one who released the Indenture for execution by the deceased once PW1 told him that the latter had been traced but was unwell. The instrument was never returned, hence the filling of this suit. Later, PW1 advised PW2 that the deceased vendor had died. PW2 categorically denied any suggestion that he had applied for the removal of the 1<sup>st</sup> Plaintiff's caveat as suggested by the Defence.

Regarding the indenture shown to have been executed between the deceased and the 2<sup>nd</sup> Defendant, PW2 testified that the same would have been subjected to a 5 year stamp duty penalty had it been presented as having been executed on 20<sup>th</sup> July 1990, since it read "*One thousand nine hundred and ninety*" (shown in words) and because it was presented for registration in 1995.

PW3, (Elizabeth Gicheha), a Registrar of Titles, produced the Abstract of Title in respect of the suit property wherein it is shown that on 26<sup>th</sup> January 1995 the 2<sup>nd</sup> Defendant applied for a withdrawal of the caveat entered as No. 10 in the register. A Conveyance to the 2<sup>nd</sup> Defendant dated 20<sup>th</sup> July 1995 and another transfer from the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> Defendant dated 29<sup>th</sup> June 1995, were shown to have been rejected and the entries thereof cancelled. Although PW3 testified that she was not sure exactly why the documents were rejected, she could tell, by looking at the dates of the documents as entered in the register, that the 2<sup>nd</sup> Defendant was, by those documents, purporting to dispose of a property he did not

have at the time of presentation. She compared the documents of transfer, presented under entry No. 15 in place of the cancelled entry No. 14, which she found to be similar, save for the date of the Conveyance to the 3<sup>rd</sup> Defendant, which now read 20<sup>th</sup> July 1995 instead of 29<sup>th</sup> June 1995.

As regards the date of the Indenture produced as “P67B” (Ahmed Ali Odey to Justus Nyamu Gatondo) whose date was shown as “20<sup>th</sup> July One Thousand Nine Hundred Ninety 1995” PW3 testified that, in her view, if 1995 was the correct year, then the date in words ought to have been completed with the addition of the word “five” not the insertion of “1995” after “ninety”. She however testified that the lands registry must have taken the year 1995 as the current one for stamp duty purposes, otherwise the same would have attracted a stamp duty of 5 years. She was able to confirm that, as per the register, the 2<sup>nd</sup> Defendant became owner of the suit property on 8<sup>th</sup> September 1995, after (purportedly) purchasing it for KShs. 3.5 million and that on the same day he transferred it to the 3<sup>rd</sup> Defendant for KShs 7 million.

The witness testified that the 1<sup>st</sup> Plaintiff’s caveat, entry No. 10 in the abstract of Title No. 330/357, was removed on the application for withdrawal of caveat lodged by Justus Gatondo (2<sup>nd</sup> Defendant) on 26<sup>th</sup> January 1995 whose application partly reads as follows:-

**“Withdrawal of caveat relating to L.R. No. 3330 specifically entry No. 10**

**Applicant Justus Gatondo”**

PW3 stated that the withdrawal itself was missing from the registrar’s records and since, in all cases, a withdrawal would, of necessity, be signed for by either the caveator himself or his advocate (whereas the application may be presented by anybody), it was impossible for her to say who actually obtained the withdrawal. Regarding the sale transactions which were registered on 8<sup>th</sup> September 1995; The Conveyance to Justus Nyamu Gatondo and from him to Geraldine James, PW3 testified that there was glaring anomaly in that, the purchase price having doubled in the same day (from KShs. 3.5 million shown to have been paid by Gatondo, to KShs. 7 million paid to him by Geraldine James), the registration ought to have been provisional and the instrument of transfer taken for stamp duty valuation to ascertain the correct duty payable, which was not done. She further testified that there was no undertaking for stamp duty in relation to the transfer from Justus Gatondo (2<sup>nd</sup> Defendant) to Gerladine James (3<sup>rd</sup> Defendant).

PW3 also testified that no valid clearance certificate was produced and that the transfer of 8<sup>th</sup> September 1995 was effected against a clearance certificate which had expired on 19<sup>th</sup> August 1995. When put to task as to how she could have registered the withdrawal of the caveat yet she was not able to confirm who signed for it, PW3’s testimony was that she must have compared the signature in the withdrawal which must have matched that of the caveator, otherwise she would have refused to register the withdrawal.

PW4, who is a relative of the 1<sup>st</sup> Plaintiff testified that he was invited by PW1 to view the suit property and to negotiate the purchase price. He saw an auction notice pinned on the property and was present when the deceased and 1<sup>st</sup> Plaintiff were intervened by Mr. Salim Dhanji, advocate, at his firm’s offices at Corner House in July 1991, and the transaction assigned to PW2. PW4 testified that he procured the cheques used to pay off KCFC’s debt. He was later to be made aware of the failure by the deceased to sign the transfer documents and of his disappearance. However when he met up with him at the International Casino, late in 1991, the deceased told PW4 that he had been away in Uganda hence the delay in signing the transfer. The deceased promised to go to Salim Dhanji & Co. to do so, which he did not.

PW4, testified further that he accompanied PW1 to the deceased’s house a few days before his death when together, they tried to have him sign the Conveyance which he was unable do owing to his weak state. PW4 testified that he knew the deceased socially as a gambler and he did not appear to him to be of

unsound mind. Under cross-examination, PW4 testified that when it became impossible for the deceased to hold a pen to sign the transfer, he and PW1 left but returned the following day with ink and a thumb-printing pad intending that the deceased affixes his thump print on the instrument. However, in view of the deceased's diminished health, the two concluded it would be inhumane to force him to thump-print the document and left. According to PW4, the deceased was all willing to sign the transfer document but was unable to do so.

Testifying for the Estate, (1<sup>st</sup> Defendant) Fatuma Ali Odey (DW1) confirmed that she was at the deceased's house when PW1 and PW4 came to ask him to sign the transfer document. She stated, however, that initially, PW1 demanded the payment of a debt of KShs. 1.2 million owed to him by the deceased. Also that PW1 and PW4 wanted to have the deceased thump-print the document, which was read out to the deceased by DW1's husband, who then told PW1 and PW4 that, since the deceased needed urgent medical attention, they would not discuss the document at that time. DW1, testified that she had never heard of the deceased's intention to sell his house and that PW1 only wanted to recover a debt owed to him. She was aware that the suit property was up for auction but said she did not know that PW1 was interested in it. It was her testimony that PW1 had wanted to force the deceased to sign the transfer document but was repulsed by her nephew who was present at the time. Also that later, after the burial of the deceased, PW1 visited her, offered condolences and then proceeded to ask for the repayment of the debt earlier mentioned.

DW1, came to know of the 2<sup>nd</sup> Defendant when she noticed that security guards at the suit premises had been changed. On enquiring, she was told that the property had changed hands. She conducted a search at the lands registry and discovered that the 2<sup>nd</sup> Defendant had acquired the property on 20<sup>th</sup> July 1995, over three years after the deceased had died and after she had obtained a grant of Letters of Administration, which had not been objected to or challenged by any one. She reported the matter to the police. The 2<sup>nd</sup> Defendant was arrested charged and tried in the criminal case where DW1 testified as a witness.

Regarding the deceased, DW1, testified that he had a history of mental health for which she had taken him to Mathare Hospital in 1989 but he ran away. That he ailed from that condition for five years but that between 1989 and 1990, he suffered from pneumonia and a sick leg among other ailments, but never sought any medical treatment. He even discharged himself from Nazareth Hospital on 6<sup>th</sup> January 1992, where DW1 had taken him on 2<sup>nd</sup> January 1992.

Under cross-examination, DW1 testified that she instructed her advocate to file a defence to this suit once she secured a Grant Letters of Administration. She stated that she had no medical records to support the contention that the deceased suffered from mental illness and conceded that the diagnosis in the discharge sheet from Nazareth Hospital, (produced as exhibit No. 4 of the Defence bundle) was not one of mental illness but

“gastroenteritis and skin lensions”.

Cross examined by Mr. Mulekyo for the 3<sup>rd</sup> defendant, DW1 testified that she did not know anyone called Geraldine James (3<sup>rd</sup> Defendant) – She conceded that the property was the prime asset left behind by the deceased yet she had not taken any steps to recover it from the alleged new owners. Asked to comment on the indenture between the deceased and the 3<sup>rd</sup> Defendant, DW1 stated that if the execution date is taken to have been 1990 then the deceased could have signed the document; but if the date is 1995 then he could not have. She said she knew nothing of the sales to the 3<sup>rd</sup> Defendant nor the one to the 4<sup>th</sup> Defendant.

DW2 (Hussein Ali Odey) testified that he is a co-administrator of the deceased's estate with DW1. He said he was familiar with his deceased brothers' signature and produced the deceased's identity card and a cheque signed by him to prove the same. He testified, however, that he had never discussed any sale transaction with the deceased but he was at the deceased's house on 9<sup>th</sup> January 1992, when PW1 brought what he refers to as an agreement for sale, drawn by Salim Dhanji and Company, with the intention of securing the deceased's signature thereon. He testified further that some relatives present

were angry with PW1's advances but that DW2 quietened them, then promised PW1 that the family would help him "*complete the transaction*" since the deceased was critically ill.

DW2 confirmed that the copy of identity card appearing in the plaintiff's bundle of document genuine. Asked about PW1 and PW2's demeanour at the scene on 9<sup>th</sup> January 1992, DW2 testified that they were peaceful even as nephews of the deceased roughed them up and vented anger at them. DW2 testified that he did not know what ailment the deceased had died from but that he suffered mental health. DW2 stated also that he did not know what the deceased was doing in July 1991, and had not seen him at all during that time.

A third witness for the estate, Dr. Peter Njagi Njuki testified as DW4, (the court having allowed the 4<sup>th</sup> Defendant's to testify ahead of the close of the 1<sup>st</sup> Defendant's Defence when PW4 was unable to attend court). He testified that he had attended to the deceased at the Mathare Mental Hospital in 1986 and that the deceased "*flatly refused*" to be admitted as recommended by DW4. He diagnosed him as being "*paranoid and clearly hallucinating*". From the dishevelled look, DW4 concluded that the deceased was "*potentially aggressive*".

After the deceased refused to be admitted, DW4 held discussions with the relatives who had brought him to hospital and agreed that they could have him treated at a private hospital clinic run by a Dr. Charles Munene, a clinic which DW4 later took over after Dr. Munene migrated to England in 1999. DW4 produced a medical report on the deceased dated 16<sup>th</sup> February 2006, which he said was requested for by counsel for the 1st defendant, Mr. M. Mutiso.

Under Cross-Examination, DW4 testified that he saw the deceased for the 30 minutes only when he attended to him at Mathari Hospital and that the report produced by him was compiled purely on memory as he had neither the medical notes from Mathari Hospital nor had he treated the deceased again after that. He testified, however, that he remembered being told by Dr. Munene that he was taking care of him but produced no documentary evidence to prove that.

DW4 stated that, in his opinion, the condition the deceased was suffering from in 1986 was treatable with medicine and he was quite sure that Dr. Munene did administer the necessary treatment. It was his testimony that he relied on the accompanying relatives to get the deceased's medical history and he did not try to establish from the deceased what he did for a living. He found no records in regard to the deceased when he took over Dr. Munene's practice, where he had found record keeping very wanting, being haphazard and/or disorderly.

DW4 conceded that it is not standard practice to produce a medical report based on memory, stating further that the diagnosis of the deceased, which in his opinion was schizoaffective disorder, was not a permanent disorder. According to DW4, a person is to perform normal functions and to carry on with daily activities when not affected. Under re-examination, DW4 explained that the reason he did not take the deceased's history was that he was unwilling to give it. He also told the court that the letter from R. M. Mutiso & Company requesting for medical report did not suggest what information should be contained in the report.

For the 3<sup>rd</sup> defendant John Musyoka Annan, Advocate, testified as DW5. His testimony was as regards his instructions to act in the registration of the conveyance of the suit property to the 2<sup>nd</sup> Defendant, simultaneously with the transfer to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. He testified that he first heard of the suit property when an undisclosed agent introduced him to the 2<sup>nd</sup> Defendant who then presented to PW5 an Indenture relating to the property, indicating that it had been executed between the 2<sup>nd</sup> Defendant and the owner of the property (the deceased). He searched the property and found out that he same was registered in the name of the deceased and that all encumbrances previously registered against the title had been removed. He concluded that there were no impediments to the registration of the 2<sup>nd</sup> Defendant's Indenture but decided nevertheless to seek confirmation of the Chief Land Registrar a Mr. Odhiambo, who was personally known to him. The Chief Land Registrar, okeyed the registration of the indenture and the Conveyance from the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> Defendant.

DW5 bought the 2<sup>nd</sup> Defendant's explanation that he had not registered his indenture since the same was drawn up in 1990 for lack of funds, having lost money in the 1992 parliamentary elections where he had for a seat. DW5 handled the payment of the purchase price in the transactions between the 2<sup>nd</sup> Defendant (KShs 7000,000/-) and between the 3<sup>rd</sup> Defendant and the 4<sup>th</sup> (KShs 10,000,000/-) both done through his law firm. He testified that he did not suspect any foul play as regards the 2<sup>nd</sup> Defendant ownership since he had physical possession of the suit property, wherein a nephew of his was in occupation of the main house while a tenant occupied the domestic servant quarters.

DW5, testified that he prepared the transfer documents to convey the suit property to both the 3<sup>rd</sup> and 4<sup>th</sup> Defendants which were executed simultaneously and dated on 20<sup>th</sup> July 1995, the same date he appended on the 2<sup>nd</sup> Defendant's Indenture, said to have been prepared much earlier but not registered. He explained that it was necessary to allocate the 2<sup>nd</sup> Defendants Indenture the same date to avoid stamp duty penalties being imposed by the Collector. DW 5 further testified that he was not made aware that the owner of the property had died in 1992 or that the original documents of title were elsewhere ("*with the Plaintiff*"). He was also unaware of the suit before court and the Succession Cause in which the 1<sup>st</sup> Defendant had obtained letters of administration over the suit property. He confirmed, however, that he was a witness in the Criminal Case NO. **2848 of 1996 (REPUBLIC –VS- JUSTUS NYAMU GATONDO)** in which the 2<sup>nd</sup> Defendant was tried and convicted of the offences of forgery and obtaining money by false pretences, convicted and sentenced to serve a prison term but was later released upon the quashing of the conviction on appeal.

DW5, testified that in his opinion that there was no fraudulent dealing in the transactions done by his firm and that he believed that the 3<sup>rd</sup> defendant was being candid when he said he had not registered his Indenture, particularly since he was in actual possession, which left no room for one to suspect his claim of ownership. DW5 also testified that he was the one who told the 4<sup>th</sup> Defendant's director, Mr. Ratilal Gordhendas Sanghani (the father of DW3, now deceased) of the property, which DW5 considered suitable for development. It was only after the sale to the 4<sup>th</sup> Defendant (Woolmich Investment Ltd) was registered and possession passed from Justus Gatondo to Woolwich Investments (Emphasis mine) and Mr Gatondo's nephew and the occupants of the domestic quarters had moved out that DW5 learnt of this suit and the ownership by the deceased. This DW5 said, was after some people claiming to be heirs of the original owner came to his office, and introduced themselves as such. It was DW 5's testimony that the original Indenture which the 2<sup>nd</sup> Defendant gave him was surrendered to the criminal court as an exhibit.

Under cross examination, DW 5 repeated his evidence that he saw nothing suspect in the 2<sup>nd</sup> Defendant's position as a purchaser and vendor since he was in physical possession. He was satisfied with the 2<sup>nd</sup> Defendant's statement that he had last seen the deceased "*in Bull Bull*" some time before but did not know where he was at the material time. DW5 conceded however that had he known that the owner of the property had died, he would not have proceeded to register the transactions transferring the property to the 2<sup>nd</sup> Defendant and to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. He confirmed that the indenture before court produced as Exhibit P 67 B of the Plaintiffs bundle was the one he registered on behalf of the 2<sup>nd</sup> Defendant. Asked to comment on the full date given in words viz; "*One thousand nine hundred and ninety*" DW5 stated that, in his view the words represented the date that the 2<sup>nd</sup> Defendant said the document had been drawn.

He testified that the date "1995" was inserted by his office. Asked about the identity of the 3<sup>rd</sup> Defendant, DW5 stated that he was a male aged about 35 to 40 years whose whereabouts were not known, but conceded that "*Geraldine*" must be a lady's name. He told the court that his file was with the advocates for the 3<sup>rd</sup> Defendant and he could not, therefore, produce any document to prove the 3<sup>rd</sup> Defendant's identity or whereabouts. He left it to the 4<sup>th</sup> Defendant to prove the existence of the person known as the 3<sup>rd</sup> Defendant. He further stated that he was not concerned with whether the 2<sup>nd</sup> Defendant had paid the purchase price of KShs. 3.5 million shown on his indenture since he was in physical possession of the property.

Put to task as to why the agreement for sale drawn by his firm between the 3<sup>rd</sup> Defendant to the 4<sup>th</sup> Defendant was dated 10<sup>th</sup> July 1995, whereas the former had nothing to transfer at that time (its purchase from the 2<sup>nd</sup> Defendant being shown to have taken place on 20<sup>th</sup> July 1995), DW5 stated that it may be true that the 3<sup>rd</sup> Defendant had no interest he could transfer on 10<sup>th</sup> July 1995, adding only that “*that is not what happened.*” As regards the caveats on the register, DW5 testified that he did note a purchaser’s caveat which had been registered by the Plaintiff but the same was shown to have been removed when he conducted his search. Again on Geraldine James, DW5 testified that he was a client who had come to his office. Cross examined further, DW5 testified that if DW3 (for Woolwich) had testified that he had never met the said Geraldine, all DW5 could say to that was that he dealt with DW3’s father not with DW3. Under re-examination, DW5 reiterated that the 3<sup>rd</sup> Defendant was a “*usual*” client of his.

Raju Rajendra Sanghani (DW3) testified for the 4<sup>th</sup> Defendant herein. He stated that the 4<sup>th</sup> Defendant was one of his companies and was nominated by his father, Ratilal Gordhendas Sanghni to complete the purchase of the suit property herein from the 3<sup>rd</sup> Defendant. That he attended before DW5 and attested to the execution By the 4<sup>th</sup> Defendant (under company seal), of the Agreement for Sale dated 20<sup>th</sup> November 1995, “*Exhibit D 41*” wherein a consideration of KShs. 10,000,000/= was stated. DW3 produced copies of cheques paid through DW5 in payment of stamp duty and the purchase price, which was paid in instalments. He testified that initially, there was some problem in getting vacant possession of the property, for which he threatened to stop payment but that the same was resolved and possession given on 7<sup>th</sup> December 1995. He produced copies of correspondence exchanged with DW5’s law firm to this effect.

DW3, testified further that after the transaction was completed, the 4<sup>th</sup> Defendant was informed of the present dispute over the suit property and later served with court papers relating to the same. He told the court that the 4<sup>th</sup> Defendant intended to develop apartments on the property but could not do so because of the suit, but that is has continued to pay rates in respect thereof.

Under cross-examination, DW3 stated that he did not know who executed the agreement for sale dated 20<sup>th</sup> November 1995 on behalf of the vendor (3<sup>rd</sup> Defendant). He also conceded that from the Conveyance registered in favour of the 3<sup>rd</sup> Defendant on 8<sup>th</sup> September 1995 it was not disputable that the 3<sup>rd</sup> Defendant became the owner of the suit property on that date, which meant he could not enter into an agreement with his father (Predecessor of 4<sup>th</sup> Defendant in the sale) before becoming owner. Shown the Indenture 20<sup>th</sup> July 1995, DW3 conceded that the deceased, who is shown in the death certificate to have died on 15<sup>th</sup> January 1992 could not have executed the indenture transferring the suit property to the 3<sup>rd</sup> Defendant.

DW3 was categorical that he did not know who executed the conveyance to the 4<sup>th</sup> Defendant on behalf of the vendor (3<sup>rd</sup> Defendant) and that he never got to know who the 3<sup>rd</sup> Defendant was. He denied however, learned counsel for the Plaintiff’s suggestion that the agreement between the 3<sup>rd</sup> Defendant and the 4<sup>th</sup> Defendant dated 20<sup>th</sup> November 1995 had been manufactured for the purposes of this suit, seeing that the same had not been referred to in the Defence filed on behalf of the 4<sup>th</sup> Defendant.

He further stated that he did not find it necessary to enquire on the authenticity or otherwise of the entity referred to as Flave Enterprises represented by Geraldine James in the Conveyance of 10<sup>th</sup> July 1995, whereby DW5 is shown to have witnessed the 2<sup>nd</sup> Defendants execution of the instrument as vendor, while an associate of his, Joel M. Kabaiko, witnessed the one by Flave Enterprises. DW3 also produced the following documents as exhibits:

1. Rates clearance statement for 1996 in sum of KShs. 35,170.80
2. Rates statement for period ending 31<sup>st</sup> July 1995 and corresponding payment receipt (KShs. 157,563.55)
3. Receipt for clearance fee of KShs. 700 paid on 17<sup>th</sup> July 1995

4. Receipt for legal fees payment to Nairobi City Council
5. Rates payment receipt dated 17<sup>th</sup> July 1995 in the sum of KShs 153,038.55
6. Water bill for April – July 1995 for KShs. 7,342.35

I find it necessary, at this point, to set out the respective parties' positions as regards the suit generally, and the issue of ownership and/or interest in the suit property as can be deduced from their respective pleadings, the evidence tendered and the submissions filed. The same are hereby summarized as follows:-

### **1. The 1<sup>st</sup> Plaintiff's position**

- (i) That he entered into a valid agreement for sale with the deceased owner of the property on 9<sup>th</sup> July 1991 and has paid part of the agreed purchase price of KShs 3 million
- (ii) That he lodged a caveat claiming a purchaser's interest on 10<sup>th</sup> July 1991, which was illegally removed by the 5<sup>th</sup> Defendant at the instance of the 2<sup>nd</sup> Defendant on 26<sup>th</sup> January 1995.
- (iii) That notwithstanding the failure of the deceased to present himself to the advocates for the purpose of executing the transfer, he still had the intention to complete the transaction at the time immediately preceding his death on 15<sup>th</sup> January 1992.
- (iv) That the 2<sup>nd</sup> Defendant illegally and fraudulently acquired the suit premises
- (v) That in view of (iv) above, no title passed to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants
- (vi) That in view of (iv) and (v) above, the 5<sup>th</sup> Defendant unlawfully registered the transfers from the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> and subsequently to the 4<sup>th</sup> Defendant.
- (vii) That the registration of the 4<sup>th</sup> Defendant's as owner of the suit premises did not confer upon her any title and the same is suitable for cancellation.
- (viii) That the deceased's estate, as represented by Hussein Ali Odey, Amina Ali Odey and Fatuma Ali Odey, (all together referred to as the 1<sup>st</sup> Defendant), is in the circumstances, legally bound to transfer the suit premises to him, since in the legal property in L.R. No, 209/330/357 never moved from the deceased and remains vested in the estate.

### **The 2<sup>nd</sup> Plaintiff's Position**

Although the 2<sup>nd</sup> Plaintiff did not participate in the proceedings, and no oral testimony was adduced to support his claim, evidence tendered by the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant is that he is owed money by the estate.

### **The 1<sup>st</sup> Defendant's position**

- (i) That the deceased never transferred the suit property to the Plaintiff as he had no mental capacity to sign the Agreement for sale dated 9<sup>th</sup> July 1991. The signature on the said agreement for sale did not belong to the deceased.
- (ii) That although not clear, the deceased may have borrowed from the Plaintiff the money paid to clear KCFC's debt, since he was in the habit of borrowing money and using the property as security.
- (iii) That the loan advanced to the 2<sup>nd</sup> Plaintiff, if any was a friendly loan which did not attract interest. The loan amount is disputable.
- (iv) That the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendant's are guilty of perpetuating a scheme of unjust enrichment of which they were the beneficiaries.

### **The 2<sup>nd</sup> Defendants Position**

(i) Having abandoned the proceedings, the 2<sup>nd</sup> Defendant is presumed to have abandoned his defence of the suit.

### **The 3<sup>rd</sup> Defendant's Position**

- (i) That the suit is incompetent having been filed against a party who was dead at the time the Plaintiff was filed
- (ii) That he/she is a stranger to the Plaintiff's claim
- (iii) That he/she is a bona fide purchaser for value (without notice of any fraud) of the suit property and his/her transfer of the same to the 4<sup>th</sup> Defendant was lawful against the 1<sup>st</sup> Defendant

### **The 4<sup>th</sup> Defendant's Position**

- (i) That she is a bona fide purchaser for value (without notice of any fraud) of the suit property and a stranger to the Plaintiff's claim against the 1<sup>st</sup> Defendant.
- (ii) That the Plaintiff's suit against the 4<sup>th</sup> Defendant is statute barred within the provisions of Section 136 of the Government Lands Act as read together with Section 43 of the Limitation of Actions Act for reasons that the Amended Plaintiff under which the 4<sup>th</sup> and 5<sup>th</sup> Defendants on 5<sup>th</sup> December 1996, over one year after the registration of the 4<sup>th</sup> Defendants title on 22<sup>nd</sup> November 1995, yet no leave was sought or obtained to file the action against the 4<sup>th</sup> Defendant.
- (iii) That there being no claim made against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by the estate of the deceased the status of the property ought not to be disturbed.

### **The 5<sup>th</sup> Defendant's Position**

- (i) That the transfers registered by the 5<sup>th</sup> Defendant were governed by the Government Lands Act and the registrars actions in effecting the registrations, having been done in good faith are protected from any action or proceeding under **Section 126** of the said Act.
- (ii) That the order sought to compel the 5<sup>th</sup> defendant to remove the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants Conveyances from the register and reinstate the 1<sup>st</sup> Plaintiff's caveat of 10<sup>th</sup> July 1991 is seeks to enforce a public duty and ought to have been sought through Judicial Review proceedings.

The documentary evidence material to the dispute is as follows:-

1. The sale agreement dated 9<sup>th</sup> July 1991 between Ahmed Ali Odey and the Plaintiff, Angelo Costabir.
2. The unexecuted indenture drawn by Salim Dhanji & Co. for execution by Ahmed Ali Odey and the Plaintiff Angelo Costabir.
3. The Notification of Sale issued on 5<sup>th</sup> June 1991, in regard to the sale scheduled for 10<sup>th</sup> July 1991.
4. The indenture dated 20<sup>th</sup> July 1995 (as per the evidence adduced by DW3) said to have been executed between Ahmed Ali Odey and Justes Gatondo (2<sup>nd</sup> Defendant)
5. The Conveyance dated 20<sup>th</sup> July 1995 executed by Justus Gatondo and Geraldine James, t/a Flave Enterprises (3<sup>rd</sup> Defendant)
6. Conveyance dated 20<sup>th</sup> November 1995 executed by Flave Enterprises and Woolwich Investments Limited (4<sup>th</sup> Defendant)
7. The Caveat registered on 16<sup>th</sup> June 1989, by Idris Ali Osman claiming a creditors' lien

8. Caveat registered on 10<sup>th</sup> July 1919, by Angelo Costabir Claiming a purchaser's interest
  9. Correspondence exchanged between Salim Dhanji & Co. and J.N. Njagi & Co. Advocates regarding the loan advanced to Ahmed Ali Odey by Idris Haji Osman (2<sup>nd</sup> Plaintiff) particularly the following:
    - (a) Letter dated 24<sup>th</sup> September 1991 from Salim Dhanji & Co. Advocates to Jane Njage & Co. Advocates
    - (b) Letter dated 27<sup>th</sup> September 1991 from J. M. Njage & Co. Advocates to Salim Dhanji & Co. Advocates
  10. Correspondence exchanged between M/S Salim Dhanji & Company and M/s Oraro & Rachier as Follows:
    - (a) Letter dated 8<sup>th</sup> July 1991 from Salim Dhanji & Co. Advocates to Oraro & Rachier Advocates
    - (b) Letter dated 9<sup>th</sup> July 1991 from Oraro & Rachier Advocates to Salim Dhanji & Co. Advocates.
    - (c) Letter dated 18<sup>th</sup> July 1991 from Oraro & Rachier Advocates to Salim Dhanji & Co. Advocates
  11. The Plaintiff's letter of 15<sup>th</sup> July 1991 to Salim Dhanji & Co. Advocates
  12. Salim Dhanji & Co. Advocates Letter dated 11<sup>th</sup> November 1991 to Ahmed Ali Odey
  13. Photocopy of Ahmed Ali Odey's identity card No.876423/64
  14. Motor Services Ltd Employers identity card No. (Mr. Ahmed Ali Odey)
  15. Death Certificate dated 20<sup>th</sup> January 1992
  16. Grant of Letters of Administration Intestate dated 13<sup>th</sup> May 1992
  17. Bundle of Receipts for rates payments produced by 4<sup>th</sup> Defendant's witness
  18. Copy of bankers cheque dated 21<sup>st</sup> November 1995 for Stamp Duty paid (KShs. 400,000/=)
  19. Copy of cheques dated 17<sup>th</sup> November 1995 to Musyoka Annan & Co. Advocates (KShs. 3,000,000/=)
  20. Copy of cheque dated 6<sup>th</sup> December 1995 to Musyoka Annan & Co. Advocates (KShs. 6,000,000)
  21. Correspondence exchanged between Woolwich Investments Ltd and M/S Musyoka Annan & Co. Advocate's in particular
    - (a) The letter dated 5<sup>th</sup> December 1995, (Woolwich to Musyoka Annan & Co. Advocates)
    - (b) Letter dated 6<sup>th</sup> December 1995 (Musyoka Annan to Woolwich)
    - (c) Letter dated 7<sup>th</sup> December 1995 (Musyoka Annan & Co. Advocates to Director, Woolwich)
    - (d) Letter dated 8<sup>th</sup> December 1995 Musyoka Annan & Co. Advocates to Director, Woolwich).
  22. Prohibitory Order dated 28<sup>th</sup> July 1997 (issued 24<sup>th</sup> September 1997)
  23. Letter dated 13<sup>th</sup> October 1997 from M/S Kairu & McCourt to the Commissioner of Lands.
- Deducing from the pleadings and the evidence tendered before Court, I find that the suit herein hinges on the following considerations:
1. Whether there exists a valid contract of sale of the suit property between the deceased Ahmed Ali Odey capable of being performed through an order for specific pay granted against his estate/personal representatives (1<sup>st</sup> Defendant).
  2. Whether there exists any or any valid transfer of the suit property from the deceased to the 2<sup>nd</sup> Defendant as would have conferred upon him legal title on 8<sup>th</sup> July 1995.
  3. Whether the 2<sup>nd</sup> Defendant effectively transferred the suit property to the 3<sup>rd</sup> Defendant
  4. Whether the 3<sup>rd</sup> Defendant legally acquired any title over the suit property
  5. Whether the 3<sup>rd</sup> Defendant effectively transferred the suit property to the 4<sup>th</sup> Defendant.
  6. Whether the registration Indenture between the deceased and the 2<sup>nd</sup> Defendant and of the Conveyances from the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> Defendant and from the 3<sup>rd</sup> Defendant to the 4<sup>th</sup> Defendant by the 5<sup>th</sup> Defendant were proper.

Before analyzing the evidence, it is imperative that the point of law raised by the 3<sup>rd</sup> Defendant as

regards the validity of the suit be addressed. In his submissions, counsel for the 3<sup>rd</sup> Defendant took issue with the propriety of the suit and submitted that the same was a “*non starter*” owing to the fact that the Plaintiff was filed a day after the deceased vendor had died, meaning that there was no Defendant. In respect to this, counsel for the Plaintiff has submitted that the 3<sup>rd</sup> Defendant’s objection was ill timed and out of place, having never been raised in the Defence filed and not forming part of the pleadings. Counsel cited the provisions of **Order 1V 4 (2) of the Civil Procedure Rules (2009 Revised Edition)**, which requires a Defendant to an action for recovery of land,

**“to plead specifically every ground of defence on which he relies.”**

Counsel submitted therefore that, since capacity had not been raised as a ground of defence, it cannot be introduced through submissions.

The above proposition is correct. Additionally, I would wish to be guided by the provisions of **Order 1 Rule 9 of the Civil Procedure Rules** (both under the old Rules and the **2010 Civil Procedure Rules**), which provides as follows:-

**“No suit shall be defeated by reason of misjoinder or non joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”**

In the submissions filed on behalf of the Plaintiff on 7<sup>th</sup> October 2009, counsel for the Plaintiff has submitted that after becoming aware of the death of Mr. Ahmed Ali Odey, he filed an Amended Plaintiff on 24<sup>th</sup> July 1992, joining the administrators of the deceased to the suit, and then proceeded on the basis that the named administrators were liable to the Plaintiff in this suit which, undoubtedly survived the deceased.

There appears to be no case law reported locally dealing directly with the issue of a suit filed against a Defendant who is later shown to have died prior to the date of filing the Plaintiff. In the submissions filed for the 3<sup>rd</sup> Defendant, counsel has cited BETH WANJIKU KAMAU –VS- SAVINGS & LOAN (K) LTD 2006 eKLR which, however, relates to an objection raised in regard to a suit filed on behalf of a dead Plaintiff, which the law treats as being void ab inito for want of locus standi.

My understanding of the law relating to the suitability or non suitability of parties is that the position as regards a dead Defendant is different, as can be seen from the discussion at pages 219-231 of the **Supreme Court Practice 1999** on the provisions relating to the addition and substitution of parties under **Order 15 Rule 6 of the Supreme Court Practice** which gives the court in England the same powers as are vested in our courts under **Order 1 Rules 9 and 10 of the Civil Procedure Rules** (both under the old Rules, under which the present suit was filed, as well as under the new **Civil Procedure Rules 2010**).

The High Court is empowered, under **Order 1 Rule 10** at any stage of proceedings, to order that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, be added either on application or on its own motion. In England, this power is expressed to be vested in the court to avoid the likelihood of a suit being challenged for the reasons of misjoinder or nonjoinder of parties as is seen from the provisions of **Order 15 Rule 6 of the Supreme Court Practice Rules** [ref **Supreme Court Practice 1999 Vol 1**], which reads as follows:-

**“6-(1) No cause or matter shall be defeated by reason of misjoinder or nonjoinder of any party; and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter**

**(2) Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either on its own motion or on application—**

**(a)-----**

**(b) order the following persons to be added as a party, namely\_\_\_\_\_**

**(i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon,**

or

**(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.**

The above provisions are quite akin to the provisions of **Order 8 (3)** of the **Civil Procedure Rules**, which provides for the power of the court to amend pleadings for the purpose of ensuring that the correct parties are included in the suit for the just and proper determination of the issues in dispute. It is trite that where a person against whom a cause of action would be directed had died but the cause of action survives him the action may be brought against the estate of the deceased. **Order 15 Rule 6A (3)** of the **Supreme Court Practice Rules** provides specifically that:-

**“An action purporting to have been commenced against a person shall be treated, if he was dead at its commencement, as having been commenced against his estate-----,whether or not a grant of probate or administration was made before its commencement.”**

The position in England is that no application need be made for an order to substitute a dead Defendant where a suit survives him. In the Kenyan case I believe that the power is crystallized or given effect by the provisions of **Order 8 Rule 3** of the **Civil Procedure Rules** which provides for the amendment of pleadings with leave of the court where **Order 1 Rules 9** and **10** are in issue. The suit herein is therefore validly before court and cannot be avoided for want of capacity on the part of the 1<sup>st</sup> Defendant.

As regards the objection raised by the 4<sup>th</sup> Defendant that the suit against her is statute barred, I am satisfied with the Plaintiff's submission that the same having not been raised as part of the pleadings cannot stand, in view of the provisions of **Order 2 Rule 4 (2)** of the **Civil Procedure Rules 2010**, which replaced **Order V1 Rule 4 (1)** of the **2009 Rules** as cited in the Plaintiff's submissions. The same provides as follows:-

**“4 (1) A party shall in any pleading subsequent to a plaint plead specifically any matter---**

**(a) which he alleges makes any claim or defence of the opposite party not maintainable;**

**(b) which, if not specifically pleaded, might take the opposite party by surprise;**

or

**(c) -----**

**(2) Without prejudice to subrule (1), a Defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.”**

It is stated in the editorial notes to **Order 15 Rule 6** that even where limitation is in issue, the court will allow an amendment to include a Defendant where it is proved that the new party is sued jointly with the original Defendant and not severally (which would mean a separate cause would be possible against the new party) and that failure to join the new party might render the claim unenforceable. In explaining the justification for the seemingly liberal approach, the editors of the **Supreme Court Practice 1991 Vol. 1** at page 231 state that:-

**“The court will look with disfavour on the conduct of an intended Defendant who takes to “playing the game”---in cynically taking advantage of procedural rules e.g. to disown liability which had**

**been freely and fully accepted.”**

It would seem that going by that principle the late objection to the addition of the 4<sup>th</sup> Defendant would not be readily entertained even if **Order 8 Rule 4 (2)** was not invoked. The amendment to the Plaint to include the 4<sup>th</sup> Defendant having been made with leave of the court and in accordance with the **Civil Procedure Rules**, the 4<sup>th</sup> Defendant is a proper party within the legal requirements relevant to this case.

As regards the procedural objection by the 5<sup>th</sup> Defendant, I am of the considered view that, that too does not hold ground. To say that the actions of the Government Lands Registrar are protected from questioning by those who are aggrieved by them on the ground that the same were done in good faith and that, as was stated in the written submissions filed in that regard,

**“It is not the mandate of the 5<sup>th</sup> Defendant to intervene (sic) with an advocate client judiciary relationship”**

when such is not the issue is to render a very casual approach to the application of the law. Good faith on the part of those vested with public duty involves due diligence which in this case appears not to have been exercised by those involved in the transactions at the Government Lands Registry at the material time. My reasons for so finding appear later in this judgment.

My position therefore, as regards the property of the suit and the suitability of the parties is that the same are in order. Having arrived at that conclusion, and having done my best to identify and isolate the various issues arising, as relate to the parties to the suit and their respective positions taken, I now turn to the issue of ownership of the suit property which is central to the 1<sup>st</sup> Plaintiff's claim.

Other than to ask that the claims over the suit property by the Plaintiff on one hand and the 4<sup>th</sup> Defendant be dismissed the 1<sup>st</sup> Defendant has not appear to have made any specific request for the annulment of the 4<sup>th</sup> Defendant's registration of the suit property in its name. Weighed against the evidence tendered by the Plaintiff's witnesses, the defence of the 1<sup>st</sup> Defendant, to the effect that the deceased never signed the Sale Agreement of 9<sup>th</sup> July 1991, cannot stand. The deceased presented himself to the firm of Salim Dhanji & Company willingly and participated in the loan to KCFC being paid from the proceeds of the sale of the suit property to the 1<sup>st</sup> Plaintiff. He even gave them a copy of his identity card.

The evidence adduced to suggest that he had no mental capacity to contract was contradictory in itself with the medical expert being unable to confirm the condition of the deceased at the time he is said to have negotiated the sale of the suit property with the 1<sup>st</sup> Plaintiff. The suggestion that he may have changed his mind later is mere speculation on the part of the 1<sup>st</sup> Defendant's witnesses. Similarly, the suggestion that the Plaintiff was after a loan he had given to the Deceased when he approached him for the signing of the unexecuted Indenture drawn between himself and the 1<sup>st</sup> Plaintiff, immediately prior to his death, is mere speculation without evidential support.

That it is not disputed that the 1<sup>st</sup> Plaintiff had caused to be registered a caveat claiming a purchaser's interest and referring specifically to the agreement for sale of 9<sup>th</sup> July 1991, is in my view, conclusive evidence that the transaction between the deceased and the 1<sup>st</sup> Plaintiff was one for the sale of the subject matter and not for a loan as suggested by the 1<sup>st</sup> Defendant in its defence to the action.

The circumstances in which the caveat was removed were confirmed by PW3 to be suspicious since she could not produce the withdrawal itself to show who signed for it. It cannot therefore be said conclusively that the 1<sup>st</sup> Plaintiff did it. In view of PW3's testimony that the withdrawal was effected on the application by the 2<sup>nd</sup> Defendant and given the facts of the case, the withdrawal can only be deemed

to have been done by the 2<sup>nd</sup> Defendant who, not being the caveator, did so illegally and fraudulently.

The fact that the 2<sup>nd</sup> Defendant was tried and convicted on fraud charges relating to the suit property (whether he was acquitted on appeal or not) coupled with the fact that he conveniently absented himself from these proceedings leaves me in no doubt that he was involved directly in frustrating the completion of the 1<sup>st</sup> Plaintiff's transfer and placing himself instead as the buyer of the suit property. In my view, the acquittal by the Court of Appeal in the criminal case does not affect my findings herein since the burden of proof in civil cases weighs on a balance of probabilities.

The evidence of DW3 leaves a gaping hole in the linkage between the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Defendant whose identity from the evidence tendered remains a mystery. There is no evidence produced to show that the 2<sup>nd</sup> Defendant paid any purchase price to anybody in regard to the suit property which, as DW5 would wish one to believe was either purchased from the deceased before he died or from his estate, going by the Indenture he registered in favour of the 2<sup>nd</sup> Defendant.

With all due respect, the evidence of DW5 as regards his enquiries from the Chief Land Registrar, Mr. Odhiambo, who was not called to testify, is not representative of prudence but professional ineptitude, given that the 2<sup>nd</sup> Defendant approached him with nothing at all to establish the genesis of the undated Indenture presented for registration and the so called "*onward sale*" of the suit property. That DW5 did not bother to establish the identity of the vendor of a prime property, yet approached the Chief Land Registrar to confirm that the Indenture was registrable raises eyebrows.

That DW5 and the Chief Land Registrar would condone a change of the date of a legal instrument to avoid the payment of appropriate stamp duty is to me indicative of the fact that his evidence as regards the genuineness of the transactions handled by him cannot be believed. The evidence adduced by DW5 and PW3 as relates to the registration of the transfer to the 2<sup>nd</sup> Defendant and subsequently to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants is, in my view, evidence of fraud. It is not normal that a document will bear a date which reads partly in words and partly in numbers in the manner presented by the Indenture produced as "exhibit 67 B" wherein the date appears as:-

**"20<sup>th</sup> day of July one thousand one hundred and ninety 1995."**

I accept PW3's testimony that the document, if genuinely made in 1995 would have been dated **"the 20<sup>th</sup> day of July One Thousand nine hundred and ninety five."** (underlining by court)

I refuse to believe DW5's testimony that the date **"20<sup>th</sup> July One Thousand one hundred and ninety"** referred to the date that the document was drawn. I find that to be a strange proposition given that the date of an instrument will normally be the date of execution, as is clearly intended by the execution clause of the Indenture which reads as follows:-

**"IN WITNESS WHEREOF the parties hereto have set their hands and affixed their seals the day and the year first hereinabove WRITTEN."**

It is common knowledge that any instrument bearing an ambiguous entry or detail, particularly as regards the date thereof will normally be rejected wherever presented.

The representation also that the document was drawn by CHRISHAN GAUTAMA – Advocate and the execution thereof witnessed by CHRISHAM GAUTAMA whose identity was not confirmed by DW5 leads me to conclude that the document was neither genuine nor authentic.

It has been submitted that the Plaintiff has not strictly proved fraud as would justify the granting of the prayers sought in this suit. In my view all the evidence points towards fraud having been committed first by the 2<sup>nd</sup> Defendant, the 3<sup>rd</sup> (mysterious) Defendant and the 4<sup>th</sup> Defendant with the assistance of DW5 and the Chief Land Registrar (whether, on the part of these two such assistance was given

intentionally or by some legal lapse). Fraud, generally, as defined in Osborn's Concise Law Dictionary means,

**“obtaining material advantage by unfair or wrongful means; involves moral obliquity”**

It is said to be proved when it is shown that a false presentation has been made

- (i) knowingly; or
- (ii) without belief in its truth; or
- (iii) recklessly or carelessly whether it be true or false.”

It is clear that this is the case as regards the presentations made before the registrar in relation to the Indenture dated 20<sup>th</sup> July 1995, (or 1990) which, if executed in 1995 misrepresented the vendor who had died early 1992. PW3 testified that the registrar concerned took the date 1995 as the date of the document, otherwise it would have been subjected to stamp duty calculated as from the 20<sup>th</sup> July 1990.

The same relates to the Conveyances registered in favour of the 3<sup>rd</sup> Defendant and the 4<sup>th</sup> Defendant which, owing to the escalation of the purchase price from KShs. 3 million to KShs. 7 million and to KShs. 10 million in quick succession would have been registered provisionally and subjected to valuation for appropriate upstamping. The court considers it appropriate to draw the 5<sup>th</sup> Defendant's attention to the holding in OLE MEIKOKI –VS- OLE SIRERE [1981] KLR 593, as to the exercise of power by the Land Registrar and his accountability in the registration of land transactions.

From the above, it follows that this court finds that the 2<sup>nd</sup> Defendant's title was fraudulently acquired; meaning that no title passed from him to the 3<sup>rd</sup> Defendant and/or subsequently to the 4<sup>th</sup> Defendant. It follows therefore that the registration of the 4<sup>th</sup> Defendant as the owner of the suit property has no basis in law, since a vendor cannot pass a better title than he himself possesses. Having been represented by the same advocate (DW5) who registered the 2<sup>nd</sup> Defendant's falsely acquired title and who, despite being put on inquiry made no attempt to do the right thing, the 4<sup>th</sup> Defendant cannot claim to be a good purchaser for value without notice of fraud. He acquired no title at all from the phantom known as Geraldine James or Flave Enterprises. I accept the Plaintiff's submissions that the authorities cited, viz: OPENDA –VS- AHN [1984] KLR 208, MARGARET WANJIKU KAMAU –VS- JOHN NJOROGE GATHURU [2005] eKLR, NDEGE WHOLESALERS LTD –VS- CHIKOO INVESTMENTS LTD H.C.C.C. No. 788 of 1997 (unreported) and ESAU MUMIA –VS- THE CITY COUNCIL OF NAIROBI H.C.C.C. No. 1127 of 2003 (unreported) do support their claim in material respects.

In conclusion I find that on the balance of probabilities, the Plaintiff's have proved their case in that from the evidence tendered it is established that a valid agreement for sale was entered into between the deceased Ahmed Ali Odey and the 1<sup>st</sup> Plaintiff and that the deceased did owe the 2<sup>nd</sup> Plaintiff a sum of money (KShs. 762,752.25/= as proved by evidence) of which the 1<sup>st</sup> Defendant is liable to compensate.

Accordingly the suit succeeds and judgment is hereby entered in favour of the Plaintiffs as prayed in prayers 1 (a) (b) (d) (e), III and IV of the Plaint. As regards prayer II of the Plaint, judgment is entered as in favour of the 2<sup>nd</sup> Plaintiff against the 1<sup>st</sup> Defendants jointly and severally for:

- (a) KShs. 762, 752.25
- (b) Costs of the suit
- (c) Interest on (a) and (b) above

The interest awarded shall be at court rates.

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>TH</sup> day of NOVEMBER, 2011**

**M. G. MUGO**  
**JUDGE**

In the presence of:

Mr. Kairu

For the Plaintiffs

Mr. Mulekyo holding brief for Mr. Mutiso For the 1<sup>st</sup> Defendant

No Appearance For the 2<sup>nd</sup> Defendant

Mr. Mulekyo For the 3<sup>rd</sup> Defendant

No Appearance For the 4<sup>th</sup> Defendant

No Appearance For the 5<sup>th</sup> Defendant