



Kenya Commercial Bank Limited & another v Municipal Council of Mombasa & 2 others (Environment & Land Case 289 of 2007) [2024] KEELC 1659 (KLR) (6 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1659 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 289 OF 2007
LL NAIKUNI, J
FEBRUARY 6, 2024**

BETWEEN

KENYA COMMERCIAL BANK LIMITED 1ST PLAINTIFF

MARY WAMBUI CHEGE 2ND PLAINTIFF

AND

MUNICIPAL COUNCIL OF MOMBASA 1ST DEFENDANT

CHEMBE HOLDINGS LIMITED 2ND DEFENDANT

AUCKLAND AGENCIES 3RD DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by the Kenya Commercial Bank Limited and Mary Wambui the Plaintiffs herein through a Plaint dated 22nd October, 2007 and filed on 12th November, 2007 against the Municipal Council of Mombasa, Chembe Holdings Limited and Auckland Agencies Defendants herein.
2. The 1st Plaintiff as per the Plaint is described as a limited liability Company incorporated in Kenya pursuant to the provisions of the *Companies Act*. The 2nd Plaintiff is described as a Kenyan adult female residing and working in Nairobi. The 1st Defendant is a local authority established pursuant to the provisions of the Local Government Act, the 2nd Defendant is a limited liability company pursuant to the provisions of the incorporated and carrying on business inter alia in *Companies Act* and the 3rd Defendant is a company incorporated in Kenya and practicing inter alia in Mombasa as an auctioneer to the provisions of the *Auctioneers Act*.



3. Upon service of the Plaintiff to the Defendants, the 1st and 2nd Defendants filed their statement of defence dated 5th December, 2007 and 21st November, 2007 respectively .
4. On 20th June, 2022 upon all parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on the pre-trial conference, it was fixed for full trial on 21st February, 2023. It is instructive too note that despite of all this only the Plaintiff and the 3rd Defendant participated in the full trial of the case. The 2nd Defendant never attended Court at all though had been adequately notified of the headings schedules. Conclusively, they seem to have lost keenness and interest in the matter.

II. The 1st and 2nd Plaintiffs' case

5. Based on the filed pleadings by the Plaintiff and the Plaintiff the brief facts of the case are set out here. Accordingly, the Plaintiffs were the duly appointed Legal Administrators of the Estate of Stevenson Chege Kimotho (Hereinafter referred to as "The Deceased"). The deceased passed away on 2nd February 1997. Prior to his death, the deceased was the registered proprietor of all that parcel of land known as Sub - division Number 2525 Section I Mainland North situated within the Municipality of Mombasa and valued at over a sum of Kenya Shillings Thirty Five Million Four Hundred Thousand (Kshs. 35,400,000/=) as at the year 2007. The Sub - division Number 2525 Section I Mainland North is part of the deceased's estate now being administered by the Plaintiffs. (Hereinafter referred to as "The Suit Land")
6. On or about the 22nd August 2006 the 1st Defendant filed a civil Suit CMCC (Mombasa) No. 2813 of 2006 against the deceased and purported to serve summons for disposal of suit upon the deceased by registered post. The said civil suit was a claim by the 1st Defendant for recovery of a sum of Kenya Shillings Five Sixty Two Thousand Two ten Hundred (Kshs.562, 210/= being alleged municipal land rates and alleged interest on the municipal land rates. The 1st Defendant also prayed for further interest at 2% per month and costs.
7. On or about 14th September 2006, the 1st Defendant purported to proceed with formal proof ex-parte and on or about 5th October 2006, the sub - ordinate court delivered Judgment against the deceased and in favour of the 1st Defendant as prayed. On or about the 15th December 2007 the 3rd Defendant purported to sell Sub - division Number 2525 Section I Mainland North to the 2nd Defendant for the sum of Kenya Shillings Six Million (Kshs.6,000,000/=) in purported execution of the purported decree in CMCC (Mombasa) No. 2813 of 2006.
8. On or about the 20th December 2006, the 3rd Defendant rushed to the sub - ordinate court under Certificate of Urgency and obtained orders purportedly declaring the sale absolute and vesting the property in the 2nd Defendant.
9. On receiving this information, the 1st and 2nd Plaintiffs moved Court through two applications for setting aside of the Judgment, decree, sale and all consequential orders. However, the 1st, 2nd and 3rd Defendants opposed the applications and the subordinate court dismissed the applications. The entire process from the filing of the suit in the subordinate court, the entry of judgment and execution process were all tainted by fraud, illegalities and misrepresentation to which all the Defendants were party.
10. The Plaintiffs relied on the following particulars of fraud, illegality and misrepresentation:-
 - a. Filing suit against a deceased person.
 - b. Purporting to serve summons by registered post on a deceased person.



- c. Submitting before a subordinate court an affidavit deponing that the deceased was in deed served with summons.
 - d. Proceeding with hearing of the suit against a deceased person.
 - e. Purporting to execute a decree against a deceased person.
 - f. Failing to serve the judgment debtor (deceased) with notifications of sale.
 - g. Selling the property before the expiry of 30 days as required by order 21 Rule 62 of the Civil Procedure Rules.
 - h. Failing and/or omitting to obtain consent of the judgment debtor to sell before the expiry of 30 days as required by Order 21 Rule 62 of the Civil Procedure Rules.
 - i. Failing and/or omitting to advertise the sale sufficiently and/or at all.
 - j. Failing and/or omitting to comply with the requirements of *Auctioneers Act* Chapter 5 of 1996.
 - k. Selling or buying the property without any and/or any valid professional valuation as required by the Auctioneers Rules, 1997.
 - l. Failing and/or omitting to produce to the subordinate court any valid valuation prior to the purportedly approval of the terms of sale.
 - m. Failing and/or omitting to serve the judgment debtor with a notice of the day fixed for setting a sale notification.
 - n. Selling and/or buying the property at grossly undervalued a way price of Kenya Shillings Six Million (Kshs. 6,000,000/=).
 - o. The 3rd Defendant failed and/or omitted to serve a notification of sale on the registered owner of the property as required by the Auctioneers Rules 1997.
 - p. The 3rd Defendant failed to give the registered owner of the property a 45 days' redemption notice.
 - q. The 3rd Defendant failed and/or omitted to advertise and/or to validly advertise the sale in a newspaper.
 - r. The Defendants failed and/or omitted to deposit the proceeds of the sale in court.
 - s. Selling and/or buying the property.
 - t. Filing and prosecuting an application for an order declaring the sale absolute and for a vesting order under certificate of urgency and obtaining orders without notice to the registered proprietor.
 - u. Opting to sell the property when the better option of registering the debt under the provision of Section 19 of the *Rating Act* Cap. 267 was always available.
 - v. The second defendant despite knowing that the sale was not properly advertised proceeded to collude with the Defendants to buy the property.
11. By virtue of the Defendants' illegal conduct aforesaid, the Judgment of the subordinate court in favour of the 1st Defendant and the entire execution process including the sale of the property to the 2nd Defendant are all null and void ab initio. As a result of the sale and the execution process, the estate of



the deceased had been unlawfully deprived of a prime investment located in an up-market area. And the Plaintiffs claim damages.

12. The Plaintiffs relied on the following particulars for special damages:-

Value of the property - Kshs.35,400,000/=

13. The Plaintiffs averred that save for CMCC (Mombasa) No. 2813 of 2006 there is no other suit pending and that there have been no previous proceedings, in any Court between the Plaintiffs and the defendants over the same subject matter. Despite demand being made and notice of intention to sue duly intimated to the Defendants the defendants have failed refused and or neglected to settle the Plaintiffs claim thus rendering the institution of this suit necessary. The Plaintiffs submitted to the jurisdiction of this Honourable Court.

14. The Plaintiffs prayed for Judgment against the 1st, 2nd and 3rd Defendants jointly and severally for:-

- a. An injunction restraining the Defendants, their agents and/or representatives from servants, selling, transferring, leasing out, charging or any other way whatsoever disposing of or dealing with Subdivision Number 2525 Section I Mainland North.
- b. A declaration that that the entire proceeding in Mombasa CMCC No. 2813 of 2006 including the sale to the Second Defendant of Subdivision Number 2525 Section I Mainland North are null and void ab initio and of no legal effect.
- c. Reconveyance of Subdivision Number 2525 Section I Mainland North to the Plaintiffs.
- d. In the alternative Kshs. 35,400,000 being the equivalent of the current market value of Subdivision Number 2525 Section I Mainland North.
- e. Costs of this suit.

15. The Plaintiff called its first witness on the 21st February, 2023 where the Witness testified as follows:

A. Examination in chief of PW - 1 by Ms. Kaguri Advocate.

16. PW – 1 was sworn on oath and testified in English language. She identified as Patricia Adhiambo Odongo. She was a holder of the Kenyan national Identity card. Her date of birth was 13th February, 1984. He informed Court being the Legal officer of the 1st Plaintiff. She had filed a witness statement dated 3rd May, 2021. Further, she also filed a List of Documents dated even date. She stated that KCB and the 2nd Plaintiff held the original Certificate of Title Deed for the suit land. Currently they were not sure of the occupants of the suit property. From the civil suit - CMCC (Mombasa) No. 2817 of 2006, Chembe Holdings Limited were illegally with the title deed. However, from the defence filed by the 2nd Defendant – they had denied giving instructions to their advocate at paragraph 10.

17. PW – 1 told the court that the advocates purportedly instituted the suit. They had claimed at paragraph 11 that the signature that verified the pleadings was forged. The 3rd Defendant claimed to have served them with the claim. They denied that they had ever been served. As a matter of practice, all their documents received were officially stamped. The documents in question were not stamped. They were shocked to see a gazette notice stating that the Land Registrar was about to issue the 2nd Defendant with a new certificate of title yet they were still holding the original Certificate of title for the deceased. They received word of this matter after they got their advocate to lodge an objection which they did and they conducted investigations – perusing the Court file for CMCC (MSA) No. 2813 of 2006 – the Defendants filed an application to substitute the Plaintiff with themselves - the KCB the 1st Plaintiff. They found out the case was for recovering of rates but the application was dismissed that is for the



recovering of a sum of Kenya Shillings Five Sixty Two Thousand (Kshs. 562,000/-). They applied for the dismissal of the case as it was wrongful filed against a deceased.

18. The witness told the court that the application was dismissed and they filed this suit. The auctioneer claim to have sold the property at a sum of Kenya Shillings Six Million (Kshs. 6,000,000/-). It was undervalued. They conducted their own valuation in the year 2007. The value of the suit land was a sum of Kenya Shillings Thirty Five Million Four Hundred (Kshs. 35,400,000/-) but the property had since appreciated. They sought for the entire proceedings in the Civil Case - CMCC (Mombasa) No. 2813 of 2006 be stayed and declarations of the property be granted to the Executors of the Estate of the deceased and the value of the property be endorsed according to the market rate. They were keeping the original certificate of title. PW – 1 showed Court the original Certificate of Title Deed.

A. Cross examination of PW - 1 by Mr. Wamoyo Advocate.

19. PW – 1 told the Court that they came to know of the Civil Case - CMCC No. 2813 of 2006 when it was gazetted. They found out that the KCB was not a party to the said suit. They discovered that there was a Judgment entered in the matter by a magistrate but it was irregular; it was in force. The involvement of the 3rd Defendant was purely in their capacity as Auctioneers. According to the documents, the 3rd Defendant (Auctioneers) were instructed by their Advocates Meenye & Kirima Advocates. She had seen the letter by the Advocate on the sale of the suit property by auction for a sum of Kenya Shillings Six Million (Kshs. 6,000,000/-) was for the higher bidder by that time the Judgment had not been set aside.
20. She confirmed that by the year 2006, KCB were not party to the proceedings nor were they in occupation of the suit property. For that reason, KCB could not have been served with the notice. It was not indicated to Court whether the party was deceased. The Auctioneer was to execute the orders/ decree of the Court. She did not know whether there was someone guarding the property. She could not confirm whether the notice was served upon the Guard guarding the property. They sent the advocates to peruse the file. They never informed them whether it was the Auctioneers who sold the property.

A. Re - examination of PW - 1 by Ms. Kaguri Advocate.

21. PW – 1 reiterated that it was irregular and illegal for the advocates i.e. Meenye & Kirima Advocates to have recovered the money yet they had not received instructions on the lower court matter. They applied to be substituted with the deceased and informed the Court that the parties were deceased but the application was dismissed. So they only came onto the matter at the very end of it. She confirmed that the auctioneer was not party to the suit. They never received the notification of the same. They only came to know of the auction through the gazette notice.
22. That was the close of the Plaintiff's case.

III. The 1st Defendant's case

23. On 5th December, 2007, the 1st Defendant filed their Statement of defence dated the same day where the 1st Defendant prayed that the Plaintiffs suit against it be dismissed with costs.
24. The 1st Defendant stated that it was a stranger to the contents of Paragraphs 4 and 5 of the Plaint. The 1st Defendant further stated that it was a stranger to the contents of Paragraphs 6, 7 and 8 of the Plaint. The 1st Defendant denied the contents of Paragraph 9 of the Plaint and stated that it did not file or authorize the filing of the alleged suit against the deceased. The 1st Defendant stated that if any suit was filed against the deceased as alleged or at all, the same was done without the authority



of the 1st Defendant and that it amounted to fraud. The 1st Defendant further stated that none of its authorized officers gave instructions for the filing of the said Civil suit CMCC (Mombasa) No.2813 of 2006 against the 1st and 2nd Plaintiffs.

25. The 1st Defendant denied the contents of Paragraphs 10 and 11 of the Plaint and stated that it was never involved in the said suit. The 1st Defendant stated that it was a stranger to Paragraphs 12 and 13 of the Plaint. The 1st Defendant denied the contents of Paragraphs 14, 15 and 16 of the illegality and/or misrepresentation as particularized in Paragraph 15 (a) to (v) of the Plaint. The 1st Defendant stated that in fact it never gave instructions to the Law firm of Advocates who purportedly instituted CMCC (Mombasa) No. 2813 of 2006 on its behalf or at all. The 1st Defendant stated that the signature on the verifying affidavit of the Plaint in the said suit was a forgery as the same was not executed by the alleged officer of the 1st Defendant.
26. The 1st Defendant denies that the deceased's estate has suffered any loss/damage as alleged in Paragraph 17 of the Plaint. The 1st Defendant stated that there was no other suit pending and there had been no previous proceedings at all in any court between the 1st Defendant and either or both of the Plaintiffs over the same subject matter. The 1st Defendant denied that any demand was made or notice given to it by the Plaintiffs as alleged in Paragraph 19 of the Plaint.
27. The 1st Defendant submitted to the jurisdiction of this Honourable Court.

IV. The 2nd Defendant's case

28. On 20th November, 2007, the 2nd Defendant entered appearance and filed their statement of defence dated 21st November, 2007 on 22nd November, 2007 where the 2nd Defendant prayed that the Plaintiffs' suit against it be dismissed with costs.
29. The 2nd Defendant denied paragraph 2 of the Plaint. The 2nd Defendant specifically denied that the 2nd Plaintiff resided or works in Nairobi. In answer to Paragraph 6 of the Plaint the 2nd Defendant averred that this court sitting at Nairobi in Succession Cause No. 1146 of 1997 granted to the Plaintiffs the administration of all the estate of Stevenson Job Chege Kimotho (deceased) who died on 2nd February, 1997. The 2nd Defendant stated that the said grant was made on 6th May, 1998 but had not been confirmed at the time of filing the defence, it being a grant touching on immovable property.
30. In answer to Paragraph 7 of the Plaint, the 2nd Defendant only admitted that the deceased was the registered proprietor of sub-division No. 2525 Section 1 Mainland North. The 2nd Defendant denied paragraph 8 of the Plaint and puts the Plaintiffs into strict proof thereof. The suit premises, sub-division No. 2525 Section 1 Mainland North no longer form part of the estate of the deceased. The 2nd Defendant added that the Plaintiffs were not administering the suit premises.
31. In answer to the contents of Paragraphs 9, 10, 11, 12 and 13 of the Plaint, the 2nd Defendant averred that the Plaintiffs, by their negligence and breach of duty to the estate of the deceased jointly and severally caused CMCC (Mombasa) No. 2813 of 2006 to be filed, prosecuted, Judgment entered and the suit premises to be sold.
32. The 2nd Defendant relied on the following particulars of negligence and breach of duty:-
 - a. The Plaintiffs obtained Grant of Probate of Written Will to the estate of the deceased on 6th May, 1998. The Plaintiffs had a statutory duty as well as a sworn duty under the terms of the said grant, to gather the whole of the estate of the deceased.



- b. The Plaintiffs were required under the provision of Section 52 of the Registration of Titles Act, Chapter 281, Laws of Kenya to apply to the Registrar of Titles to be registered as proprietors (as representatives) of the suit premises. They failed to make that application.
 - c. The Plaintiffs were required by the Law of Succession Act, Chapter 160, Laws of Kenya to pay all the debts of the deceased. The Plaintiffs failed or refused to pay rates over the suit premises causing the 1st Defendant to take out proceedings to recover those rates under the Rating Act.
 - d. The Plaintiffs failed to respond to the notice by the Registrar of Titles, Mombasa, published in Gazette Notice No. 156 of 2007 dated 12th January, 2007 inviting valid objections to his intention to dispense with production of the original Certificate of Title and registration of the transfer. In purported objection to that notice, the 1st Plaintiff filed a notice of objection in CMCC (Mombasa) No. 2813 OF 2006 claiming that it, the 1st Plaintiff, was the registered owner of the suit premises. This information was false. The 1st Plaintiff was not at any time whether material or otherwise the registered owner of sub-division No.2525 Section 1 Mainland North.
 - e. The notice dated 12th January, 2007 published by the Registrar of Titles, Mombasa as Gazette Notice No. 156 of 2007 clearly notified the Plaintiffs of the civil case - CMCC (Mombasa) No. 2813 of 2006. The Plaintiffs failed to take any action at that stage to set aside Judgment, restrain the registration of the vesting order or obtain a stay of execution and only applied to the court in late March, 2007 long after the 2nd Defendant had acquired the suit premises for value and without notice.
 - f. The notice of objection dated 23rd January, 2007 was neither an order of stay of execution nor an order of injunction restraining the registration of the vesting order.
33. Further to paragraph 7 above, the 2nd Defendant averred that the plaintiffs know or ought to have known that the suit premises were to be registered in favour of the 2nd Defendant but never took any action to stop that registration.
34. The 2nd Defendant relied on the following particulars of knowledge:-
- a. The Plaintiffs saw, read and understood Gazette Notice No.156 of 2007 published by the Registrar of Titles. That Notice contained details of Mombasa CMCC (Mombasa) 2813 of 2006 in which sale of the suit premises to the 2nd Defendant had been ordered.
 - b. The 1st Plaintiff responded to the said Gazette Notice by a notice of objection dated 23rd January, 2007 and filed in CMCC (Mombasa) No. 2813 of 2006.
 - c. The 1st Plaintiff had a copy of the grant showing the property belonged to the deceased and not to itself.
 - d. The 1st Plaintiff had not by 23rd January, 2007 complied with Section 52 of the Registration of Titles Act and on the records kept by the Registrar of Titles, the 1st Plaintiff had no interest in the property.
35. The 2nd Defendant stated that it was not bound to inquire into the manner in which CMCC (Mombasa) No. 2813 OF 2006 was filed or conducted or the manner in which the decree and orders therein were granted. The 2nd Defendant averred further that it responded to an advertisement in a local daily in which the suit premises had been advertised for auction by the 3rd Defendant and duly attended the auction together with others. The Plaintiffs bid was the highest and was accepted.



36. In answer to the contents of Paragraphs 14 and 15 of the Plaint, the 2nd Defendant stated that the Plaintiffs never filed any appeal against the Judgment, decree or orders issued by the magistrate in CMCC (Mombasa) No. 2813 of 2006. The 2nd Defendant specifically denied the allegations and all the particulars of fraud, illegalities, notice and misrepresentations contained in paragraphs 14 and 15 of the Plaint. The 2nd Defendant denied paragraph 17 of the Plaint
37. The 2nd Defendant admitted to the contents of Paragraph 18 of the Plaint and further went on to deny the contents of Paragraph 19 of the Plaint. The 2nd Defendant denied paragraph 20 of the Plaint. The 2nd Defendant specifically averred that this Honourable court has no jurisdiction, in a civil suit begun by Plaintiff, to supervise, overrule, quash, review, set aside or vary any decision of a magistrate exercising a jurisdiction or power and the *Rating Act*. The 2nd Defendant averred that the 2nd Plaintiff had not filed any verifying affidavit as required by Order VII of the Civil Procedure Rules and that therefore the 2nd Plaintiff's suit ought to be struck out with costs.
38. The 2nd Defendant averred that the 1st Plaintiff had not filed any resolution authorizing it to file this suit for itself or for the 2nd Plaintiff and that therefore this suit was incompetent. The 2nd Defendant added that the 1st Plaintiff had not filed any valid verifying affidavit. The 2nd Defendant averred that no notice had been filed under Order 1 rule 12 of the Civil Procedure Rules, 2010 to enable the 1st Plaintiff to appear, plead or act for the 2nd Plaintiff and that therefore the suit by the 2nd Plaintiff was incompetent and ill- conceived.
39. Without prejudice to any of the foregoing, the 2nd Defendant averred that a reconveyance of the suit premises to the Plaintiffs or the payment to the Plaintiffs of a sum of Kenya Shillings Thirty Five Million Four Hundred Thousand (Kshs. 35,400,000.00/=) would be unlawful, illegal and irregular as the suit premises were immovable property/land. The Plaintiffs had not obtained a confirmed grant of probate at the time this suit was filed. This suit was therefore pre-mature, incompetent, an abuse of the process of court and frivolous. The 2nd Defendant averred without prejudice to any of the foregoing that the allegations against the magistrate and the Registrar of Titles could not be heard without joining them to this suit. The 2nd Defendant further stated that this Honourable Court could not issue orders to the Registrar of Titles as pleaded when the Registrar of Titles was not a party to this suit. Further to the foregoing, the 2nd Defendant averred that if the estate of the deceased has suffered any loss, which is denied, such loss was caused by the criminal acts or negligent omissions of the plaintiffs.
40. The 2nd Defendant relied on the following particulars of the crime and of the negligence of the Plaintiffs:-
- a. The Plaintiffs obtained the Grant of Probate from this court sitting at Nairobi on 6th May, 1998.
 - b. Under the provision of Section 95 (a) of the *Law of Succession Act*, Cap. 160 the Plaintiffs failed to get in the whole of the estate including the suit premises and thereby suffered the suit premises to be sold to the 2nd Defendant.
 - c. Failure to gather the estate and particularly the suit premises and to comply with the provision of Section 52 of the Registration of Titles Act constitute a criminal offence under Section 95 (a) of the *Law of Succession Act*.
 - d. Failure to gather the suit premises constitutes negligence under Section 94 of the *Law of Succession Act*.
41. Further to paragraph 22 above, the 2nd Defendant averred that this suit was maliciously brought to enable the Plaintiffs to escape the criminal penalties for offences committed against the estate. Further



and without prejudice to any of the foregoing, the Plaintiffs having committed the offence referred to above are also liable to compensate the estate under the provisions of Section 94 of the Law of Succession Act, Chapter 160, Laws of Kenya. This suit therefore ought to have been brought by the beneficiaries of the estate against the Plaintiff's jointly and severally to recover any such loss as the estate may have sustained as a result of the negligence by the Plaintiffs and pursuant to the crimes committed by the Plaintiffs against the estate. Therefore, the 2nd Defendant averred that this suit was incompetent, frivolous, vexatious and an abuse of the process of court.

42. Further to the contents of Paragraph 24 above, the Plaintiffs had a statutory duty under the provision of Section 94 of the Law of Succession Act, Cap. 160 to compensate the estate. That duty could not be transferred to the 2nd Defendant. The 2nd Defendant stated, without prejudice to any of the foregoing that the 2nd Plaintiff is not aware of this suit and her name has been used without her knowledge or consent.
43. The Defendants called DW - 1 on 5th July, 2023 where the witness stated that:

D. Examination in Chief of DW - 1 by Mr. Wameyo Advocate.

44. DW – 1 was sworn and testified in English language. He identified himself as Mr. Ben Mbugua Gathuri. He had a Kenya Identity card. He was an auctioneer T/A Aulland Agencies. He corded and adopted his witness statement dated 9th May, 2022. He told the court that he received instructions from Meenye & Kirima Advocates to execute against Mr. Kimotho at a property situated a Nyali; he perused the Court and found there were a Judgment, a decree and a warrant. There were no orders to stop him from the execution. He served the documents and placed a copy on file and door. They sold the property and received a Bankers Cheque for a sum of Kenya Shillings One Million Seven Fifty Thousand (Kshs. 1,750,000/-) in the names of the advocates.
45. The witness told the court that before the Judgment, he had not been familiar with the facts of the case. He filed a list of documents dated 9th May, 2022 which he produced and marked as 3rd Defendant Exhibit Numbers 1 to 7 in that order.

E. Cross examination of DW - 1 by M/s Kaguri Advocate.

46. DW – 1 confirmed that he received a letter dated 27th November, 2006 from the advocates of Meenye & Kirima Advocates. It never indicated the plot number. The prohibitory order never indicated the Plot Number. He served Mr. Chege through postal; he never found out where Mr. Chege Kimotho was physically. They got his details from the Court file.
47. He told the court that from the notification of sale there was an indication of the plot number. It was served on a guard who was at the main gate. Although he took the photographs from the premises, he never brought to Court. He never had copies of the notices that they fixed on the gate. They sent the letter to Mr. Chege through Registered Posts. He had not attached any receipts.
48. He further stated that they sold the property to Chembe Holdings. From the memorandum of sale indicated the names of Chembe Holdings Limited, it indicated the directors. They paid the Meenye, Kirma through a banker's cheque; he did not have a copy of the same as it was in the old matter. He was aware that the Chembe Holdings Limited paid the balance. He received instructions from Meenye Kirima Advocate for the Municipal Council; he never found out whether they had instructions or not. From the Municipal Council. He did not know whether Mr. Joseph Kimotho was deceased.



F. Re - examination of DW - 1 by Mr. Wameyo Advocate.

49. According to the witness, he was an auctioneer, he had no mandate or reason to inquire how an advocate is instructed. He got the plot number from the Court file and used the people to take him there. From the decree, he was able to get the property number. The Advocate Meenye & Kirima Advocate had never disputed the receiving of the cash deposit.
50. On 5th July, 2023 the 3rd Defendant through its Learned Counsel marked its case closed.

V. Submissions

51. On 5th July, 2023, upon the closure of the case by the Plaintiffs, 1st, 2nd and 3rd Defendants herein, the Honourable Court in the presence of all the parties gave directions on the disposition of the suit through the Plaint dated 22nd October, 2007 by way of written submission.
52. Unfortunately, by the time of penning down this Judgement none of the parties had complied. The Court will proceed to render the Judgement on merit. Pursuant to that, it was only the Plaintiffs who complied. Subsequently, on 3rd October, 2023 after the Honourable Court confirming compliance set the Judgment date on 19th February, 2024. However, the date was deferred to 6th March, 2024.

A. The Written Submissions by the 1st and 2nd Plaintiffs

53. The 1st and 2nd Plaintiffs through their Learned Counsels, the Law firm of Messrs. Miller & Company Advocates filed their written Submissions dated 15th September, 2023. M/s. Kaguri Advocate commenced her submissions by stating that before this Honourable Court for determination was the Plaintiffs' suit dated 22nd October 2007. She stated that the said suit sought the afore stated orders from this Honourable Court. The same was supported by the sworn statement of one MS. Patricia Adhiambo and list of documents by the Plaintiff. Both were filed in court on the 5th May 2021.
54. The Learned Counsel informed court that the suit was defended by the 2nd and 3rd Defendants whom filed their Statements of Defences in the matter accordingly. The 1st Defendant on it's part filed a Defence dated 5th December 2007 which drew the attention of the Court that the 1st Defendant never authorised its officers to file Suit Number CMCC (Mombasa) No. 2813 of 2006 as against the Plaintiffs. The 1st Defendant also averred that it never gave instructions to the firm of advocates who purportedly instituted CMCC (Mombasa) No. 2813 of 2006.
55. The 1st and 2nd Plaintiffs' case and evidence.

The Learned Counsel summarized the Plaintiffs' case as follows. That the deceased died testate at the Nairobi Hospital on 02nd February, 1997. A copy of the Certificate of Death was produced as Plaintiffs Exhibit No. 1 herein. His Probate Will dated 27th January, 1986 appointed the 1st Plaintiff and his wife, the 2nd Plaintiff to be the executors and trustees of his Probate Will, marked as the Plaintiffs Exhibit No. 2.

On 06th May, 1998, the High Court in Nairobi in Succession Cause No. 1146 of 1997 issued a Grant of Probate wherein Plaintiffs were granted probate of the deceased's written Will and marked as Plaintiffs Exhibit No. 3 a copy of the Grant. From the aforementioned date of 06th May, 1998, all the property of the deceased vested in Plaintiffs as per the provisions of Section 79 of the *Law of Succession Act* (Cap 160).

56. On or about 22nd August, 2006, the 1st Defendant purported to institute the Civil case CMCC (Mombasa) No. 2813 of 2006 against the deceased in his personal capacity and further purported to



- serve summons by post. A copy of the Plaint, summons and the purported affidavit of service marked as Plaintiffs Exhibit No. 3. On 14th September, 2006, the 1st Defendant's lawyers appeared before the subordinate court and purported to proceed with "formal proof". The 1st Defendant's claim was for a sum of Kenya Shillings Two Fifty Thousand Two Hundred (Kshs. 250,200.00/=) being alleged arrears of rates plus interest thereon making the total sum of Kenya Shillings Five Sixty Two Thousand Two Ten Hundred (Kshs. 562,210.00/=) as per the Plaint.
57. After the Ex - Parte proceedings, the 1st Defendant was on the 5th October 2006 granted Judgment against the deceased as prayed in the Plaint. On 6th October 2006, a decree was issued by the subordinate court and prohibitory order was issued in respect of the suit property. There was no assessment of costs. Annexed and marked as exhibits were copies of a letter dated 6th October, 2006 from the 1st Defendant's lawyers and the Decree marked as "PA - 6" and a Prohibitory order. It was the Plaintiffs' case that the deceased or his estate was not served with any notice of delivery of Judgement or the impending execution as required by Order 21 of the Civil Procedure Rules, 2010.
58. It was the contention of the Learned Counsel that the 1st Defendant ought to have instituted the suit herein against the administrators of the estate of the deceased. It was both trite law and common sense that no suit could be maintained against a deceased person in his personal capacity. The deceased was the registered owner of the parcel of the suit land. Subsequently the 1st Defendant set down the matter for settling of terms of sale on 16th November 2006. Further, the 1st Defendant purported to serve the deceased by post annexed and marked as Plaintiffs exhibit Numbers 8 and 9 were copies of the affidavit of service and the purported notice.
59. On 16th November 2006 the settlement of terms of sale was put off to 22nd November 2006. Again, it was the Plaintiffs' case that no notice was served upon the deceased regarding the new date. On 22nd November 2006 terms of sale were purportedly approved as prayed. The Plaintiffs averred that the terms of sale were manifestly unjust and vague. On the same day a notification of sale was purportedly issued. It was the Plaintiffs' case that the Notification of sale was not served on the Defendant in the said suit or on his estate. The notifications scheduled the sale was for 15th December 2006. This was no valid or sufficient notice as required by the law.
60. On the 15th December 2006, the suit land was allegedly sold by the 3rd Defendant herein to the 2nd Defendant herein. There was no forty-Five (45) days auctioneer's redemption notice was served upon the registered owner or his estate as required by law. On 18th December 2006, the 1st Defendant's lawyers submitted to the subordinate court a Certificate of Sale and a vesting order. The court purported to approve them on 20th December 2006. Annexed and marked as Plaintiffs Exhibit Numbers 12 were copies copy of a letter dated 18th December 2006, the Vesting order and the Certificate of sale. Simultaneously and curiously the 1st Defendant rushed to court under certificate of urgency on 20th December, 2006 seeking orders of confirmation of the sale to the 2nd Defendant herein. The court purported to promptly allow the application. On 12th January 2007, the Plaintiffs were shocked to see a notice in the Kenya Gazette that a new Certificate of Title was about to be issued to the 2nd Defendant herein. See Plaintiffs' Exhibit No. 14 was a copy of the Gazette Notice No.156 of January 2007. The Plaintiffs promptly perused the Subordinate Court file which revealed all the details above. Plaintiffs' witness Ms. Patricia Adhiambo also confirmed them personally. Subsequently, the Plaintiffs instructed their advocates then on record M/s. Omondi Waweru & Company Advocates who immediately lodged an objection to the Registrar of Titles on 23rd February 2007. However, the subordinate court dismissed the applications filed by the Plaintiffs.
61. The Learned Counsel averred that it was the Plaintiffs' case that the entire process from the filing of the suit in the subordinate court, the entry of Judgement and execution process were all tainted by



fraud, illegalities, and misrepresentation to which all the Defendants were a party. That the Defendants herein had acted unlawfully, irresponsible and fraudulently in purporting to dispose of the said parcel of land because:

- i. The property was disposed of for a penalty sum of Kenya Shillings Six Million (Kshs. 6,000,000.00/=) yet it was valued at a sum in excess of Kenya Shillings Thirty Five Million Four Hundred (Kshs. 35,400,000.00/=). See of the Plaintiffs Exhibit No.16 was a copy of a Valuation report dated 16th March, 2007.
 - ii. The 1st and 3rd Defendants never advertised the said property for sale. The same was likely sold by private treaty in an inexplicable deal contrary to the documents placed before the subordinate court by the 1st Defendant.
 - iii. It was unconscionable and immoral to dispose of a property worth Kenya Shillings Thirty Five Million Four Hundred (Kshs. 35,400,000.00/=). in a bid to recover Kenya Shillings Five Sixty Two Thousand Two Ten Hundred (Kshs. 562,210.00/=)
 - iv. The property was disposed off without a valuation report being prepared in order to ascertain the true value of the property.
 - v). The estate of the deceased had more than adequate funds to settle any claims as regards rates.
62. The Learned Counsel submitted that in any case the 1st Defendant ought to have registered a charge against the title to the said property which charge would have ranked in priority as per the provisions of Section 19 of the *Rating Act* (Cap 267). It was the Plaintiffs' case that as a consequence of the aforesaid the estate of the deceased was likely to suffer huge loss in the event that the said fraudulent transaction was allowed to stand.

Also, it was telling that a Discharge of Charge on the parcel of land herein was registered on the same day as the Vesting Order. It was clear that the 1st and 3rd Defendants and or their agents went an extra mile in trying to prepare the property for sale and even have it discharged to facilitate the transfer to the 2nd Defendant.

That the Defendants acted illegally and fraudulently by:

- a) Filing a suit against a deceased person.
- b) Purporting to serve summons by registered post on a deceased person.
- c) Submitting before a subordinate court an affidavit deponing that the deceased was indeed served with summons.
- d) Proceeding with hearing of the suit against a deceased person.
- e) Purporting to execute a decree against a deceased person.
- i) Failing to serve the Judgement Debtor (deceased) with notifications of sale.
- g) Selling the property before the expiry of 30 days as required by the provision of Order 21 Rule 62 of the Civil Procedure Rules, 2010.
- h) Failing and/or omitting to obtain consent of the Judgement Debtor to sell before the expiry of 30 days as required by the provision of Order 21 Rule 62 of the Civil Procedure Rules, 2010.
- i) Failing and/or omitting to advertise the sale sufficiently and/or at all.
- j) Failing and/or omitting to comply with the requirements of *Auctioneers Act* Chapter 5 of 1996.



- k) Selling or buying the property without any and/or any valid professional valuation as required by the Auctioneers Rule, 1997.
 - l) Failing and/or omitting to produce the subordinate court any valid valuation prior to the purportedly approval of the terms of sale.
 - m) Failing and/or omitting to serve the Judgement Debtor with a notice of the day fixed for setting a sale notification.
 - n) Selling and/or buying the property at grossly undervalued a way price of a sum of Kenya Shillings Six million (Kshs. 6,000,000/=).
 - o) The 3rd Defendant failed and/or omitted to serve a notification of sale on the registered owner of the property as required by the Auctioneers Rules 1997.
 - p) The 3rd Defendant failed to give the registered owner of the property a 45 days redemption notice.
 - q) The 3rd Defendant failed and/or omitted to advertise and/or to validly advertise the sale in a newspaper.
 - r) The Defendants failed and/or omitted to deposit the proceeds of the sale in court.
 - s) Selling and/or buying the property.
 - t) Filing and prosecuting an application for an order declaring the sale absolute and for a vesting order under certificate of urgency and obtaining orders without notice to the reregistered proprietor.
 - u) Opting to sell the property when the better option of registering the debt under the provision of Section 19 of the Rating Act cap 267 was always available.
 - v) The 2nd Defendant despite knowing that the sale was not properly advertised proceeded to collude with the Defendants to buy the property.
63. She informed Court that the Plaintiffs identified and pleaded and testified on the following as the particulars of fraud, illegalities and misrepresentation. SUBPARAGRAPH a)
- a. Filing a suit against a deceased person.
 - b. Purporting to serve summons by registered post on a deceased person.
 - c. Submitting before a subordinate court an affidavit deponing that the deceased was indeed served with summons.
 - d. Proceeding with hearing of the suit against a deceased person.
 - e. Purporting to execute a decree against a deceased person.
 - f. Failing to serve the judgement debtor (deceased) with notifications of sale.
 - g. Selling the property before the expiry of 30 days as required by the provision of Order 21 Rule 62 of the Civil Procedure Rules, 2010.
 - h. Failing and/or omitting to obtain consent of the judgement debtor to sell before the expiry of 30 days as required by the provision of Order 21 Rule 62 of the Civil Procedure Rules, 2010.
 - i. Failing and/or omitting to advertise the sale sufficiently and/or at all.



- j. Failing and/or omitting to comply with the requirements of *Auctioneers Act* Chapter 5 of 1996.
 - k. Selling or buying the property without any and/or any valid professional valuation as required by the Auctioneers Rule, 1997.
 - l. Failing and/or omitting to produce the subordinate court any valid valuation prior to the purportedly approval of the terms of sale.
 - m. Failing and/or omitting to serve the judgement debtor with a notice of the day fixed for setting a sale notification.
 - n. Selling and/or buying the property at grossly undervalued a way price of a sum of Kenya Shillings Six Million (Kshs. 6,000,000/=).
 - o. The 3rd Defendant failed and/or omitted to serve a notification of sale on the registered owner of the property as required by the Auctioneers Rules 1997.
 - p. The 3rd Defendant failed to give the registered owner of the property a 45 days redemption notice.
 - q. The 3rd Defendant failed and/or omitted to advertise and/or to validly advertise the sale in a newspaper.
 - r. The Defendants failed and/or omitted to deposit the proceeds of the sale in court.
 - s. Selling and/or buying the property.
 - t. Filing and prosecuting an application for an order declaring the sale absolute and for a vesting order under certificate of urgency and obtaining orders without notice to the reregistered proprietor.
 - u. Opting to sell the property when the better option of registering the debt under Section 19 of the *Rating Act* cap 267 was always available.
 - v. The 2nd Defendant despite knowing that the sale was not properly advertised proceeded to collude with the defendants to buy the property.
64. The Learned Counsel submitted that it seemed that the 1st Defendant then Municipal County of Mombasa was in the habit of fraudulently and illegally selling properties allegedly to recover rates. See Plaintiffs Exhibit No.17 a copy of newspaper cutting about a similar case. That in March 2007, the Plaintiffs' advocates filed an application for setting aside. The 1st and 2nd Defendants' lawyers opposed and it was dismissed by the court. That later in August 2007, the Plaintiffs herein applied to be joined in the suit and for setting aside. That against the 1st and 2nd Defendants herein statutory opposed the application and it was again dismissed. The Learned Counsel contended that it was clear that in the entire process the Defendants had colluded to defraud the deceased's estate of its prime property. The administrators of the deceased's estate had a right to relief against Defendants herein arising from the same acts and transactions that from the subject matter of this suit and that entire transaction was a nullity because of the fraud and the illegalities involved.
65. By virtue of the Defendants' illegal conduct aforesaid, the Judgement of the subordinate court in favour of the 1st Defendant and the entire execution process including the sale of the property to the 2nd Defendant were all null and void ab initio. As a result of the sale and the execution process, the estate of the deceased had been unlawfully deprived of a prime investment located in an up-market area. And the Plaintiffs claim damages as follows.



Value of the property -Kshs. 35,400,000 in the year 2006 when the case was first filed.

It was the Plaintiffs case that save for the civil case - CMCC (Mombasa) No. 2813 of 2006 there was no other suit pending and that there had been no previous proceedings, in any court between the Plaintiffs and the Defendants over the same subject matter. Despite demand being made and notice of intention to sue duly intimated to the Defendants the Defendants failed refused and or neglected to settle the Plaintiffs.

The Plaintiffs' case as prayed in the Plaint for judgement against the Defendants jointly and severally for the above stated orders.

To buttress her case, the Learned Counsel was guided by the decision in the case of “Arthi Highway Developers Limited – Versus - West End Butchery Limited & 6 Others” in which the Court of Appeal approved the High Court decision in the case of “Alberta Mae Gacie - Versus - Attorney General & 4 Others (Supra), the case of Joseph Muriithi Njeru – Versus - Mary Wanjiru Njuguna & Another [2018] eKLR; and Benjamin Macfoy – Versus - United Africa Co. Limited [196112 AII ER 1169. [Supra] for the holdings/principles and propositions.

Additionally, the Learned Counsel sought reliance in the case of:- “Wambui – Versus - Mwangi & 3 others (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) (19 November 2021) (Judgment) where the Court of appeal noted the holding in the case of “Kawaljeet Singh Rekhi – Versus - Peter Wainaina Kamau & 2 Others [2016] eKLR; in which the case of “Macfoy [Supra] was approved; Chemey Investment Limited – Versus - Attorney General & 2 Others [2018] eKLR; Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura vs. Attorney General & 4 Others [2017] eKLR; and Arthi Highway Developers Limited [supra] all for the holdings/principles and/or propositions.

66. The 1st Defendant's case

The Learned Counsel brought Court's attention to the fact that the 1st Defendant in its statement of Defence dated 5th December, 2007 averred to court that if any suit was filed against the Deceased as alleged or at all, the same was done without the authority of the 1st Defendant and that it amounted to fraud. This clearly confirmed the Plaintiffs' averment on fraud.

Also, the 1st Defendant stated that none of its authorized officers gave instructions for the filing of the said civil suit CMCC (Mombasa) No. 2813 of 2006 against the Plaintiff.

Further, the 1st Defendant never gave instructions to the firm of advocates who purportedly instituted the said suit.

67. The Learned Counsel submitted that all action taken in the said suit was an act of forgery in signing of the affidavit by officials of the 1st Defendant and as such, their action are illegal and irregular. This confirmed that the Ruling/judgment of the court in the civil case of CMCC (Mombasa) No. 2813 of 2006 was invalid and void ab initio.

Thus, she averred that by the defence of the 1st Defendant herein, this Court should indeed pronounce that the subject property was still validly owned by the Plaintiff noting that the 1st Defendant averred that they never sanctioned the suit in CMCC (Mombasa) No. 2813 of 2006. To buttress on this point, the Counsel was guided by the decision in the case of “Wambul – Versus - Mwangi & 3 others (Supra). She asserted that this case very similar in terms of the facts, law and finding of the Court of Appeal to the suit herein. The Learned Counsel asserted



that the COA took cognizance of the decision in “Rallal Gordhanbhai Patel – Versus - Lalji Makanji (1957) E.A 314 relied in the lower court and held thus:-

“.....on the threshold for proof of fraud and applying the above threshold to the record ruled that, in the Judge’s opinion, the evidence tendered on record had demonstrated clearly that the 2nd Respondent fraudulently filed the High Court proceedings with the sole aim of defrauding the 1st Respondent of the suit property, by presenting himself as Julius Mutugi Muchemi holder of ID card No. xxxx. That upon investigation by PW - 62, it was revealed that the rightful holder of the above ID card number was one Mugo Gitari. It was pursuant to the above falsehood that the 2nd Respondent obtained an ex parte Judgment through fraud and caused it to be executed through the fraudulent sale of the suit property to the 3rd Respondent through a public auction allegedly to recover a debt owed to him by the 1st Respondent knowing that it was a fraudulent scheme to defraud the 1st Respondent of his property. The Judge therefore ruled that all transactions stemming from the fraudulent High Court proceedings were all rooted on a fraudulent and illegal decree and could not in law be sanctioned by a court of law as they were null and void abinitio and could not therefore bestow any rights to any party either directly or indirectly affected by those proceedings.”

68. The 2nd Defendant’s case.

The Learned Counsel informed Court that the 2nd Defendant filed a Statement of Defence dated 21st November, 2007 and claimed that the suit property was registered to the 2nd Defendant having acquired the same. The 2nd Defendant never participated in the hearing of this suit and their case was closed without tendering evidence in the suit. As such, it’s clear they were not interested in the suit and as such their defence was never proved in evidence. The Learned Counsel relied in the decision of Wambui (Supra) where the Court of appeal in its Judgment noted as follows in a similar matter: -

“We have on our own considered the conclusions reached above by the Judge in light of the totality of the record assessed above and find no basis for faulting the Judge’s conclusion that Julius Mutugi Muchemi was a fraudster and therefore the entire proceedings purportedly initiated in the said High Court against the 1st Respondent were fraudulent especially when it is evident from the record that there was no basis for initiating the same against the 1st Respondent.

The Judge’s finding on the element of nullity was also well founded both in law and in fact. On the law, the record is explicit that the Judge took into consideration persuasive jurisprudence among these the often cited case of Macfoy - Versus - United Africa Co. Ltd [Supra] whose cumulative legal position is that a Judgment founded on null and void proceedings is a nullity and any action stemming from it or rooted thereon is also null and void abinitio. ...That fraudulent ex - parte Judgment resulted in a decree whose execution by way of auction is what led to the suit property being sold to the 3rd Respondent as the highest bidder at an auction conducted in pursuance thereof and subsequently sold to the Appellant.”

69. The Learned Counsel asserted that on this decision, this court had the power and jurisdiction indeed to declaration that the entire proceeding in the Civil case of CMCC (Mombasa) No. 2813 of 2006 including the sale to the 2nd Defendant of the suit land were null and void ab initio and of no legal effect and to order a reconveyance of the suit land the Plaintiffs.



70. The 3rd Defendant's case

According to the Learned Counsel, the 3rd Defendant raised a defence that they were strangers to the fraud as alleged by the Plaintiffs. It was the Plaintiffs case that the 3rd Defendant failure to adhere to Auctioneer rules,1997. From the instruction letter from the law firm of Messers. Meenye & Kirima Advocates; never attached the Notification for sale of 15th December, 2006 nor the Order of 22nd November, 2006. There was no Plot number in the said letter. The Learned Counsel, then wondered under such circumstances how then the Auctioneer knew what property was to be attached. Mr. Ben Mbugua Gathura informed the court in his evidence that he affixed the notice on the subject property having met the guard at the property. The Learned Counsel submitted that there was, no affidavit of service of the notice was tendered in court nor pictures to prove that indeed such notice was affixed on the subject property.

71. In a case requiring high proof as this one where a party was going to loss its property vide auction, the 3rd Defendant was under a heavy duty to prove that he indeed issued the notice. Particularly now that the owner was deceased. She averred that the evidence of service by the witness was not water tight since it never had proof.

Further, the 3rd Defendant's witness testified that the property was sold to the 2nd Defendant for a sum of Kenya Shillings Six Million (Kshs. 6,000,000/=). No valuation was tendered in court by the 3rd Defendant to show the market value of the property at the time before the sale. The cheque paid in as deposit was also not tendered in court to proof indeed such money was paid. The recovery sum was Kenya Shillings Six Fifty Thousand Eight Ninety Nine Hundred (Kshs. 650,899/=) so what happened to the balance of the money allegedly received by Meenye & Kirima Advocates.

72. The Learned Counsel contended that there was failure to conduct the sale in a proper manner in accordance to the act. There was lack of a reserve price and proper valuation of the property which was required under Rule 11 of the Auctioneers Rule. The Contents of court warrant or letter of instruction as provided in the Act provided that the reserve price for each separate piece of land is based on a professional valuation carried out not more than 12 months prior to the proposed sale.

The 3rd Defendant also failed to notify sale to registered owner, as well as given 45 days in which the owner may redeem the property and nonetheless arranged for sale of the property after 14 days of expiry of notice after the first newspaper advertisement which was required under the provision of Section 15.

Rule 15 of the Auctioneers Rule provides that:-

“Immovable property

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property-

- (a) record the court warrant or letter of instruction in the register;
- (b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;
- (c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;



- (d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;
- (e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement."

Failure to issue an itemized account as provided by Rule 18 of the Auctioneers Rule.

73. On this point, the Learned Counsel once more referred Court the decision of "Wambui (Supra) where the Court of appeal in its Judgment noted as follows in a similar matter:-

"Fourth, the reasoning and sequence of deceitful events we have alluded to in holding number 3 above operates to taint the appellant's title with fraud in that the sole aim of the said fictitious Julius Mutugi Muchemi initiating the High Court suit proceedings was solely for purposes of defrauding the 1st Respondent of title to the suit property vide which he purportedly succeeded in causing the suit property to be fraudulently, auctioned to the 3rd Respondent.

Fifth, on a contrived decree, it is explicit from the record that the decree in the High Court suit on the basis of which the 3rd Respondent purportedly acquired title to the suit property through a public auction was contrived in that it was founded on both fraud and deceit and was therefore unsanctionable by a court of law."

74. In conclusion, the Learned Counsel asserted the Plaintiffs had made out a watertight case of fraud and confirmed by the 1st Defendant. The entry for the transfer to the 2nd Defendant in the subject title herein was tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was null and void abinitio. Anything founded on nullity was also null and void and of no consequence. She opined that the provision of Section 26 of the [Land Registration Act, No. 3 of 2012](#) was explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. She further sought guidance from the decision of "Wambul (Supra)" where the Court of appeal upheld that:

"The title purportedly acquired by the 3rd Respondent and subsequently passed on to the appellant having been demonstrably shown to have been tainted with fraud, deceit and nullity fits the description of title that has been acquired not only irregularly and unprocedurally but also through a corrupt scheme. The corrupt scheme herein arises from the facts informing the vitiated High Court proceedings which we find no need to rehash but adopt as already highlighted above.

In light of all the above, we reiterate that the Judge's reasoning as to why appellant's title to the suit property was vitiated was well founded both in fact and in law and is therefore unassailable.

.... Under the Torrens Land Registration System, all that the land registration under this system provides for as expounded by the case law assessed above is that a party suffering prejudice arising from such a party acting on the entries made in a register kept by the Government and held out by the Government as correct for all intents and purposes to his/her detriment is entitled to compensation for any loss as a result of acting on such entries to his/her detriment."



In the long run, the Learned Counsel urged the Court to uphold the prayers sought by the Plaintiff herein and allow the suit as prayed with costs.

VI. Analysis and Determination

75. I have carefully read and considered the pleadings herein by the Plaintiff and the Defendants, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
76. This Honourable Court will still examine the facts of the case and in order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) issues for its determination. These are:-
- a. Whether the suit instituted by the 1st and 2nd Plaintiffs through the filed Plaintiff dated 22nd October, 2007 has any merit.
 - b. Whether the parties herein were entitled to the reliefs sought?
 - c. Who will bear the Costs of suit?

Issue No. a). Whether the suit instituted by the 1st and 2nd Plaintiffs through the filed Plaintiff dated 22nd October, 2007 has any merit.

77. Under this sub title, the Honourable Court is to deliberate on the reality and management of a property belonging to the Estate of a deceased. In whichever way one looks at it this is a case of fraud, deceit and irregularity on the disposal of the asset belonging to a deceased person and without following the due process of the law at the behest of the 1st, 2nd and 3rd Defendants working closely and cohort with the Government officials being the Land Registrar who is the custodian of all records on land under the Torrens System at the chagrin of the Plaintiffs. By all means and substance, they all breached the trust and the obligations bestowed on them under the law. The Plaintiffs' case is that the Plaintiffs are the duly appointed Legal Administrators of the estate of the late Stevenson Chege Kimotho – the deceased who passed away on 2nd February 1997. Prior to his death, the deceased was the registered proprietor of the suit land. Formally, the land was valued at over a sum of Kenya Shillings Thirty Five Million Four Hundred Thousand (Kshs. 35,400,000/=) as at 2007. The suit land is part of the deceased's estate now being administered by the Plaintiffs.
78. On or about the 22nd August 2006 the 1st Defendant filed a civil suit - CMCC (Mombasa) No. 2813 of 2006 against the deceased and purported to serve summons for disposal of suit upon the deceased by registered post. The Civil Suit - CMCC (Mombasa) No. 2813 of 2006 was a claim by the 1st Defendant for recovery of a sum of Kenya Shillings Five Sixty Two Thousand Two ten hundred (Kshs.562,210/=) being alleged municipal land rates and alleged interest on the municipal land rates. The 1st Defendant also prayed for further interest at 2% per month and costs.
79. On or about 14th September 2006, the 1st Defendant purported to proceed with formal proof ex-parte and on or about 5th October 2006, the sub - ordinate court delivered Judgment against the deceased and in favour of the 1st Defendant as prayed. On or about the 15th December 2007 the 3rd Defendant purported to sell the suit land to the 2nd Defendant for the sum of Kenya Shillings Six Million (Kshs. 6,000,000/=) in purported execution of the purported decree in CMCC (Mombasa) No. 2813 of 2006. On or about the 20th December 2006, the 3rd Defendant rushed to the subordinate court under Certificate of Urgency and obtained orders purportedly declaring the sale absolute and vesting the property in the 2nd Defendant.



80. The Plaintiffs moved Court through two applications for setting aside of the Judgment, decree, sale and all consequential orders. While the application was opposed, the court dismissed them. The entire process from the filing of the suit in the subordinate court, the entry of Judgment and execution process were all tainted by fraud, illegalities and misrepresentation to which all the Defendants were party.
81. The Plaintiffs relied on the following particulars of fraud, illegality and misrepresentation: -
- a. Filing suit against a deceased person.
 - b. Purporting to serve summons by registered post on a deceased person.
 - c. Submitting before a subordinate court an affidavit deponing that the deceased was in deed served with summons.
 - d. Proceeding with hearing of the suit against a deceased person.
 - e. Purporting to execute a decree against a deceased person.
 - f. Failing to serve the judgment debtor (deceased) with notifications of sale.
 - g. Selling the property before the expiry of 30 days as required by order 21 Rule 62 of the Civil Procedure Rules.
 - h. Failing and/or omitting to obtain consent of the judgment debtor to sell before the expiry of 30 days as required by Order 21 Rule 62 of the Civil Procedure Rules.
 - i. Failing and/or omitting to advertise the sale sufficiently and/or at all.
 - j. Failing and/or omitting to comply with the requirements of *Auctioneers Act* Chapter 5 of 1996.
 - k. Selling or buying the property without any and/or any valid professional valuation as required by the Auctioneers Rules, 1997.
 - l. Failing and/or omitting to produce to the subordinate court any valid valuation prior to the purportedly approval of the terms of sale.
 - m. Failing and/or omitting to serve the judgment debtor with a notice of the day fixed for setting a sale notification.
 - n. Selling and/or buying the property at grossly undervalued a way price of a sum of Kenya Shillings Six Million (Kshs. 6,000,000/=).
 - o. The 3rd Defendant failed and/or omitted to serve a notification of sale on the registered owner of the property as required by the Auctioneers Rules 1997.
 - p. The 3rd Defendant failed to give the registered owner of the property a 45 days redemption notice.
 - q. The 3rd Defendant failed and/or omitted to advertise and/or to validly advertise the sale in a newspaper.
 - r. The Defendants failed and/or omitted to deposit the proceeds of the sale in court.
 - s. Selling and/or buying the property.
 - t. Filing and prosecuting an application for an order declaring the sale absolute and for a vesting order under Certificate of Urgency and obtaining orders without notice to the registered proprietor.



- u. Opting to sell the property when the better option of registering the debt under the provision of Section 19 of the Rating Act cap 267 was always available.
 - v. The 2nd Defendant despite knowing that the sale was not properly advertised proceeded to collude with the Defendants to buy the property.
82. By virtue of the Defendants' illegal conduct aforesaid, the Judgment of the subordinate court in favour of the 1st Defendant and the entire execution process including the sale of the property to the 2nd Defendant are all null and void ab initio. As a result of the sale and the execution process, the estate of the deceased has been unlawfully deprived of a prime investment located in an up-market area. And the Plaintiffs claim damages. The Plaintiffs relied on the following particulars for special damages:-

Value of the property - Kshs.35,400,000

83. The Plaintiffs averred that save for the civil suit - CMCC (Mombasa) No. 2813 of 2006 there is no other suit pending and that there have been no previous proceedings, in any Court between the Plaintiffs and the Defendants over the same subject matter.
84. According to the 2nd Defendant in answer to paragraph 6 of the plaint the 2nd Defendant averred that this court sitting at Nairobi in Succession Cause No.1146 of 1997 granted to the plaintiffs the administration of all the estate of deceased who died on 2nd February, 1997. The 2nd Defendant stated that the said grant was made on 6th May, 1998 but had not been confirmed at the time of filing the defence, it being a grant touching on immovable property. In answer to paragraph 7 of the Plaint, the 2nd Defendant only admitted that the deceased was the registered proprietor of the suit premises. The 2nd Defendant denied paragraph 8 of the Plaint and puts the Plaintiffs into strict proof thereof. The suit premises, no longer form part of the estate of the deceased. The 2nd Defendant added that the Plaintiffs were not administering the suit premises.
85. The 2nd Defendant relied on the following particulars of negligence and breach of duty:-
- a. The Plaintiffs obtained grant of probate of written will to the estate of the deceased on 6th May, 1998. The Plaintiffs had a statutory duty as well as a sworn duty under the terms of the said grant, to gather the whole of the estate of the deceased.
 - b. The Plaintiffs were required under Section 52 of the Registration of Titles Act, Chapter 281, Laws of Kenya to apply to the Registrar of Titles to be registered as proprietors (as representatives) of the suit premises. They failed to make that application.
 - c. The Plaintiffs were required by the Law of Succession Act, Chapter 160, Laws of Kenya to pay all the debts of the deceased. The plaintiffs failed or refused to pay rates over the suit premises causing the 1st Defendant to take out proceedings to recover those rates under the Rating Act.
 - d. The Plaintiffs failed to respond to the notice by the Registrar of Titles, Mombasa, published in Gazette Notice No. 156 of 2007 dated 12th January, 2007 inviting valid objections to his intention to dispense with production of the original certificate of title and registration of the transfer. In purported objection to that notice, the 1st Plaintiff filed a notice of objection in CMCC (Mombasa) No. 2813 of 2006 claiming that it, the 1st Plaintiff, was the registered owner of the suit premises. This information was false. The 1st Plaintiff was not at any time whether material or otherwise the registered owner of the suit land.
86. The notice dated 12th January, 2007 published by the Registrar of Titles, Mombasa as Gazette Notice No. 156 of 2007 clearly notified the Plaintiffs of CMCC (Mombasa) No. 2813 of 2006. The Plaintiffs



failed to take any action at that stage to set aside judgment, restrain the registration of the vesting order or obtain a stay of execution and only applied to the court in late March, 2007 long after the 2nd Defendant had acquired the suit premises for value and without notice.

The notice of objection dated 23rd January, 2007 was neither an order of stay of execution nor an order of injunction restraining the registration of the vesting order.

Further to paragraph 7 above, the 2nd Defendant averred that the Plaintiffs know or ought to have known that the suit premises were to be registered in favour of the 2nd Defendant but did not take any action to stop that registration. The 2nd Defendant relied on the following particulars of knowledge:-

The Plaintiffs saw, read and understood Gazette Notice No.156 of 2007 published by the Registrar of Titles. That Notice contained details of CMCC (Mombasa) 2813 of 2006 in which sale of the suit premises to the 2nd Defendant had been ordered.

The 1st Plaintiff responded to the said Gazette Notice by a notice of objection dated 23rd January, 2007 and filed in CMCC (Mombasa) No. 2813 of 2006.

- a. The 1st Plaintiff had a copy of the grant showing the property belonged to the deceased and not to itself.
- b. The 1st Plaintiff had not by 23rd January, 2007 complied with Section 52 of the Registration of Titles Act and on the records kept by the Registrar of Titles, the 1st Plaintiff had no interest in the property.

87. The 2nd Defendant states that it was not bound to inquire into the manner in which CMCC (Mombasa) No. 2813 of 2006 was filed or conducted or the manner in which the decree and orders therein were granted. The 2nd Defendant avers further that it responded to an advertisement in a local daily in which the suit premises had been advertised for auction by the 3rd Defendant and duly attended the auction together with others. The Plaintiffs bid was the highest and was accepted. In answer to paragraphs 14 and 15 of the Plaintiff, the 2nd Defendant stated that the Plaintiffs did not file any appeal against the Judgment, decree or orders issued by the magistrate in CMCC (Mombasa) No. 2813 of 2006. The 2nd Defendant specifically denies the allegations and all the particulars of fraud, illegalities, notice and misrepresentations contained in paragraphs 14 and 15 of the Plaintiff. The 2nd Defendant denied paragraph 17 of the Plaintiff

88. The 2nd Defendant relied on the following particulars of the crime and of the negligence of the Plaintiffs:-

- a. The Plaintiffs obtained grant of probate from this court sitting at Nairobi on 6th May, 1998.
- b. Under the provision of Section 95 (a) of the Law of Succession Act, Cap. 160 the Plaintiffs failed to get in the whole of the estate including the suit premises and thereby suffered the suit premises to be sold to the 2nd Defendant.
- c. Failure to gather the estate and particularly the suit premises and to comply with Section 52 of the Registration of Titles Act constitute a criminal offence under Section 95 (a) of the Law of Succession Act.
- d. Failure to gather the suit premises constitutes negligence under Section 94 of the Law of Succession Act.

89. Further to paragraph 22 above, the 2nd Defendant averred that this suit is maliciously brought to enable the plaintiffs to escape the criminal penalties for offences committed against the estate. Further and



without prejudice to any of the foregoing, the Plaintiffs having committed the offence referred to above are also liable to compensate the estate under the provisions of Section 94 of the Law of Succession Act, Chapter 160, Laws of Kenya. This suit therefore ought to have been brought by the beneficiaries of the estate against the Plaintiff's jointly and severally to recover any such loss as the estate may have sustained as a result of the negligence by the Plaintiffs and pursuant to the crimes committed by the Plaintiffs against the estate. The 2nd Defendant therefore averred that this suit is incompetent, frivolous, vexatious and an abuse of the process of court.

90. The question that lingers then was the deceased person properly sued in CMCC (MSA) No. 2813 of 2006 according to PW – 1. The 2nd Defendant relied on the following particulars of the crime and of the negligence of the Plaintiffs:-

91. The Plaintiffs obtained grant of probate from this court sitting at Nairobi on 6th May, 1998. Under Section 95(a) of the Law of Succession Act, the Plaintiffs failed to get in the whole of the estate including the suit premises and thereby suffered the suit premises to be sold to the 2nd Defendant. Failure to gather the estate and particularly the suit premises and to comply with Section 52 of the Registration of Titles Act constitute a criminal offence under Section 95(a) of the Law of Succession Act. Failure to gather the suit premises constitutes negligence under Section 94 of the Law of Succession Act. Further to paragraph 22 above, the 2nd Defendant averred that this suit is maliciously brought to enable the Plaintiffs to escape the criminal penalties for offences committed against the estate. Further and without prejudice to any of the foregoing, the Plaintiffs having committed the offence referred to above are also liable to compensate the estate under the provisions of Section 94 of the Law of Succession Act, Chapter 160, Laws of Kenya. This suit therefore ought to have been brought by the beneficiaries of the estate against the Plaintiff's jointly and severally to recover any such loss as the estate may have sustained as a result of the negligence by the Plaintiffs and pursuant to the crimes committed by the Plaintiffs against the estate. The 2nd Defendant therefore averred that this suit is incompetent, frivolous, vexatious and an abuse of the process of court. They got word after they got their advocate to lodge an objection which they did and they conducted investigations – perusing the Court file for CMCC (MSA) No. 2813 of 2006 – the Defendants filed an application to substitute the Plaintiff with themselves, KCB the 1st Plaintiff. They found out the case was for recovering of rates but the application was dismissed i.e. recovering of Kenya Shillings Five Sixty Two Thousand (Kshs. 562,000/-). They applied for the dismissal as the case was wrongful filed as it was against a deceased.

92. At this juncture, I wish to refer to the provision of Section 82 (a) the Law of Succession Act, Cap. 160 provides as follows:-

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

It should be pointed out that the above provision of the Law can only be fully exercised by a substantive administrator, which is the person holding a full Grant. It should not be a Limited Grant at all. Likewise, the duties imposed by Section 83 of the Act are to be discharged to their fullest by the holder of a substantive Grant of representation as was decided in “Re the estate of Helena Wangechi Njoroge (Deceased) [2015] eKLR.”

93. PW - 1 testified that the Court that they came to know of CMCC No. 2813 of 2006 when it was gazetted. They found out that the KCB was not a party to the said suit before the subordinate Court.



They discovered there was a Judgment entered in the matter by a magistrate but it was irregular; it was in force. The involvement of the 3rd Defendant was purely in their capacity as Auctioneers. According to the documents the 3rd Defendant (Auctioneers) was instructed by their advocates Messrs. Meenye & Kirima Advocates. She had seen the letter by the advocate the sale by auction for a sum of Kenya Shillings Six Million (Kshs. 6,000,000/-) was for the higher bidder by that time the Judgment had not been set aside. She confirmed that by the year 2006, KCB were not party to the proceedings nor were they in occupation of the suit property; for that reason KCB could not have been served with the notice. It was not indicated to Court whether the party was deceased. The Auctioneer was to execute the orders/ decree of the Court. She did not know whether there was someone guarding the property. She could not confirm whether the notice was served upon the Guard guarding the property. They sent the advocates to peruse the file. They never informed them whether it was the Auctioneers who sold the property. According to DW - 1, from the notification of sale there was an indication of the plot number. It was served on a guard who was at the main gate. Although he took the photographs from the premises, he never brought to Court. He did not have copies of the notices that they fixed on the gate. They sent the letter to Mr. Chege through Registered Posts. He had not attached any receipts. He further stated that they sold the property to Chembe Holdings Limited. From the memorandum of sale indicated the names of Chembe Holdings Ltd, it indicated the directors. They paid the Advocates Meenye, Kirima through a banker's cheque; he did not have a copy of the same as it was in the old matter. He was aware that the Chembe Holdings Limited paid the balance. He received instructions from Messrs. Meenye Kirima Advocate for the Municipal Council; he never found out whether they had instructions or not. From the Municipal Council. He did not know whether Mr. Joseph Kimotho was deceased.

94. As indicated above, this was an outright case of fraud. 'Fraud' has been defined in Blacks Laws Dictionary as;

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”

Further from the Black's Law Dictionary Ninth Edition at Page 731 also defines 'fraud' as:-

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

With the definition of fraud in mind and having held that the 1st, 2nd and 3rd Defendants forged the documents belonging to the deceased and through deceitful acts caused the property to be sold off through a private treaty to the 2nd Defendant herein. Nonetheless, the Court is privy to the fact that allegations of fraud and/or illegalities must be established and/or proven to a standard above the balance of probability, but not beyond reasonable doubt. In support of the foregoing position, I can do no better than to adopt the holding in the Decision in the cases of: “Kagina – Versus Kagina” (Supra) ; the Viraj Morajaria (Supra) and “Kinyanjui Kamau -Versus - George Kamau Njoroge [2015] eKLR”, where the Honourable Court of Appeal observed as hereunder:-

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G&F) 742 wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden



to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

In the particulars of fraud, the appellant alleged that he did not consent to the transfer of the property. We find this was not true; as pointed out by the courts below, the appellant had full knowledge of and consented to the transaction. The evidence of the chief (DW2) was instructive in this regard, as was a letter to the Land Registrar, Kiambu. This letter in particular shows that the appellant was fully aware of the transaction between the respondent and his deceased brother.

The evidence that was adduced by the Land Registrar seemed to indicate that there may have been some mischief in the manner that the title in favour of the respondent was procured. In his evidence, the Land Registrar indicated that the file in respect of the subject property could not be found, and as such, any transfer that may have been undertaken may have been fraudulent. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

95. On this grounds, I fully concur with the Learned Counsel for the Plaintiffs on this legal position and while citing the holdings from the myriad of “Wambui – Versus - Mwangi (Supra) where the Court of appeal noted the holding in the case of “Kawaljeet Singh Rekhi (Supra) in which the case of “Macfoy [Supra] was approved; Chemey Investment Limited (Supra) Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura – Versus - Attorney General & 4 Others [Supra] and Arthi Highway Developers Limited [Supra]. Form these decisions, the Courts had these dispositions:-
- i. The court of law should never sanction either the acquisition of title to property in favour of a party who has acquired such title from a legally registered innocent proprietor using forgery, deceit or any kind of fraud;



- ii. The transfer of title from the person who acquired it through forgery, deceit and or fraud from a legally registered innocent proprietor to a 3rd party even if it were acquired innocently and for valuable consideration for the reason that the person who had acquired it through forgery, deceit and or any form of fraud from the innocent legally registered proprietor had no valid or legally acquired title in the property to pass on to the third party;
 - iii. a decree founded on procedure fraudulently crafted by a party(ies) thereto can neither be sanctioned by a court of law, nor can such a decree form a proper basis for transferring property subject to such a decree from one party to another;
 - iv. in law a contrived decree is null and void and any subsequent transactions premised on such a purported decree amount to nothing, null and void and therefore of no legal consequences;
 - v. no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing the obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court; and lastly, that it is trite law that where an act is a nullity it is void and every proceeding founded on it is also in law a nullity.
 - vi. every subsequent act premised on a nullity could not accrue legitimacy or legality;
 - vii). since sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at another person;
 - Viii). a court of law cannot protect title to land which has been obtained illegally or fraudulently merely because a person is entered in the register as proprietor;
 - ix. a property could not have two title deeds. Where there was a proven demonstration that the second title was founded either on mistake, misrepresentation or fraud, the first title in time prevailed;
 - x). the doctrine of purchaser without notice never enabled a purchaser to take free from legal rights as distinct from equitable interests; and lastly,
 - xi). the doctrine of purchaser without notice was qualified by a fundamental distinction between legal estates and equitable interests.
96. Further to this, I will proceed to examine the Judgment delivered in the lower court and whether it was an irregular Judgment. The provision of Order 10 Rule (2) of the Civil Procedure Rules, 2010 provide for Affidavit of Service upon non-appearance as follows: -

“Where any Defendant fails to appear and the Plaintiff wishes to proceed against such Defendant, he shall file an affidavit of service of summons unless the summons has been served by the process server appointed by the Court.”

97. The provision of Order 10 Rule 11 of the Civil Procedure Rules, 2010 provides for setting aside of Judgment entered under Order 10 of the Rules. I seek refuge from the case of:- “Ali Bin Khamis – Versus - Salim Khamis Korobe & 2 Others, [1956] 23 EACA 195”, it was held ‘inter alia’ that an order made without service of summons to Enter Appearance is a nullity which must be set aside ex debito justitiae. This position was confirmed by the Court of Appeal in the case:- “CA No. 6 of 2015 James Kanyita Nderitu -Versus - Maries Philotas Ghika & Another [2016] eKLR” where it was held:-

“We shall first address the ground of appeal that faults the Learned Judge for setting aside the default Judgment and consequential orders in the circumstances of this case. From the onset,



it cannot be gainsaid that a distinction has always existed between the default Judgment that is regularly entered and one, which is irregularly entered. In a regular default Judgment, the Defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file defence, resulting in default Judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default Judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default Judgment, and will take into account such as the reason for the failure of the Defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer (see *Mbogo & Another - Versus - Shah* (supra); *Patel – Versus - EA Cargo Handling Services Ltd* [1975] EA 75, *Chemwolo & Another V Kubende* [1986] KLR 492 and *CMC Holdings – versus - Nzioki* [2004]1 KLR 173).

In an irregular judgment, on the other hand, Judgment will have been entered against a Defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the Judgment is irregular, it can set aside the default Judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular Judgment. The reason why such Judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo – Versus - Attorney General* [1986 – 1989] EA 456). The Supreme Court of India forcefully underline the importance of the right to be heard as follows in *Sangram Singh – Versus - Election Tribunal, Kotch*, AIR 1955 SC 664, at 711:

“There must be never present to the mind the fact that ours of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

98. The approach of the courts, from the case of:- “*James Kanyita Nderitu – Versus - Maries Philotas Ghika & Another* case (Supra), where an irregular default judgment has been entered is demonstrated in the following cases of: “*Frigonken Limited – Versus - Value Park Food Ltd*, HCC No. 424 of 2010”, the High Court stated:

“If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court *ex debito justitiae*. Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process”.

99. I cannot emphasize more on the importance of an effective service onto parties as it is provided for under Order 5 of the Civil Procedure. It should never be perceived as a formality. The law requires the process server to return to court an affidavit of service and evidence of such service of summons



to enter appearance which was not done in this case. An affidavit of service alone is not evidence of service of process. There is no reason why the Plaintiff only filed into Court affidavit of service and not evidence of service which it now purported to annex to the affidavit in reply to the application by the Defendant seeking to set aside the Ex - Parte Judgment.

100. DW - 1 has already told the Court that they never served the intended party that they had sued in person. They left the documents with the guard at the door. Hence, having the matter heard and concluded without the knowledge of the Plaintiff was wrong. Therefore, for these reasons, the entry of Judgment against the Plaintiffs was by all means irregular and must be set aside and vacated as it violated the provision of Order 10 Rules 8 of the Civil Procedure Rules. On that ground alone I would set aside the Judgment entered in favour of the 1st Defendant in CMCC No. 2813 of 2006.
101. By all means, critically assessing all the surrounding facts and inferences herein, I am not persuaded at all that the 2nd Plaintiff and her family herein were properly served and or that it chose to ignore the summons to enter appearances as well as the suit papers upon them.
102. Be that as it may and being that the suit property has already been sold to the 2nd Defendant clearly through fraudulent means as the 1st Defendant clearly knew they had sued a deceased person. I find that that the Plaintiffs have made out their claim but not to the extent of re-conveyance of the title back to the Plaintiffs.

ISSUE No. b.) Whether the Plaintiffs are entitled to the prayers sought

103. Under this Sub heading, the Honourable Court will be building from the legal principles already well stated above. The provision of Section 80 (1) and (2) of the Land Registration Act No. 3 of 2012 empowers this court to order the rectification of a register of a suit property directing it be cancelled. Though, the Plaintiffs have sought the relief that the suit property re - conveyance of the suit property. In the alternative, a sum of Kenya Shillings Thirty-Five Million Four Hundred Thousand (Kshs. 35,400,000/=) being the equivalent of the current market value of the suit property to be payable.
104. In respect of the subject matter, other than impleading a prayer for refund of the market value of the suit property, based on the valuation that was commissioned and prepared in the year 2007 I find that the Plaintiffs have made out a case for the grant of prayer (d) of the Plaintiff.

ISSUE No. c.) Who will bear the Costs of suit

105. It is well established that the issue of costs is at the discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

106. The proviso of Section 27 of the Civil Procedure Act, Cap. 21 provides that costs ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction



to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

107. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons,
108. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.
109. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “*Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited* [2014] eKLR” the court noted that:-

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why Section 27 (1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

110. In this case, as this Honourable Court has opined above, the Plaintiffs have proved their claim against the 1st, 2nd and 3rd Defendants and therefore the Plaintiffs have the costs of the suit as per the Plaint dated 22nd October, 2007 and filed in Court on 12th November, 2007 to be paid jointly by the 1st, 2nd and 3rd Defendants.

VII. Conclusion and Disposition

111. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiffs have established his case against the Defendants herein. Thus, the Court proceeds to make the following specific orders:-
- a. That Judgement be and is hereby partially entered in favour of the Plaintiffs against the Defendants herein as per the Plaint dated 22nd October, 2007.
 - b. That an order be and is hereby made compelling the 1st Defendant to make a payment of a sum of Kenya Shillings Thirty-Five Million Four Hundred Thousand (Kshs. 35,400,000/-) being the equivalent of the current market value of Subdivision Number 2525 Section I Mainland North within 60 days of this judgment.
 - c. That the Plaintiffs shall have the costs of the suit to be paid jointly and severally by the Defendants.
 - d. That the Interests on (b) and (c) above shall apply at court rates.

It is so ordered accordingly.



JUDGMENT DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 6TH DAY OF FEBRUARY 2024.

.....

**HON. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Judgement delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Oseko Advocate holding brief for M/s. Kaguri Advocate for the Plaintiff.
- c. No appearance for the 1st, 2nd & 3rd Defendants.
- d. No appearance for the 2nd and 3rd Defendants.

