



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 870 OF 2003**

**M.O. OSEKO.....1<sup>ST</sup> PLAINTIFF**

**J.O. OSEKO.....2<sup>ND</sup> PLAINTIFF**

**=VERSUS=**

**DAVID AWORI.....1<sup>ST</sup> DEFENDANT**

**MARIA LILIAN ODONGO OUYA.....2<sup>ND</sup> DEFENDANT**

**JUDITH MHINA.....3<sup>RD</sup> DEFENDANT**

**CONSOLIDATED WITH ELC SUIT NO. 877 OF 2003**

**MARIA LILIAN ODONGO OUYA.....1<sup>ST</sup> PLAINTIFF**

**DAVID AWORI.....2<sup>ND</sup> PLAINTIFF**

**=VERSUS=**

**MATHEW O. OSEKO.....1<sup>ST</sup> DEFENDANT**

**J.O. OSEKO.....2<sup>ND</sup> DEFENDANT**

**AND**

**ELC SUIT NO. 2905 OF 1993**

**M.O. OSEKO.....1<sup>ST</sup> PLAINTIFF**

**J.O. OSEKO.....2<sup>ND</sup> PLAINTIFF**

**=VERSUS=**

**LERO LUNO ENTERPRISES LIMITED.....1<sup>ST</sup> DEFENDANT**

**NICHOLAS WANDIA RABALA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

This judgment is in respect of three cases which were consolidated and heard together. The oldest suit, ELCC No. 2905 of 1993 was brought by **M. O. Oseko** and **J. O. Oseko** (hereinafter referred to only as “**the Osekos**” for ease of reference). This suit was brought against **Lero Luno Enterprises Limited** and **Nicholas Wandia Raballa** (hereinafter together referred to as “**the defendants in ELCC No. 2905 of 1993**” and individually as “**Lero Luno**” and “**Raballa**” respectively). In their plaint dated 15<sup>th</sup> June, 1993, the Osekos averred that through negotiations and discussions between them and Raballa, the Osekos agreed to purchase and Raballa agreed to sell to them two parcels of land measuring a total of one acre known as L. R. No. 12219/3 and L. R. No. 12219/4 (hereinafter together referred to as “**the suit properties**”

and individually as “Plot No. 12219/3” and “Plot No. 12219/4” respectively). The Osekos averred that Raballa agreed to sell to them the suit properties which were subdivisions of L.R No. 3589/6 at a price of Kshs. 850,000/= . The Osekos averred that it was discussed with Raballa and Raballa was aware that the Osekos intended to vacate their rented house at Kileleshwa to a matrimonial home that they intended to construct on the suit properties. The Osekos averred that Raballa promised that he would obtain all the necessary approvals from the City Council of Nairobi and the Ministry of Lands and would provide the Osekos with title deeds for the suit properties so that they could commence the construction of the said matrimonial home on the suit properties. The Osekos averred that the other terms and conditions that the parties agreed on which were to be incorporated in the sale agreement were that;

- (i) On the signing of the sale agreement Raballa would acknowledge receipt of payment of Kshs. 380,000/= that had already been made to him.
- (ii) Upon acknowledging receipt of the said sum of Kshs. 380,000/= from the Osekos, the Osekos would take possession of the suit properties.
- (iii) Raballa would obtain all the necessary consents including consents from the Ministry of Lands and the City Council of Nairobi.
- (iv) The balance of the purchase price would be paid to Raballa once he had obtained title deeds for the suit properties and delivered the same to the Osekos.

The Osekos averred that Raballa had informed them that the subdivision of L.R No. 12219 (“**the original plot**”) was approved subject to among other conditions, the construction of a road (cul-de-sac) including surface water drainage and street lightings. The Osekos averred that the fulfilment of the said condition together with the others was a condition precedent to the Ministry of Lands issuing title deeds for the subdivisions of the original plot and that Raballa undertook to comply with the said conditions.

The Osekos averred that they prepared an agreement of sale between them and Raballa, signed the same and forwarded it to Raballa for his signature. The Osekos averred that it was at this stage that Raballa disclosed to them that the suit properties were registered in the name of Lero Luno which he claimed was his company. The Osekos averred that Raballa amended the said agreement of sale in his own hand and among others, changed the name of the vendor to Lero Luno and the plot reference numbers from “D” and “E” that were contained in the survey plan to L.R No. 12219/3 and 12219/4 (“the suit properties”). The Osekos averred that Raballa thereafter returned the said agreement of sale to the Osekos for correction before signing by the parties.

The Osekos averred that they took possession of the suit properties on or about 15<sup>th</sup> March, 1993 in accordance with clause 6 of the agreement of sale aforesaid and engaged a contractor to clear foliage and tree stumps before fencing the suit properties. The Osekos averred that they also dug holes around the fence for planting trees. The Osekos averred that in breach of the said agreement of sale, Raballa failed to carry out various construction works that were mandatory to the subdivision of the original plot as a consequence of which the Osekos were impeded in their desire to start developing the suit properties. The Osekos averred that they could not obtain building plan approval from the City Council of Nairobi without the titles for the suit properties that could not be issued before the conditions that were imposed for the subdivision of the original plot were met by Raballa.

The Osekos averred that pursuant to the said contract that they entered into with Raballa, they had incurred substantial costs in; clearing and fencing the suit properties, architectural fees, purchasing construction material, transportation and related expenses. The Osekos averred that in further breach of the said agreement of sale, Raballa had failed to obtain the necessary consents and to avail the title deeds for the suit properties to the Osekos. The Osekos averred that Raballa had in essence refused to complete the said agreement of sale. The Osekos averred that on 6<sup>th</sup> June, 1993, Raballa went to the suit properties and threatened to knock down and destroy their fence and the building materials they had on the properties. The Osekos averred that Raballa claimed that he had not been paid the full purchase price. The Osekos averred that on 7<sup>th</sup> and 8<sup>th</sup> June, 1993, Raballa’s workers entered the suit properties and pulled down the fence that the Osekos had put up around the suit properties and destroyed the materials that had been used to put up the said fence. The Osekos averred that as a result of Raballa’s and Lero Luno’s said unlawful activities, they had suffered loss and damage.

The Osekos sought judgment against Raballa and Lero Luno jointly and severally for;

- (i) Specific performance of the agreement for sale of the suit properties.
- (ii) Further and in the alternative, damages for breach of the said contract.
- (iii) An injunction restraining Raballa and Lero Luno from damaging and/or interfering with the Osekos’ developments or occupation of the suit properties in any way whatsoever.
- (iv) Damages for trespass.
- (v) Special damages.
- (vi) Interest.
- (vii) Further or other relief.

Raballa and Lero Luno did not file a defence to the Osekos’ claim in ELCC No. 2905 of 1993. Upon being served with summons, they appointed the firm of Shapley Barret & Co. Advocates to represent them in the suit. The firm withdrew from acting for them subsequently

for lack of instructions. An application by the Osekos in ELCC No. 2905 of 1993 for interlocutory injunction to restrain Raballa and Lero Luno from dealing with the suit properties pending the hearing of the suit was dismissed by the court on 29<sup>th</sup> November, 1993.

While ELCC No. 2905 of 1993 was pending, Lero Luno, the 1<sup>st</sup> defendant in ELCC No. 2905 of 1993 sold and transferred the suit properties to one, Judith Mhina who was registered as the owner thereof on 26<sup>th</sup> March, 1998. Judith Mhina subsequently transferred Plot No. 12219/3 and Plot No. 12219/4 to David Awori and Maria Lilian Odongo Ouya respectively on 28<sup>th</sup> October, 2002 and 29<sup>th</sup> October, 2002.

On 20<sup>th</sup> August, 2003, the Osekos filed another suit namely, ELCC No. 870 of 2003 against David Awori (“**Awori**”), Maria Lilian Odongo Ouya (“**Ouya**”) and Judith Mhina (“**Mhina**”) who were sued as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> defendants respectively seeking the following reliefs;

- (i) An injunction restraining Awori and Ouya from entering or interfering with the Osekos’ possession and development of the suit properties
- (ii) A declaration that Awori and Ouya were not entitled to enter, use and/or occupy the suit properties or move materials into the suit properties or at all.
- (iii) A declaration that the transfer of the suit properties by Lero Luno to Mhina and the subsequent transfer of the said properties by Mhina to Awori and Ouya was illegal, fraudulent, null and void.
- (iv) Damages for trespass.
- (v) Special damages.
- (vi) Costs and interest.

In their plaint dated 20<sup>th</sup> August, 2003, the Osekos averred that at all material times they were the owners of the suit properties and entitled to possession thereof. The Osekos averred that they took possession of the suit properties pursuant to the agreement of sale that they entered into with Lero Luno on or about 15<sup>th</sup> March, 1993. The Osekos averred that the suit properties were the subject of ELCC No. 2905 of 1993 in which they had sued Lero Luno for specific performance and damages which suit was pending. The Osekos averred that after taking possession of the suit properties on 15<sup>th</sup> March, 1993, they developed the same and had continued to develop the same. The Osekos averred that on or about 15<sup>th</sup> August, 2003 they were informed by Awori that Awori and Ouya had purchased the suit properties from Mhina. The Osekos averred that upon receipt of this information, they carried out a search at the land registry that revealed that the suit properties had been sold to Awori and Ouya by Mhina on 29<sup>th</sup> October, 2002. The search also revealed that Lero Luno had earlier on transferred the suit properties to Mhina on or about 29<sup>th</sup> March, 1998 notwithstanding the fact that the suit properties had been sold to them and that they had taken possession thereof on 15<sup>th</sup> March, 1993.

The Osekos averred that the purported sale of the suit properties by Lero Luno to Mhina and the subsequent transfer of the same by Mhina to Awori and Ouya were illegal, fraudulent, null and void since Lero Luno had only one surviving director left after the death of Raballa in or about 1996 who could not carry out any transaction on behalf of Lero Luno.

The Osekos averred that Awori and Ouya had claimed wrongfully that they had a right to the suit properties and that Awori had intimated that he wanted to start construction on Plot No. 12219/3. The Osekos averred that Awori went to the suit properties on or about 16<sup>th</sup> August, 2003 and broke the doors of the temporary houses that they had put up thereon in an attempt to evict the Osekos’ workers who were residing in the premises. The Osekos averred that Awori had threatened and intended unless restrained by the court to repeat the said acts of trespass. The Osekos averred that they had been subjected to humiliation and had suffered great mental anguish and stress and had therefore suffered loss and damage.

Awori and Ouya filed a joint statement of defence on 9<sup>th</sup> September, 2003. In their defence dated 8<sup>th</sup> September, 2003, Awori and Oyuga averred that they held absolute and indefeasible title in respect of the suit properties. Awori and Ouya averred that the Osekos’ possession of the suit properties could not be construed to confer ownership of the said properties upon them. Awori and Ouya averred that if the Osekos had carried out any development on the suit properties, they did so at their own peril since they were trespassers on the suit properties. Awori and Ouya averred that they were innocent purchasers of the suit properties for value and urged the court to dismiss the Osekos’ suit with costs. Mhina did not file a defence to the Osekos’ claim in ELCC No. 870 of 2003. The firm of K. O. Asinuli Advocate entered appearance for Mhina in the matter on 29<sup>th</sup> September, 2005 but did not file a statement of defence on her behalf.

Unaware that the Osekos had sued them in ELCC No. 870 of 2003, Awori and Ouya filed a suit against the Osekos on 22<sup>nd</sup> August, 2003 namely, ELCC No. 877 of 2003 seeking the following reliefs;

1. An injunction restraining the Osekos from entering, evicting, harassing and/or in any other way interfering with their quiet possession and occupation of the suit properties.
2. Damages.
3. A declaration that Awori and Ouya were the rightful registered proprietors of the suit properties.
4. Costs of the suit and interest.

In their plaint dated 20<sup>th</sup> August, 2003, Awori and Ouya averred that they acquired the suit properties from Mhina who was the duly registered owner thereof at a consideration of Kshs. 1,000,000/= each. Awori and Ouya averred that upon being registered as the proprietors of the suit properties, they became the owners thereof together with all the buildings, fixtures, fittings and other improvements thereon. Awori and Ouya averred that Ouya had charged Plot No. 12219/4 to Barclays Bank to secure a loan facility of Kshs. 2,100,000/= and had engaged various professionals for the purposes of commencing construction of a residential house on Plot No. 12219/4. Awori and Ouya averred that if the work that Ouya wanted to carry out on Plot No. 12219/4 stalled, she would incur great loss and expense. Awori and Ouya averred that Awori had already commenced construction on Plot No. 12219/3 by digging the layout of a house that he wished to construct on the property. Awori and Ouya averred that on 17<sup>th</sup> August, 2003, M. O. Oseko in the company of armed men trespassed on the suit properties and destroyed the equipment belonging to Awori's contractor who was on site and covered all the trenches that had been dug by the said contractor. They averred that on the same day, M. O. Oseko caused the workers who were working on Awori's parcel of land, Plot No. 12219/3 to be arrested and detained at Hardy Police Station. Awori and Ouya averred that their contractors and other professionals that they had engaged for the purposes of the construction which they wanted to undertake on the suit properties had been denied access to the suit properties by the Osekos who had barricaded the said properties. Awori and Ouya averred that Awori was forced to stop construction that he had commenced on Plot No. 12219/3 by the actions of the Osekos aforesaid while Ouya had obtained funds from Barclays Bank upon charging Plot No. 12219/4 and was desirous of commencing development on the said property. Awori and Ouya averred that the Osekos had harassed and threatened to evict them from the suit properties while they were the registered owners thereof.

The Osekos filed their statement of defence in ELCC No. 877/2003 on 19<sup>th</sup> July, 2005. The Osekos averred that they were at all material times and still were the owners of the suit properties having taken possession of the said properties pursuant to an agreement of sale that they entered into with Lero Luno on or about 15<sup>th</sup> March, 1993. The Osekos averred that the charge that Ouya had created over Plot No. 12219/4 in favour of Barclays Bank was null and void. The Osekos averred that upon taking possession of the suit properties on 15<sup>th</sup> March, 1993 they developed and had continued to develop the same. The Osekos averred that Lero Luno had no capacity to transfer the suit properties to Mhina from whom Awori and Ouya derived their titles to the suit properties. The Osekos averred further that since there was a pending suit in court namely, ELCC No. 2905/1993 between the Osekos and Lero Luno in which the Osekos had sought specific performance, Lero Luno lacked legal capacity to transfer the suit property to Mhina. The Osekos averred that the transfer of the suit properties by Lero Luno to Mhina and the subsequent transfer of the same by Mhina to Awori and Ouya were illegal, fraudulent, null and void. The Osekos averred that they were entitled in law as the rightful owners of the suit properties who were in exclusive possession thereof to turn away any trespasser and to use reasonable force to prevent any illegal entry into the suit properties by Awori and Ouya and their agents. The Osekos averred that Awori and Ouya had no legal or equitable right to claim the suit properties and that their attempt to force their way into the suit properties was illegal. The Osekos urged the court to dismiss the suit by Awori and Ouya with costs.

ELCC No. 870 of 2003 and ELCC No. 877 of 2003 were consolidated on 28<sup>th</sup> August, 2003 with ELCC No. 870 of 2003 as the lead file. The two (2) consolidated matters were further consolidated with ELCC No. 2905 of 1993 with ELCC No. 870 of 2003 remaining the lead file. M. O. Oseko died while the suits were pending hearing.

At the trial, Julie Oseko, the widow of M.O. Oseko who had brought ELCC No. 2905 of 1993 and ELCC No. 870 of 2003 together with her deceased husband gave evidence in proof of the Osekos' claims in the two suits and in their defence in ELCC No. 877 of 2003. Julie Oseko (PW1) adopted her witness statement dated 13<sup>th</sup> July, 2018 as part of her evidence in chief. In her oral testimony, PW1 stated as follows. In 1992, Mathew O. Oseko deceased ("the deceased") and she ("the Osekos") entered into a sale agreement with Lero Luno which was represented by Raballa. At the time, the suit properties were part of a larger parcel of land that had not been subdivided. There was however a subdivision plan for identification of the various parcels. They chose a half acre plot that was identified as "G" in the subdivision plan. The purchase price for the said plot was agreed at Kshs. 450,000/= of which they paid Kshs. 80,000/=. Towards the end of 1992, they were informed that plot "G" had been sold to another person and Raballa offered them the suit properties. They entered into fresh negotiations with Raballa in respect of the suit properties. They agreed on a price of Kshs. 850,000/= for the two parcels of land. Raballa agreed to apply the sum of Kshs. 80,000/= that he had received under the earlier agreement for plot "G" towards the purchase price of the suit properties. They paid a deposit of Kshs. 300,000/= for the suit properties. Together with Kshs. 80,000/= that they had paid earlier that was transferred to this transaction, they had paid a total of Kshs. 380,000/= towards the purchase price of the suit properties. Raballa allowed them to take possession of the suit properties to guard against the said properties being sold to other persons like plot "G". After taking possession of the suit properties, they cleared the same, put up a fence and constructed temporary workers' houses thereon. Raballa thereafter permitted them to start construction of their matrimonial house on the suit properties as they continued paying the balance of the purchase price. They had their building plans approved after which they started assembling building materials on the suit properties with a view to commencing construction.

They had further negotiations with Raballa and Raballa asked them to construct a road of access to the suit properties the cost of which was to be assessed and deducted from the balance of the purchase price. It was agreed with Raballa that if the cost of putting up the road exceeded the balance of the purchase price, Raballa would pay them the difference. The agreement regarding the construction of the road was in writing.

They drafted an agreement of sale in respect of the suit properties and forwarded the same to Raballa for approval. Raballa amended the agreement by putting Lero Luno as the vendor in place of he. He also changed the purchase price for the suit properties from kshs. 850,000/= to Kshs. 900,000= . They had all along believed that the suit properties were owned by Raballa. They completed construction of the said road on the suit properties at a cost of Kshs. 400,000/=. Raballa did not agree that the construction of the said road costed Kshs. 400,000/=. In his estimation, the road could not have costed more than Kshs. 200,000/= to construct. The said road improved the value of the land in the area and Raballa started getting more buyers for the plots that had not been sold. They gave Raballa a bank guarantee for the payment of the balance of the purchase and also completed the road that they had agreed on with Raballa. Despite all these, Raballa refused and/or neglected to issue them with the title deeds for the suit properties. It was on account of this that they filed ELCC No. 2905/1993 seeking specific performance and injunction against Raballa and Lero Luno.

They remained in occupation of the suit properties even after filing the said suit. Raballa died in 1996 while ELCC No. 2905/1993 was pending. They continued with construction on the suit properties and had workers staying on the said properties. On 11<sup>th</sup> August, 2003, Awori came to the suit properties and told the said workers that he had purchased the properties and wanted to move construction materials to the same. When Awori came to the suit properties, they had their construction materials on site and had started putting up the foundation

for their house. They met Awori when he came to the suit properties and he told them that he had purchased his parcel of land through Munikah advocate. Munikah advocate had purchased land from Raballa like them and was aware of their interest in the suit properties and of the fact that they were in occupation. Munikah was also aware that ELCC No. 2905/1993 which concerned the suit properties was pending. When they confronted Munikah on the issue, he claimed that the transaction involving Awori, Mhina and Lero Luno was a fraud.

Awori came back to the suit properties and attempted to evict their workers from the same. The matter was reported to the police and the invaders who accompanied him were arrested and charged. As a result of this invasion, they filed ELCC No. 870/2013 seeking injunction. Awori did not succeed in evicting them from the suit properties. Awori and Ouya did not therefore succeed in taking possession of the suit properties. They remained in possession of the suit properties. They had not breached any of Awori's and/or Ouya's rights. They were the ones who had been made to suffer as a result of the actions of Awori and Ouya. When purchasing the suit properties, Awori, Ouya and Mhina were all aware of their presence on the suit properties and of the fact that there was a pending suit by virtue of their association with Munikah Advocate.

They were strangers to Awori and Ouya and that their claim raised no cause of action against them. Awori and Ouya filed ELCC No. 877 of 2003 after they had filed ELCC No. 870/2003. Awori and Ouya sought injunction against them. Awori and Ouya were not entitled to the injunction they had sought because they had never been on the suit properties. Awori and Ouya were the aggressors and the ones who caused them loss and damage. The titles held by Awori and Ouya were fraudulent. Awori and Ouya were not innocent purchasers of the suit properties because they had notice of their interest. They were in possession of the suit properties and their presence was visible. Awori and Ouya obtained their titles from Mhina who had no valid title to the suit properties. They were still having possession of the suit properties and had completed the construction of their home. The home was standing on the two parcels of land.

PW1 urged the court to grant the reliefs sought in ELCC No. 2905/1993. PW1 stated that the averments they had made in ELCC No. 2905/1993 were not controverted. She urged the court to grant an order for specific performance and the injunction sought. PW1 also urged the court to grant the reliefs sought in ELCC No. 870/2003 as prayed. She urged the court to dismiss the claim brought against them by Awori and Ouya in ELCC No. 877/2003. PW1 produced as exhibits the documents attached to their list of documents dated 13<sup>th</sup> July, 2018 filed in court on 16<sup>th</sup> July, 2018.

After the close of the Osekos' case Awori (DW1) was the first to give evidence for the defendants. DW1 adopted his witness statement dated 10<sup>th</sup> November, 2017 as part of his evidence in chief and produced the documents attached to his list of documents dated 10<sup>th</sup> November, 2017 as exhibits. He stated that he engaged an advocate to act for him in the purchase of L.R No. 12219/3 ("plot No. 12219/3") from Mhina. The advocate conducted due diligence and confirmed that Plot No. 12219/3 belonged to Mhina. He paid the full purchase price and was issued with a title in respect of Plot No. 12219/3 on 28<sup>th</sup> October, 2002. He visited the property before purchasing it. The property was vacant and undeveloped. He purchased Plot No. 12219/3 at Kshs.1.5 million. Plot No. 12219/3 was still registered in his name. He purchased Plot No. 12219/3 with the intention of putting up a residential house. When he began construction, the Osekos appeared and laid claim to the property. When the Osekos came to the scene, he had already begun construction. The Osekos were not in occupation of the property when he commenced construction. Due to the Osekos' interference, he decided to file a suit against them in ELCC No. 877/2003. When he filed ELCC No. 877/2003, he was not aware that the Osekos had filed ELCC No. 870/2003 against him and Ouya. He had not been served with the pleadings. He had not taken possession of Plot No. 12219/3 because the Osekos obtained injunction in ELCC No. 870/2003 restraining him from entering the property. The Osekos had developed the property and were now residing thereon. He purchased the property from Mhina. He was unable to develop the property due to the acts of trespass by the Osekos. He urged the court to grant the prayers he had sought in ELCC No. 877/2003.

The last to give evidence was Ouya (DW2). DW2 told the court that she was an advocate of the High Court of Kenya and a company secretary. She stated that she purchased Plot No. 12219/4 from Mhina. When she purchased the property, it had no encumbrance. The property was transferred to her and she was issued with a title. She was not in occupation of the property because the Osekos had trespassed thereon. The Osekos entered the property after obtaining injunction in ELCC No. 870/2003 restraining her from entering the property. She had entered Plot No. 12219/4 in 2002. When purchasing the property, she was not aware that the same was a subject of a pending suit. She stated that she had no dealings with Lero Luno or Raballa and that the house that the Osekos had put up was on Plot No. 12219/3 owned by Awori and part of Plot No. 12219/4. She urged the court to grant the reliefs she had sought in ELCC No. 877/2003 and to dismiss the Osekos' claim in ELCC No. 870/2003. She told the court that she was claiming loss of use of Plot No. 12219/4, eviction of the Osekos from the property and mesne profits.

After the close of evidence, the parties were directed to make closing submissions in writing. Ouya filed her submissions on 11<sup>th</sup> May, 2020. Awori filed his submissions on 17<sup>th</sup> June, 2020 while the Osekos filed their submissions on 17<sup>th</sup> August, 2020. From the pleadings, the evidence and the submissions by the parties, the following in my view are the issues arising for determination in the three consolidated cases;

1. Whether the Osekos had a legally binding and enforceable agreement of sale with Raballa and Lero Luno in respect of the suit properties.
2. Whether the sale and transfer of the suit properties by Lero Luno to Mhina was lawful.
3. Whether the subsequent sale and transfer of the suit properties by Mhina to Awori and Ouya was lawful.
4. Whether the Osekos are entitled to the reliefs sought in ELCC No. 2905/1993 and ELCC No. 870/2003.
5. Whether Awori and Ouya are entitled to the reliefs sought in ELCC No. 877/2003
6. Who is liable for the costs of the suit?

Whether the Osekos had a legally binding and enforceable agreement of sale with Raballa and Lero Luno in respect of the suit properties.

I am satisfied from the evidence on record that the Osekos entered into an agreement of sale of the suit properties with Raballa and Lero Luno. Raballa acted at all material times as an agent and a director of Lero Luno in the transaction. The agreement of sale between the Osekos, Raballa and Lero Luno was oral. I am convinced from the evidence on record that Raballa and Lero Luno had agreed initially to sell to the Osekos a parcel of land then referred to as "Plot G" in the proposed subdivision plan that had been prepared for the subdivision of L.R No. 12219(the original plot) at a price of Kshs. 450,000/=. Pursuant to that agreement, the Osekos paid to Raballa a sum of Kshs. 80,000/=. This agreement was also oral. The agreement was reduced into writing but was not executed by the parties. Although Raballa claimed in the affidavit that he swore on 23<sup>rd</sup> July, 1993 in ELCC No. 2905 of 1993 that he only received Kshs. 79,000/= from the Osekos in respect of that agreement, I do not believe that that was the case. He had claimed that the Osekos took to him cash which they claimed to be Kshs. 50,000/- but which upon counting, he found to be Kshs. 49,000/= only. Raballa issued a receipt for that payment. The receipt was for Kshs. 50,000/=. I cannot believe that Raballa who was an advocate could have issued a receipt for Kshs. 50,000/= while he had only received Kshs. 49,000/=. I am convinced that Raballa received a total of Kshs. 80,000/= from the Osekos under the agreement of sale in respect of Plot "G".

The Osekos led uncontroverted evidence that Raballa sold Plot "G" to another purchaser after receiving the said sum of Kshs. 80,000/= on account of the purchase price and that he offered to sell to them the suit properties as an alternative. The Osekos also led evidence that was not controverted that they agreed on a purchase price of Kshs. 850,000/= for the suit properties with Raballa and paid him Kshs. 300,000/= as a deposit. In his affidavit sworn on 23<sup>rd</sup> July, 1993 aforesaid, Raballa admitted that he received Kshs. 300,000/= from the Osekos as purchase price for the suit properties. He denied however that the purchase price was agreed at Kshs. 850,000/=. He also claimed that the Osekos asked him for Kshs. 50,000/= from the said amount and that he gave the same back to them leaving him with Kshs. 250,000/- only. The Osekos had admitted receiving Kshs. 50,000/- from Raballa but as a loan which they paid back by a cheque of Kshs. 50,000/=. Since the evidence that was adduced by the Osekos regarding the payment of the said sum of Kshs. 300,000/- was not controverted, it is my finding that the said amount was paid to Raballa on account of the purchase price for the suit properties. If this payment is added to the sum of Kshs. 80,000/= that the Osekos had paid for plot "G" that Raballa had agreed to transfer to the new agreement, the Osekos paid a total of Kshs. 380,000/= to Raballa as purchase price for the suit properties.

I am also persuaded from the evidence on record that the purchase price for the suit properties was agreed at Kshs. 850,000/= and that the Osekos were to pay a deposit of Kshs. 380,000/= on receipt of which Raballa was to give them possession of the suit property. These facts are pleaded in the plaint filed by the Osekos in ELC No. 2905 of 1993 in respect of which no defence was filed by Raballa and Lero Luno. The same were therefore uncontroverted. A part from the said pleadings, the Osekos led evidence that they drafted an agreement of sale between them and Raballa whom they all along thought was the owner of the suit properties which they executed and presented to Raballa for execution. The Osekos led evidence that Raballa perused the said draft agreement and made changes in his own hand after which he returned the draft to the Osekos to incorporate his amendments in the final agreement after which the same was to be returned to him for execution. I have looked at the said draft agreement of sale that was amended by Raballa. The same was attached to the affidavit of Mathews Oseko sworn on 15<sup>th</sup> June, 1993 as annexure "MOO4". I have noted from the changes that were made to the said draft agreement that Raballa did not change the purchase price that was indicated as Kshs. 850,000/= in the said draft. I have also noted that Raballa did not change paragraph 4 of the said draft that provided that Kshs. 380,000/- had been paid to him. Again, there was no amendment to Special Condition B of the agreement that provided that upon payment of Kshs. 380,000/= Lero Luno was to give the Osekos possession of the suit property. It is not disputed that the said draft agreement was only signed by the Osekos. It is however indicative of what the parties had agreed on orally. Raballa did not deny this draft agreement and the fact that he made amendments to it in his own hand.

Awori and Ouya have contented in their submissions that the alleged agreement between the Osekos on the one hand and Raballa and Lero Luno on the other offended the provisions of section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya and as such the same was unenforceable. I am in agreement with the Osekos' submission that this contention has no basis. As correctly submitted by the Osekos, although the provisions of section 3(3) of the Law of Contract Act relied on by Awori and Ouya were enacted in 1990 through, The Statute Law (Miscellaneous Amendments (No. 2) Act, 1990 (Act No. 21 of 1990), the same did not come into force until 1<sup>st</sup> June, 2003 through Legal Notice No. 189 of 2002. The agreement of sale between the Osekos, Raballa and Lero Luno that was made in 1992/1993 was therefore regulated by the pre-2003 Law of Contract Act. The pre-2003 section 3(3) of the Law of Contract Act provided as follows:

**“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorised by him to sign it, provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract –**

- (i) Has in part performance of the contract taken possession of the property or any part thereof or**
- (ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”**

In Registered Trustees Anglican Church of Kenya Mbeere Diocese v David Waweru Njoroge [2007] eKLR, the Court of Appeal stated as follows regarding the amendments to section 3(3) of the Law of Contract Act and their effect:

**“Secondly, the respondent was relying on the provisions of section 3 (3) of the Law of Contract Act introduced by STATUTE LAW (MISCELLANEOUS AMENDMENTS) (NO. 2) ACT 1990. Section 3 of that Act stated that the amendments to the law of contract Act would come in operation on a date to be appointed in the Gazette by the Attorney General. By Legal Notice No. 189 of 2002, the Attorney General appointed the commencement date of the 1990 amendments in the law of contract Act as 1<sup>st</sup> June, 2003. That was long after the transaction in dispute took place. Moreover, the amendments introduced in section 3 (3) of the Law of Contract Act by the 1990 Act is not the current law. The current section 3 (3) of the Law of Contract Act was introduced by STATUTE LAW (MISCELLANEOUS AMENDMENTS) ACT NO. 2 of 2002 which became operative vide LEGAL NOTICE NO. 188 of 2002 on 1<sup>st</sup> June, 2003.**

**Section 3 (3) provides:**

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless –

(a) the contract upon which the suit is founded –

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act nor shall anything in it affect the creation of a resulting trust, implied or constructive trust”.

That subsection abolishes or rather excludes the doctrine of part performance which was applicable, as Mr. Mukunya correctly stated, at the time the transaction in this case took place.”

I am satisfied that the agreement between the Osekos, Raballa and Lero Luno met the conditions set out in section 3(3) of the Law of Contract Act that was in force when the agreement was entered into by the parties. The agreement as I have stated earlier was oral. The Osekos however took possession of the suit properties in part performance of the said agreement after paying Kshs. 380,000/= as a deposit to Raballa. From the evidence on record, I am in agreement with the Osekos that they were willing to perform their part of the agreement with Raballa and Lero Luno. From the evidence before the court, the contention by Awori and Ouya that the suit properties were vacant when they purchased the same in 2002 is not correct. There is overwhelming evidence on record that the Osekos were in possession of the suit properties in 1993 several years before Awori and Ouya came to the picture. It was a dispute over possession of the suit properties that prompted the filing of ELC No. 2905 of 1993. There is no evidence that the Osekos vacated the suit properties after taking possession of the same in 1993. A letter dated 11<sup>th</sup> November, 1996 that was addressed to the Osekos by the firm of Munikah & Co. Advocates which was acting for the remaining director of Lero Luno after the death of Raballa acknowledged the occupation or possession of the suit properties by the Osekos. In the letter, the said firm threatened the Osekos with eviction from the suit properties unless they provided the information it had sought. It is the same firm of Munikah & Company Advocates which prepared the instrument of transfer of the suit properties from Lero Luno to Mhina on 31<sup>st</sup> December, 1997 having acknowledged a year earlier that the said properties were in the possession of the Osekos. See, the documents at pages 48 to 49 and 91 to 98 of P. Exh. 1. It was from Mhina that Awori and Ouya acquired their interests in the suit properties. Due to the foregoing, it is my finding that although the Osekos agreement of sale with Raballa and Lero Luno was oral, they were at all material times willing to perform their part of the said agreement and had in part performance paid the requisite deposit and taken possession of the suit properties. Their agreement of sale with Raballa and Lero Luno was therefore enforceable under section 3(3) of the Law of Contract Act that was in force. The said agreement was legally binding and enforceable.

Whether the sale and transfer of the suit properties by Lero Luno to Mhina was lawful.

As I have stated earlier in this judgment, Mhina did not file a defence to the claim by the Osekos. All the allegations made against her in the plaint in ELCC No. 870/2003 were not controverted. From the evidence on record, the suit properties were transferred to Mhina on 31<sup>st</sup> December, 1997. The transfer was however registered on 26<sup>th</sup> March, 1998. There is no evidence as to when Mhina entered into an agreement or agreements of sale with Lero Luno in respect of the suit properties. It is however clear from the evidence before the court that as at the time the suit properties were transferred and registered in the name of Mhina on 26<sup>th</sup> March, 1998, the Osekos were in possession thereof under an agreement of sale that they had entered into with Raballa and Lero Luno and had filed a suit against Raballa and Lero Luno for specific performance. Under the doctrine of *lis pendens*, the title that Mhina acquired from Lero Luno was subject to the outcome of the suit that the Osekos had filed against Raballa and Lero Luno namely, ELCC No. 2905 of 1993. I have already made a finding that Raballa and Lero Luno entered into a legally binding agreement of sale with the Osekos and that the Osekos performed part of the said agreement and were willing and ready to perform the remaining part of the said agreement. Lero Luno having entered into a binding agreement of sale with the Osekos in respect of the suit properties which was subsisting and which had been partly performed by the Osekos by paying the deposit and taking possession of the suit properties could not enter into another lawful agreement of sale in respect of the same properties with Mhina. Lero Luno transferred the suit properties to Mhina in breach of the agreement that it had entered into with the Osekos. The transfer was therefore not lawful. The evidence on record shows that Munikah & Company Advocates who acted for Mhina and Lero Luno in the transaction was aware of the Osekos interest in the suit properties and of the existence of ELCC No. 2905/1993 that had been filed by the Osekos against Lero Luno and Raballa for specific performance. The said law firm had a duty to share that information with Mhina. In any event, the doctrine of *lis pendens* is of general application and as such its application is not dependent on whether or not a person who has acquired a property which is the subject of an active suit had notice of the suit or not. In Margaret Wairimu Warima v Phylis Wanjiru Thairu & 2 others NRB Civil Appeal No. 127 of 2014 (2017)eKLR, the court stated as follows on the doctrine of *lis pendens*:

“Apart from the court orders, which we find were operative at all times material to the suit, there is a common law doctrine of *Lis pendens* which is unaffected by statute and has been upheld by this Court. The common sense of it was explained by Lord Justice Turner in the case of Bellamy vs. Sabine [1857] 1 De G 566, as follows:

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

The same case was cited by Madan J. in Mawji v US International University & Another [1976-80] 1 KLR 229. In Fredrick Joses Kinyua

and Peter Kiplangat Koech v G.N. Baird, Nairobi HCCC No. 4819 of 1989 as consolidated with George Neil Baird and Wanda Baird v Fredrick Joses kinyua and Peter Kiplangat Koech, Nairobi HCCC No. 6587 of 1991 cited in Bernadatte Wangare Muriu v National Social Security Fund Board of Trustees & 2 others [2012] eKLR, the court stated as follows:

**“The doctrine of lis Pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”**

In Emmanuel Ngade Nyoka v Kitheka Mutisya Ngata, Malindi Civil Appeal No. 63 of 2016 [2017]eKLR, the court stated that:

**“So that by the time he was subdividing, selling and transferring portions of the suit premises to the interested parties he was well aware that litigation regarding the suit premises was still ongoing in the first appellate court. This state of affairs obviously attracts the application of the lis pendens doctrine. It is a doctrine of law and thus it matters not when it is raised. The doctrine simply prohibits a party to a suit from transferring the suit premises to a third party while the suit, with regard to the suit premises is pending. The purpose of the doctrine is of course to preserve the suit premises until the finalisation of the ongoing litigation.....As already stated the appellant was well aware of the pending appeal when he purported to subdivide, sell and transfer to the interested parties portions of the suit premises. This being the case the interested parties cannot be heard to argue that they were innocent purchasers for value without notice. As correctly observed by the learned Judge purchase of a property pendente lite for valuable consideration affects the purchaser in the same manner as if he had notice and will be accordingly bound by the judgment or decree in the suit. It does not matter that at the time of purchase there was no order stopping the selling or subdivision of the suit premises as the interested parties have argued. Nor was there need to tender evidence to show that the interested parties were never parties to any collusion or fraud in their acquisition of portions aforesaid. What is pertinent is that the appellant well knowing of the pending litigation involving the suit premises nonetheless went ahead to mischievously subdivide and transfer portions thereof to the interested parties. In the circumstances the learned Judge did not err in invoking the doctrine.”**

In Kawaljeet Singh Rekhi v Peter Wainaina Kamau & 2 others MBSA Civil Appeal No. 21 of 2016 [2016] eKLR, the court stated that:

**“...Mulla and Gour in their treatises on the Indian Transfer of Property Act explain the doctrine further that:**

**“... Every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. Therefore, purchase made of property actually in litigation, pendent lite, for a valuable consideration, and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree on the suit”.**

**The doctrine therefore bars dealing with landed property under litigation to the detriment of the parties to the pending litigation. A transfer, if undertaken in those circumstances will really amount to nothing, and this is the case here.”**

Due to the foregoing, it is my finding that the transfer of the suit properties by Lero Luno to Mhina was unlawful.

Whether the subsequent sale and transfer of the suit properties by Mhina to Awori and Ouya was lawful.

In Daudi Kiptugen v Commissioner of Lands & 4 Others [2015] eKLR the court stated that:

**“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”**

In Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another, the court stated as follows:

**“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.**

Since the transfer of the suit properties by Lero Luno to Mhina was unlawful, Mhina did not acquire a valid title to the suit property. Mhina did not therefore have a valid interest in the suit properties that she could transfer to Awori and Ouya. Awori and Ouya could not have a better title than that which was held by Mhina. Since Mhina’s title was invalid, null and void the same having been acquired unlawfully, Awori and Ouya’s titles were similarly invalid the same having been tainted with the illegality of Mhina’s titles. In Macfoy v United Africa Co. Ltd. (1961) 3 ALL E.R 1169 at page 1172, Lord Denning stated as follows:

**“If an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court to declare it to be so.**

**And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”**

In African Line Transport Co. Ltd. v The Hon. Attorney General, Mombasa HCCC No. 276 of 2003 Njagi J. stated as follows:

**“On the contrary, by a letter dated 30<sup>th</sup> June, 2006, the Commissioner of Lands states that there was no proof in her record that this allocation was authorized by the President. In the absence of such proof, one can draw only one conclusion—that the grant to Mr. Omari was null and void for not having been executed by the President. And if the grant to Mr. Omari was null and void ab initio, it conferred no interest in Mr. Omari. By extension of the principle of *nemo dat quod non habet*, if Mr. Omari acquired no interest in the property, then he had no interest to transfer to the plaintiff. And that is the plaintiff’s lot. There was a gross irregularity which went to the very root of the title to the suit property, and the plaintiff acquired no interest out of it.”**

Like Mhina, Awori and Ouya acquired titles to the suit properties while the Osekos were in possession thereof and while the suit that the Osekos had filed for specific performance against Raballa and Lero Luno was pending. The transfer of the suit properties to Awori and Ouya was in the circumstances also in breach of the doctrine of *lis pendens*. The doctrine of innocent purchaser for value without notice is not available to Awori and Ouya in the circumstances.

Due to the foregoing, it is my finding that the agreements of sale of the suit properties between Mhina, Awori and Ouya were tainted with illegalities and as such the same were invalid.

Whether the Osekos are entitled to the reliefs sought in ELCC No. 2905/1993 and ELCC No. 870/2003.

I have set out at the beginning of this judgment the reliefs sought by the Osekos in ELCC No. 2905 of 1993 and ELCC No. 870/2003. From the findings that I have made above, I am satisfied that the Osekos are entitled to the orders for specific performance sought in ELCC No. 2905 of 2003. The Osekos have demonstrated that they performed their part of the agreement of sale between them and Raballa and Lero Luno and that it was Lero Luno and Raballa who breached their part of the agreement of sale thereby frustrating completion. The Osekos have also demonstrated that they were willing to complete the said agreement of sale provided that Lero Luno and Raballa performed their part. I am satisfied that a case has been made out for specific performance. The Oseko’s will however have to pay the balance of the purchase price in the sum of Kshs. 470,000/= as a condition for the order. The Osekos did not convince me that they had agreed with Raballa that they would deduct from the purchase price the cost they incurred in constructing a road on the suit properties.

The Osekos did not also convince the court that they are entitled to special and general damages sought in ELCC No. 2905/1993. Special damages were not pleaded with the necessary particulars and were not proved at the trial. With regard to general damages for trespass, the same could only be awarded against Raballa who is said to have invaded the suit properties and caused destruction to the properties belonging to Osekos. Raballa died on 9<sup>th</sup> June, 1996 while this suit was pending and was not substituted. The case against him abated and as such no order can be made against him in this suit.

As concerns the reliefs sought in ELCC No. 870 of 2003, I am satisfied that the Osekos are entitled to the declaratory orders sought against Awori, Ouya and Mhina. Again I am not satisfied that general and special damages were proved. The evidence before the court shows that attempts by Awori and Ouya to take possession of the suit properties were not successful. Awori and Ouya are therefore not liable for general damages for trespass. No evidence was tendered in proof of the claim for special damages which must be specifically pleaded and strictly proved.

Whether Awori and Ouya are entitled to the reliefs sought in ELCC No. 877/2003.

From my findings above, Awori and Ouya did not establish their claims against the Osekos. They are therefore not entitled to the reliefs sought in ELCC No. 877 of 2003.

Who is liable for the costs of the suit?

Under section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya, costs of and incidental to a suit is at the discretion of the court. In this case, I am of the view that the dispute herein arose as a result of Lero Luno’s breach of its contractual obligations to the Osekos and its attempt to defeat the Osekos’ interest in the suit properties by selling the suit properties to Mhina who subsequently sold the same to Awori and Ouya. Awori and Ouya may have been innocent actors in the illegality that was being perpetrated by the Lero Luno and Mhina. I will therefore condemn Lero Luno to pay the costs of the consolidated suits to the Osekos. The other parties shall bear their own costs.

Conclusion:

In conclusion, I hereby enter judgment for Julie Oseko, the 2<sup>nd</sup> plaintiff in ELCC No. 2905 of 1993 and ELCC No. 870 of 2003 who is also the 2<sup>nd</sup> defendant in ELCC No. 877 of 2003 as follows;

1. Lero Luno Enterprises Limited, the 1<sup>st</sup> defendant in ELCC No. 2905 of 1993 shall transfer to Julie Oseko, the 2<sup>nd</sup> plaintiff in ELCC No. 2905 of 1993 and ELCC No. 870 of 2003 who is also the 2<sup>nd</sup> defendant in ELCC No. 877 of 2003 all those parcels of land known as L.R No. 12219/3 and L.R No. 12219/4 within 90 days from the date hereof.
2. Julie Oseko, the 2<sup>nd</sup> plaintiff in ELCC No. 2905 of 1993 and ELCC No. 870 of 2003 who is also the 2<sup>nd</sup> defendant in ELCC No. 877 of 2003 shall pay to Lero Luno Enterprises Limited the balance of the purchase price in the sum of Kshs. 470,000/= within 60 days from the date hereof prior to the transfer aforesaid.

3. Julie Oseko, the 2<sup>nd</sup> plaintiff in ELCC No. 2905 of 1993 and ELCC No. 870 of 2003 who is also the 2<sup>nd</sup> defendant in ELCC No. 877 of 2003 shall pay all statutory fees and charges on the transfer and any consent that may be required for the transfer to be effected.

4. It is declared that the transfer of L.R No. 12219/3 and L.R No. 12219/4 by Lero Luno Enterprises Limited, the 1<sup>st</sup> defendant in ELCC No. 2905 of 1993 to Judith Mhina, the 3<sup>rd</sup> defendant in ELCC No. 870 of 2003 was illegal, null and void and the same is cancelled.

5. It is declared that the transfer of L.R No. 12219/3 and L.R No. 12219/4 by Judith Mhina, the 3<sup>rd</sup> defendant in ELCC No. 870 of 2003 to David Awori and Maria Lilian Odongo Ouya, the 1<sup>st</sup> and 2<sup>nd</sup> defendants in ELCC No. 870 of 2003 and the plaintiffs in ELCC No. 877 of 2003 was illegal, null and void and the same is cancelled.

6. Lero Luno Enterprises Limited, the 1<sup>st</sup> defendant in ELCC No. 2905 of 1993 and David Awori and Maria Lilian Odongo Ouya, the 1<sup>st</sup> and 2<sup>nd</sup> defendants in ELCC No. 870 of 2003 who are also the plaintiffs in ELCC No. 877 of 2003 are restrained by themselves or through their employees or agents from damaging and/or interfering with the developments on and occupation of L.R No. 12219/3 and L.R No. 12219/4 by Julie Oseko, the 2<sup>nd</sup> plaintiff in ELCC No. 2905 of 1993 and ELCC No. 870 of 2003 who is also the 2<sup>nd</sup> defendant in ELCC No. 877 of 2003 in any way whatsoever.

7. ELCC No. 877 of 2003 is dismissed.

8. Julie Oseko, the 2<sup>nd</sup> plaintiff in ELCC No. 2905 of 1993 and ELCC No. 870 of 2003 who is also the 2<sup>nd</sup> defendant in ELCC No. 877 of 2003 shall have the costs of the consolidated suits to be paid by Lero Luno Enterprises Limited, the 1<sup>st</sup> defendant in ELCC No. 2905 of 1993.

**Dated and Delivered at Nairobi this 25<sup>th</sup> day of February 2021**

**S. OKONG'O**

**JUDGE**

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

Mr. Tole for the Osekos

Mr. Kimathi for Awori

Ms. Wanjiku h/b for Mr. Wesonga for Ouya

N/A for Lero Luno and Mhina

Ms. C. Nyokabi-Court Assistant