Soy Developers Limited v Kenagri Products Limited & 4 others (Environment & Land Case 132 of 2015) [2024] KEELC 5246 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5246 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 132 OF 2015

OA ANGOTE, J

JULY 11, 2024

BETWEEN

SOY DEVELOPERS LIMITED ..... PLAINTIFF

AND

KENAGRI PRODUCTS LIMITED ..... 1ST DEFENDANT

DEPOSIT PROTECTION FUND BOARD (AS LIQUIDATORS OF POST BANK CREDIT LIMITED (IN LIQUIDATION ..... 2ND DEFENDANT

ASL LIMITED ..... 3RD DEFENDANT

THE CHIEF LANDS REGISTRAR ..... 4TH DEFENDANT

M/S CYPERR PROJECT INTERNATIONAL LIMITED ..... 5TH DEFENDANT

JUDGMENT

Background

1. Vide a Further Amended Plaint dated 31st January, 2018, the Plaintiff seeks as against the Defendants the following orders:

    a. Permanent Injunction against the 3rd Defendant preventing the 3rd Defendant, its employees, agents, servants or persons acting under and for the 3rd Defendant from encroaching, alienating, dividing, transferring, selling, charging, developing or in whatever and whichever manner and way dealing with all that property known as LR No 209/11151 and of Grant Number 47029 and contained in Land Survey Plan Number 138623 (hereinafter the suit property).

    b. A Mandatory Injunction against the 4th Defendant directing the 4th Defendant to rectify the Lands Register and reflect the Plaintiff as the sole registered owner of the suit property.

c. General damages against the 1st 2nd, 3rd and 5th Defendants for disturbance of the Plaintiff's right to quiet possession of its property.

d. An order for compensation against the 1st,2nd, 3rd and 5th Defendants for abrogating the Plaintiff's constitutional right to property; In the alternative, the 1st, 2nd 3rd, 4th and 5th Defendants to pay the Plaintiff the current and full market value of the suit property.

e. Costs of this suit.

f. Interests on (c) and (d) above at Court rates from the date of Judgement to full payment thereof.

g. Any other and further relief that this Court may deem fit to grant and for the interests of justice.

2. It is the Plaintiff's case that it is, and was at all material times the registered owner of all that parcel of land known as LR No 209/11151 of Grant Number 47029 contained in Land Survey Plan Number 138623 (hereinafter the suit property); that it acquired the property by way of allotment from the Government of Kenya having made an application on 13th February, 1989 and that its request for allotment was approved on or about the 4th April, 1989, subject to payment of certain sums.

3. The Plaintiff averred in the Plaint that on 5th April, 1989, it proceeded to pay for the allotment letter and was issued with the title to the suit property as a leasehold for a period of 99 years from 1st April, 1989.

4. According to the Plaintiff, sometimes in the year 1991, it entered into a sale agreement with the 1st Defendant for the purchase of the Plaintiff (the company) and all its assets including the suit property; that pursuant to the agreement, the consideration was Kshs 20million; that it was to release the title to the suit property to the 1st Defendant upon payment of 10% of the purchase price; that the completion date was on or before the 31st May, 1992, and that the transfer of the suit property was to be done upon completion of the purchase price.

5. According to the Plaintiff, on or about 18th December, 1991, the 1st Defendant issued a cheque for the sum of Kshs 2million being 10% of the purchase price whereupon it released the title to the suit property in accordance with the terms of the agreement to the 1st Defendant's Director and that the cheque was dishonored by the bank leading it to recall the title from the 1st Defendant.

6. The Plaintiff averred that the 1st Defendant subsequently issued another cheque for the sum of Kshs 10million with the balance of Kshs 10million to be paid on or before completion; that the 1st Defendant refused, failed and neglected to pay the balance of the purchase price leading it to terminating the sale agreement and requested for the return of the title.

7. The Plaintiff maintains that the 1st Defendant having failed to complete his part of the agreement, there was no change of directorship or shareholding of the company; that consequently, the 1st Defendant had no authority to act on behalf of the company and any action undertaken in that respect was done fraudulently and that in order to protect its interests, sometime in 1995, it moved to register a caveat on the suit property

8. The Plaintiff averred that its efforts to register a caveat aforesaid were frustrated as the land registry officials indicated that the file could not be traced; that after the response from the Lands Registry, it wrote to the 1st Defendant on 21st August, 1997 demanding the return of the title and that the foregoing communication elicited no response and that it wrote another letter on 25th March, 2005 which equally elicited no response.

9. It is the Plaintiff's case that requests to be issued with a provisional file and the placement of restrictions on dealings in the property by the land registry equally garnered no response apart from indications that the file was missing.

10. It is the Plaintiff's case that sometime in 2015, it got information that the file had resurfaced and the title to the suit property transferred to the 2nd Defendant and that a formal search lodged with the lands registry on 2nd February, 2015 revealed that the file was allegedly reconstructed under the authority of the Principal Registrar of Titles on or about the 3rd April, 2008.

11. It was averred by the Plaintiff that the title aforesaid confirmed that several transactions had been undertaken thereon without its knowledge and consent, to wit, charge to City Finance Ltd on 13th December, 1991 and discharge therefrom on 21st October, 1992; charge to Post Bank Credit Limited on 21st October, 1992; discharge from all encumbrances on 5th April, 2006 and transfer to the 3rd Defendant.

12. The Plaintiff asserts that the aforesaid transactions were unlawful, illegal and/or irregular having been undertaken without its knowledge and consent as the sole registered owner of the suit property there having been no registered change of directorship or shareholding and that the 2nd Defendant charged the property without obtaining its consent and/or authorization.

13. It was averred that the said charge, although executed by the 1st Defendant was for the benefit of the 5th Defendant, which had not given any consideration to the Plaintiff for the transaction and that the 3rd Defendant agreed to have the property transferred to it without confirming if the 2nd Defendant had proper rights to transfer the suit property.

14. As regards fraud, the Plaintiff set out the particulars to include the charge of the property to the 2nd Defendant by the 1st Defendant without its knowledge and authority as the sole registered owner of the suit property and for the benefit of the 5th Defendant who had not provided any consideration; the 2nd Defendant agreeing to charge the property knowing expressly or tacitly that the 1st Defendant had no authority to act for the Plaintiff; the 2nd Defendant selling the suit property to the 3rd Defendant and the charging and transfer of the suit property during the period when the file could not be traced at the registry.

15. The Plaintiff urges that the 3rd Defendant obtained no better title to the suit property than the 1st or 2nd Defendants; that it recorded a statement with the police outlining the fraud committed against it; that the Defendants' actions constitute an abrogation of its right to property and interference with its quiet possession thereof and that despite several demands, the Defendants have refused to cease their claim over the suit property.

16. The 1st and 5th Defendants filed a Defence and Counterclaim on 17th September, 2018. They asserted that the suit is incompetent not having been instituted by the Plaintiff's bonafide directors, and seeking cancellation of registrations effected under the repealed *Government Lands Act* and that the suit is statute barred having arisen out of a transaction for the sale of land and shares which was entered into on 18th November, 1991 some 27 years ago.

17. The 1st and 5th Defendants contend that sometime in the year 1991, Sammy Boit Kogo, then a Director of the Plaintiff, approached the Managing Director of the 1st Defendant, Shakhalaga Khwa Jirongo and offered to sale to him the suit property registered in the name of the Plaintiff and that it was agreed between Mr Kogo representing the Plaintiff and Mr Jirongo representing the 1st Defendant that the property would be purchased at the price of Kshs 20million.

18. According to the 1st and 5th Defendants, the suit property was the sole asset of the Plaintiff company and it was agreed that its transfer to the 1st Defendant would be in the form of acquisition and transfer of all the shares in the Plaintiff company as held by its Directors, Sammy Boit Arap Kogo and Antoinnette Boit to the 1st Defendant's Directors, Shakhalaga Khwa Jirongo and Davy Koech and that the agreement was reduced into a written agreement dated 18th November, 1991.

19. The 1st and 5th Defendants averred that the 1st Defendant paid a deposit of Kshs 10milion to the Plaintiff's then Advocates Oraro & Rachier vide cheque number NA/AE 21990 drawn on the account of Barclays Bank; that the same was acknowledged by the firm of Oraro & Rachier by a letter dated 15th December, 1991 and that the 1st Defendant thereafter issued to the Plaintiff's Advocates three cheques for the sums of Kshs 2million and Kshs 7million in favour of the Plaintiff's Advocates and Kshs 1million in favour of Sammy Boit Kogo and that the aforesaid cheques were unpaid for the reason that they did not clear.

20. It is the 1st and 5th Defendants' case that they completed payment of the purchase price within the stipulated agreement period by paying Kshs 7million in cash to Jonathan Moi on 5th May, 1992, Kshs 2million collected by Sammy Boit through Bearer Certificates of Deposit issued to him at City Finance Bank Limited against the account of Sololo Outlets Limited and a cheque for Kshs 1million later paid through Cyperr Enterprises Limited.

21. The 1st Defendant states that it paid a further Kshs.7 million to Jonathan Moi through National Bank to complete the agreement as it turned out that Sammy Boit and Antoinnette were Jonathan Moi's proxies and had failed to remit to him his share of the purchase price; that the aforesaid payments were witnessed by Sammy Nyamweya, Gerald Bomet and Sammy Boit Kogo and acknowledged through a written document signed by Sammy Kogo on 5th May, 1992 and that it paid a total sum of Kshs 27million as against the agreed Kshs 20million.

22. The Defendants contend that the Plaintiff's Director had released the original title to the 1st Defendant's Director on the execution of the formal agreement before payment of the deposit; that it was known to the Plaintiff's Director, Sammy Kogo, that the property was to be charged to City Finance Limited and that he facilitated the valuation of the property for charging purposes by taking the valuer, Mr Jirongo and the then City Finance Bank Manager Mr Daniel Muoki to the suit property for inspection and valuation.

23. It is the 1st and 5th Defendants' contention that it is apparent that the Plaintiff's Director had a devious scheme as documents now disclose that he reported the purported loss of its title as early as 25th November, 1991 only 7 days after giving it to the 1st Defendant's Director and that the Plaintiff received the deposit of Kshs 10million from the 1st Defendant.

24. They aver that upon payment of the deposit of Kshs 10million aforesaid, Mr Sammy Boit Kogo released the original certificate of incorporation of the Plaintiff, MEMOARTS and the company seal to the 1st Defendant's Director; that the executed share transfer forms were also released to the parties' joint Advocates in the transaction, Oraro and Rachier Advocates for transmission to the Bank's lawyers and that the formalities of the registration of the transfer of shares was left between the banks and Plaintiff's lawyers.

25. It is the 1st and 5th Defendants' case that the Plaintiff company was a guarantor to Sololo Outlets Limited which was allowed to access the loan funds after due formalities of change of shareholding and directorship in the Plaintiff company to Cyrus Jirongo and Davy Koech were confirmed by the bank

and its lawyers and that the principal borrower, Sololo Outlets Limited, subsequently settled its loan with City Finance Company Limited and the suit property was discharged.

26. It is their case that the 1st Defendant thereafter offered its property as security to guarantee an overdraft facility to the 5th Defendant from Post Bank Credit Limited to the tune of Kshs 50million; that the aforesaid transaction was handled by a different set of Advocates and that the transaction passed the due diligence test of the Advocates and funds were released to the principal borrower.

27. The Defendants posit that the Registrar of Companies confirmed that the original records of the company in the registry file including the Memoarts were not in the file as early as 2008 and the file had no records of copies of any returns and that the Plaintiff's former Director, Sammy Kogo, made bulk back filings on 24th February, 2015 dating back to incorporation.

28. According to the 1st and 5th Defendants, the purported certificate of official search produced by the former directors of the Plaintiff emanate from those produced by them aforesaid and subsequently, the integrity and authenticity of the current Plaintiff's records is questionable and that they nonetheless have the original MEMOARTS, Certificate of Incorporation and seal supplied to them on execution of the sale agreement.

29. The Defendants maintain that the Plaintiff's actions are tainted with fraud the particulars of which include making a false complaint regarding the loss of the title; providing records to reconstruct official missing records which records are self-serving; failure to give reasons for failure to take action for alleged breach of contract which purportedly occurred over 25 years ago and failing to name a verifiable source who informed them of the mysterious re-appearance of the file.

30. Vide the Counterclaim, the 1st and 5th Defendants seek for the following orders:

    i. A declaration that SK. Jirongo and Davy Koech are the bonafide Directors of Soy Developers Limited.

    ii. An injunction restraining the 4th Defendant from selling, alienating, charging or in any way disposing the suit property pending the hearing and disposal of this suit.

    iii. An inquiry into the damages payable to the 1st Plaintiff for the fraudulent disposal of its property.

    iv. An order cancelling the purported sell of the suit property LR No 209/11151(I.R 47029) by the 3rd Defendant to the 4th Defendant.

    v. Costs of the suit.

31. In its Defence, the 2nd Defendant denied the assertions as set out in the Plaint aforesaid contending that whereas the Plaintiff was the previous proprietor of the suit property, the 3rd Defendant acquired legal title thereto pursuant to a transfer registered in its favour on 5th April, 2006; that it sold the property to the 3rd Defendant in exercise of its statutory power of sale as a chargee as a result of default by the Plaintiff as chargor in repaying the loan advanced to it and that the charge was duly executed by the Plaintiff and registered in accordance with the law.

32. According to the 2nd Defendant, it exercised its power of sale as chargee upon issuance of the requisite notices in accordance with the law; that on the basis of the foregoing, the agreement for sale between itself and the 3rd Defendant and the subsequent transfer to the 3rd Defendant was valid and cannot be challenged and that the original Plaint is undated.

33. In particular, the 2nd Defendant contends that vide an Affidavit filed in support of an interlocutory application dated 16th February, 2015, which was subsequently withdrawn, the Plaintiff's Director indicated that the title to the suit property got lost sometime in 1991 due to no fault of its own and it thereafter made attempts to apply for a provisional title, a different version from what is in the Further Amended Plaint.

34. The 2nd Defendant maintained on a without prejudice basis that the Plaintiff's claim is tenuous as it has not given a plausible reason as to why it did not take steps to retrieve its title from the year 1991 and is guilty of laches; that it is inconceivable that the Plaintiff failed to file a suit for the recovery of the title from the 1st Defendant for a period of 20 years and that the Plaintiff has not indicated what happened to the Kshs 10million paid to it and whether the sale was formally rescinded.

35. The 3rd Defendant denied the assertions as set out in the Plaint stating that whereas the Plaintiff was the previous proprietor of the suit property, it acquired legal ownership and title over the property pursuant to a transfer registered in its favour on 5th April, 2006.

36. The 3rd Defendant explained that vide an agreement dated 24th August, 2005, the 2nd Defendant agreed to sell the property to it for the sum of Kshs 23million; that it paid a 10% deposit of the purchase price being the sum of Kshs 2.3million vide a cheque no 025442 on the 30th August, 2005 and that on 24th May,2006, it paid the balance of the purchase price being Kshs 20,700,000/= vide cheque number 001186.

37. It is the 3rd Defendant's case that after its registration as proprietor, it sought a change of user from residential to commercial which approval was granted on 10th July, 2007; that on 30th July, 2007, it sought permission from the City Council of Nairobi to fence the property with a chain link which was granted on 8th August, 2007 and that in view of the fact that the property was sold pursuant to the 2nd Defendants' statutory power of sale, the only due diligence required of it was to ascertain whether the charge by the Plaintiff was duly registered which it did.

38. The 3rd Defendant states that prior to the filing of these proceedings, it had no knowledge of the 1st Defendant's dealings with the Plaintiff and had no notice of any defect in the charge making it an innocent purchaser for value; that upon its registration as proprietor of the property, the Plaintiff's equity of redemption was extinguished and that it acquired an absolute and indefeasible title to the suit property.

39. It maintains that consequently, the only remedy open to the Plaintiff is by seeking damages against the charge, if at all and that ultimately, the sale is valid and cannot be interfered with and on account thereof, it reserves the right to move the Court to have the suit struck out in limine.

40. The 3rd Defendant averred that the legitimacy of its proprietorship of the suit property was the subject of determination in ELC Case No 567 of 2008 as consolidated with ELC 24 of 2008 which vide its Judgement delivered therein on the 28th May, 2015, affirmed its proprietorship having received support in this respect from the Chief Lands Registrar.

41. Vide a Notice dated 15th September, 2020, the 3rd Defendant issued a Notice of Cross-Claim against the 2nd Defendant in the event the claim by Soy Developers Limited, Kenagri Products Limited and Cyperr Project International Limited are upheld.

42. The 3rd Defendant's Cross-claim is premised on the same set of facts as pleaded in its Defence, to wit, that it lawfully purchased the property from the 2nd Defendant selling it in a legitimate exercise of its statutory power of sale; that it fully paid the purchase price and paid the requisite stamp duty and

that it conducted due diligence prior to the purchase of the suit property. Vide the Cross-claim, the 3rd Defendant seeks for the following orders:

i. Judgment be entered in its favour against Deposit Protection Fund Board (as Liquidators of Post Bank Credit Limited) at the current value of the property known as LR No. 209/11151 situate in Upper Hill Area of Nairobi together with interests thereon at the Court rates from the date of filing this suit to the date of payment in full.

ii. Deposit Protection Fund Board (as Liquidators of Post Bank Credit Limited) do indemnify ASL Limited against any order of costs that might be made arising from these proceedings.

iii. The costs of and occasioned by this Cross-claim be borne by the Deposit Protection Fund Board (as Liquidators of Post Bank Credit Limited).

iv. Such other and/or further relief as this Honourable Court may deem fit and proper to grant.

43. The 4th Defendant did not participate in these proceedings.

Hearing and Evidence

44. PW1, Sammy Boit Arap Kogo, adopted his witness statements dated 30th November, 2018, 8th October, 2019 and 18th September, 2019 as his evidence in chief and produced the bundle of documents dated 9th October, 2019 and the supplementary bundle dated 21st March, 2022 as PEXHB1 and 2. He testified that Soy Developers Limited belongs to him and his wife who are shareholders as well as directors therein.

45. PW1 stated that the suit property, LR 209/11151, Upper Hill, Elgon Road, is the company's only asset; that the Plaintiff and the 1st Defendant entered into an agreement dated 18th November, 1991 in which Cyrus Jirongo, his friend and neighbor, agreed to buy the suit property for the sum of Kshs 20million and that 10% of the purchase price being Kshs 2million was to be paid by 18th December, 1991 and the completion date was 31st May,1992.

46. According to PW1, Cyrus Jirongo issued the first cheques in the amounts of Kshs 2million, Ksh 7million and Kshs 1million in his name and the balance was to be paid to Oraro Advocates; that the first cheques of Kshs 2million, 1million and 7million aforesaid bounced; that Cyrus Jirongo later issued another cheque in the name of Oraro and Rachier Advocates for Ksh 10million and that his Advocate advised him to release to him the original title, the Memorandum and Articles of Association and certificate of incorporation, which he did.

47. It was his evidence that he was to sell to Cyrus Jirongo shares in the Plaintiff's company after full payment or transfer of the plot; that he was to accordingly prepare a board resolution of the Plaintiff and file the same with the company's registry; that directors require a board resolution appointing new directors and that this transaction was never undertaken.

48. PW1 averred that he is unaware of the charge dated 9th December, 1992 in favour of City Finance Limited to Sololo Outlet; that the charge was registered on 13th December, 1991 at which time him and his wife were directors of Soy Developers Limited; that he did not assign any authorizations or the deed of indemnity; that he was not privy to any payments between Mr. Jirongo and Mr. Jonathan Moi and he was never paid any monies in cash and that Jonathan Moi was not a Director of the Plaintiff.

49. PW1 denied presenting any share transfer documents to the bank as alleged contending that he does not know where City Finance is; that he was not involved in the movement of funds from Citi Finance to Post Bank Credit as alleged; that he was not aware of the charge of the suit property to Post Bank

Credit; that he does not know Cyperr International Limited and was not involved in the borrowing of the debt on its behalf and that the postal address 48180 Nairobi belongs to him to date though he has never received any statutory notice from the 2nd Defendant.

50. It was the testimony of PW1 that if indeed the chargeable interest rate was 23% per annum, as against the borrowed sum of Kshs 50 million, the sum due from the date of the charge being 1992 to the issuance of the notice on 2nd March, 2004 would be approximately Kshs 5oo million and not Kshs.16 billion as indicated in the notice and that the notice in this respect was never copied to Cyperr Project International Limited.

51. PW1 posited that at the time the notice was sent out on 2nd March, 2004, the value of the land was Kshs 300 –Kshs. 400million; that the sale of the suit property for Ksh 23million is not even obtainable in Kayole; that Lloyd Masika conducted a valuation in 2006 and gave a value of Kshs.360million; that the valuation in the 1st Defendant's list of documents values the land at Kshs 650million as at 2019 and that it is not possible to get a loan using a property whose value is less than the loan amount.

52. PW1 stated that after having given Mr Jirongo the title document, Mr Jirongo informed him that the same was lost; that despite conducting searches and visiting the land Ministry from around 2004, the deed file was never found and he could not have known that any transaction had been undertaken on the suit land and that around 14th February, 2015, when the Ministry closed the lands registry for two weeks, Mr. Lubulellah, the Registrar of Lands, called him and informed him that his file had resurfaced.

53. According to PW1, he was thereafter shown the deed file and conducted an official search which showed a charge had been registered in favour of Citi Finance which was then discharged and the property later charged to Post Bank for Ksh 50 Million; that the file was later on reconstructed and there was an entry showing the sale of the land to ASL Limited and that on 4th December, 2018, he made a complaint to the Bank Fraud Unit

54. It was his evidence that the investigations revealed that Kshs 23,000,000 was not paid to the liquidator; that there is correspondence from the Plaintiff to the 2nd Defendant seeking evidence of payment from the 3rd Defendant; that there is a letter by 2nd Defendant to the anti-fraud unit asking for more time to get the documents and that there is another letter by Post Bank to anti-banking fraud unit which states that the land was sold and but the money was never received by the liquidator agent.

55. According to PW1, the allegation that he had been paid Ksh 1million while Mr. Jonathan Moi had been paid Ksh7million are untrue; that the Kshs 10million deposit that Mr. Jirongo paid is still with Mr. Rachier Advocate and that he only gave Mr. Jirongo the documents because he had given him three postdated cheques which bounced.

56. According to PW1, the Supreme Court Judgment is erroneous; that he never gave conflicting statements to the Supreme Court as he was not given an opportunity to give evidence; that the agreement of 24th January, 2017 was drafted by Mr. Koyyoko advocate and taken to his advocate Rachier's office; that he refused to sign the same because he wanted to have this case and the criminal case included in the agreement and that he eventually signed the agreement and it was witnessed by Koyyoko, Francis and Rachier Advocates.

57. He noted that he has never been involved in any proceedings before the Lands Registry; that he was given the letter of allotment before the certificate of incorporation was issued; that in 1992, the Company Registry could reserve a name for 30 days; that it took long for the certificate of incorporation to be issued; that Mr Jirongo forged his and his wife's signatures and borrowed money from City Finance and Post Bank; that the Ksh 23 million that ASL purported to pay for the land never reached Post Bank and that the court should order for the return of the title to him.

58. PW2 informed the court that she is a shareholder in the Plaintiff's company. She stated that Pw1 is her husband. PW2 adopted her witness statement dated 8th October, 2019 as her evidence in chief. She stated that she is a shareholder of the Plaintiff's company and has never sold her shares.

59. Vide her statement, PW2 averred that sometime in 1989, together with her husband, they incorporated a company by the name of Soy Developers Limited; that on 13th April, 1989, the Plaintiff applied to be allotted some plots situate within Upper hill Area of Nairobi and that the allotment was approved on 4th April, 1989 with the government allotting Soy Developers Limited the property known as LR 209/11151 (the suit property).

60. According to PW2, sometime around 18th November, 1991, their company entered into a sale agreement with one Mr Jirongo through his company Kenagri Products Limited; that pursuant to the agreement, Kenagri Products Limited agreed to purchase the company and its only asset being the suit property at a consideration of Kshs 20million and that to the best of her knowledge, he only paid a deposit of Kshs 10million leaving a balance of Kshs 10million.

61. PW2 stated that after Mr Jirongo failed to complete the agreement, they demanded that he returns the title documents but the same was never returned; that the allegations contained in the statements by Samson Nyamweya, Gerald Kipkemboi Bomet, Daniel Mutua Muoki, Patrick Lubanga and Davy Koech to the effect that they held shares at Soy Developers Limited as nominees of Jonathan Moi are false and that equally false are the assertions that she signed a deed of indemnity dated 5th May, 1992.

62. She averred that the transaction for the sale of Soy Developers Limited and its only asset did not go through and as such there was no change in the directorship of Soy Developers Limited; that neither her nor her husband relinquished the shareholding of the Plaintiff to any one as alleged and that accordingly, they are the only ones who could in the suit property transact as directors of Soy Developers Limited, the Plaintiff herein.

63. It was her evidence in cross-examination that the issues to do with the company were mostly done by her husband; that she was not involved in the application for the land but he mentioned it to her; that she was not involved in the negotiations for the sale of the land; that she cannot remember the number of shares she took at incorporation; that she cannot remember when the company was incorporated nor the company's bank account and that she did not sign the letter applying for the land.

64. She stated that that Mr. Jirongo was her husband's friend and they were very close; that they agreed to sell the shares if the payment for the land was made in full; that she never received the Kshs 10million that was paid as deposit; that the money is still with Mr. Rachier advocate; that the letter by Mr. Rachier advocate shows that the Kshs 10million represented the part purchase price, and Kshs 10million being the balance was never paid and that she never sold her shares in the company.

65. PW3 was Solomon Kiptui Cheruiyot. He adopted his witness statement dated 8th October, 2019 as his evidence in chief. Vide his statement, he stated that the allegations in the statements of Cyrus Jirongo, Samson Nyamweya and Gerald Bomet that he was in a meeting allegedly held on 5th May, 1992 and witnessed the payment of Kshs 7 million in cash to Jonathan Moi by Mr. Jirongo are untrue and that similarly, he did not receive the aforesaid monies on Mr. Moi's behalf.

66. It was his evidence on cross examination that he knew Jonathan Moi from their school days; that he knows Mr. Kogo as a friend and as a friend to Jonathan Moi; that he also knows Mr. Jirongo, Nyamweya and Bomet all being members of the defunct YK92 and that he never signed the document allegedly witnessing payments of the purchase price.

67. PW4 was Police Constable Jared Okemwa, number 81837, currently based at banking fraud unit, DCI. He stated that he is the current Investigating Officer in the matter pursuant to a complaint recorded from Mr. Kogo, the director of Soy Developers Limited. He produced the investigation report filed on 7th November, 2022 as an exhibit.

68. It was his evidence on cross-examination that he did not commence the investigations but took over the same sometime in 2020; that the investigations are ongoing; that he does not have a copy of the first complaint letter which was written sometime in 2008; that he was not aware of the DCI investigations and or the charges that were instituted against the 1st Defendant and that the investigation is with respect to the claims that the Kshs 7million and 1million was paid from National Bank account and that the bank could not trace the payees of those cheques because of the time lapse.

69. PW5 was Superintendent Michira Ndege, the Sub-County Criminal Officer, Mandera County. It was his evidence that he is a trained forensic document examiner; that he authored a report dated 1st April, 2015; that on 31st March, 2015, Seargent Kilele presented exhibits to the laboratory and that the exhibit marked A was the charge for LR No 209/11151 dated 25th September, 1992, while exhibit marked B was a deed of indemnity.

70. It was his further evidence that the exhibit marked C was a discharge of sale (questioned document); exhibit marked D was the specimen signature of Dr Koech; exhibit marked E was the specimen signature of Mr. Kogo, exhibits marked F1-F2 were specimen signatures of Antoinnette Kogo and that he conducted examinations and comparisons and his findings are in his report which he adduced.

71. During cross-examination, he stated that exhibits A, B and C were copies; that they were legible and he was able to make comparisons; that he examined the documents in 2015 although the questioned documents were made in 1992; that with time, handwritings can vary; that he was given specimen signatures of Mr Kogo but was not given his known signature; that it is not possible for a person's signature to change unless they become sick; that there was no evidence that the people who signed the questioned and specimen signatures became sick and that the specimen signatures of Koech were different from the questioned signatures.

72. PW6 was a property valuer by profession and the Director of Lloyd Masika. It was his evidence that he prepared a valuation report in October, 2015 and that he received instructions to update the value in March, 2022. He produced the reports in evidence.

73. DW1 was Shakhalaga Jirongo, a businessman in Nairobi. He adopted his witness statement dated 17th September, 2018 and produced the bundle of documents dated 21st March, 2022 except the witness statement and valuation report as 1DEXHB1. He also produced the Further Supplementary list of documents dated 22nd March, 2022 as 1DEXHB2.

74. It was his testimony that the Plaintiff and the 1st and 5th Defendants are his companies; that he is a majority shareholder in all the three companies; that he entered into an agreement in November, 1991 wherein he negotiated with Sammy Kogo and his wife who were the Plaintiff's Directors before he acquired the company and the suit property; that the terms of the agreement were that he would buy the land for Kshs 20million and that he paid a deposit of Kshs 10million to Oraro and Rachier Advocates around 11th December, 1991.

75. DW1 stated that that the balance was Kshs 50% shareholding; that after paying the balance of the purchase price, he was given the original documents being the certificate of incorporation and memorandum and articles of association; that he charged the title to Citi Finance and then Post Bank;

that him and his partner, David Koech, executed the charge and that all the documents were executed in the presence of Advocate Rachier.

76. He stated that the charge was registered in 1991; that Mr. Kogo thereafter notified him that he was an agent of Jonathan Moi; that he paid Jonathan Kshs 7million in cash in his office; that at City Finance, Kogo took bearer certificates of Kshs 2million from Daniel Muoki, the manager therein; that Mr Kogo thereafter delivered the documents to him showing that he had transferred Soy Developers Limited to him and his co-director; that Mr. Kogo was present at City Finance; that the money came from the account owned by his company Sololo Outlets and that Soy Developers Limited became a guarantor of the advance by City Finance Bank.

77. According to DW1, Mr. Kogo told him that out of the Kshs 10million deposit, he had applied Kshs 7million to pay some youths and he (Mr. Jirongo) had to repay him; that he paid a further 7 million to him and the entire purchase price became Kshs 27 Million instead of Kshs. 20 Million; that the cash payments were made to Jonathan Moi in his office in the presence of Mr. Sammy Kogo, Mr. Cheruiyot, Mr. Sammy Nyamweya and Mr. Gerald Bomet and that the original documents were executed on the 5th May, 1992.

78. DW1 stated that there is a deed of indemnity, indemnifying them of any liabilities that the Plaintiff may have incurred; that they received a letter dated 14th January, 1993 from Rachier Advocate and responded to the same; that after the response, the issue of the sale was never raised again; that the transfer documents and the CR12 were handed over to the first bank that charged the bank and that he executed the charge as a director of Soy Developers Ltd.

79. According to DW1, he learned of this suit from Post Bank who informed him that Mr. Kogo and his wife were alleging that he stole their documents; that the DCI alleged that he had stolen the land and the company belonging to Mr. and Mrs. Kogo; that the borrowing limit for Cyperr Project was Kshs 50million and he never received the letter claiming Kshs. 16 billion and that he never owed Post Bank that much.

80. It was his evidence that when the 5th Defendant went into receivership, he owed Post Bank Kshs. 23million; that he was never notified of the sale of the land and no proceeds from the sale were deposited into the 5th Defendant's account; that his documents were taken over by the receiver; that he was charged with fraud and had no documents in his possession except evidence of the payment of Kshs 10million and that he managed to retrieve records from National Bank showing payments of Kshs 7million to Jonathan Moi and 1million to Mr. Kogo.

81. DW1 listed the following as payments in respect of the suit property: Kshs 10million to Rachier Advocates by cheque; Kshs 7million in cash to Jonathan Moi; Kshs 7miilion and 1 million by cheque to Jonathan Moi and Kogo respectively; and Kshs 2million by bearer certificates to Kogo totaling Kshs 27million.

82. According to DW1, Mr. Kogo never raised the issue of the lost title; that he later learned that other persons had obtained the title for the same property; that the title was never lost but had been charged to Post Bank; that there was no advert before the sale of the land; that the land he charged for Kshs 50million was sold for Kshs 23million and that the land was undervalued and they never participated in the said sale.

83. It was his testimony on cross-examination that he has known Mr Kogo for many years and they have been close friends; that they entered into one agreement for the sale of land and not for the sale of shares; that the agreement does not indicate that any monies were to be paid to Jonathan Moi; that Rachier advocate acted for both of them although there was no formal appointment in that regard;

that the agreement was severally varied orally and that he was entitled to the title upon payment of Kshs 10 million.

84. DW1 admitted that at the time he signed the charge on behalf of Soy Developers Limited in favour of City Finance, he had not paid any monies to the sellers; that he doesn't have the documents which he used to transfer the shares of the company in their names; that a shareholder is different from a director and purchasing shares does not make one a director; that the letter requesting for share transfer forms and form 203A came after registration of the charge and that he does not have the bearer certificate that was used to pay Mr. Kogo.

85. He asserted that the letter dated 20th November, 2019 by National Bank was erroneous; that he could not have been the source of the documents when he is the one who requested for the same; that Mr. Cheruiyot's denial of having witnessed the cash transaction is a lie; that Mr. Kogo was aware of the first charge but not the second; that the loan to Postbank is still due and that his claim is against Post Bank and not the 3rd Defendant.

86. According toDW1, he entered into negotiations with M. Kogo to sell the land and share the proceeds; that he is aware of the draft agreement dated 24th January, 2017; that they had agreed to refund the 3rd Defendant; that they never discussed the issue with the 3rd Defendant beforehand and that the agreement was later on withdrawn.

87. During re-examination, he stated that vide their Counterclaim, they seek to have the 3rd Defendant's title cancelled; that the central issue before the police was that he had stolen the title; that there was no credit to the loan account even after the sale of the land to 3rd Defendant; that the property was never sold to the 3rd Defendant by public auction; that he was not a party to the case between the 3rd Defendant and Chemos and that he never received any statement from Post Bank except the one showing the balance of Kshs 20million.

88. DW2 was Daniel Mutua Muoki, a businessman. He stated that he worked for Citi Finance until 1999. He adopted his witness statement dated 26th September, 2019 as his evidence in chief.

89. It was his evidence that he previously worked at Citi Finance as a credit controller until 1999 and that in early December 1991, Sololo Outlets owned by Mr. S.K Jirongo and Dr. Davy Koech approached Citi Finance to secure a loan of Kshs 30million against a security for the suit property owned by Soy Developers Limited.

90. It was his evidence that on 10th January, 1992, at the request of the bank's lawyers doing the documentation, he wrote a letter to the borrowers asking them to submit signed share transfer forms as well as form 203A (notification of change of directors); that the documentation was completed and the facility disbursed to Sololo Outlets and that the loan of Kshs 30million was repaid and the title released in mid-1992 while he was still working at the bank.

91. It was his evidence on cross examination that he has known Mr. Jirongo as a customer since 1986; that he was the Credit Manager with City Finance and his role was to evaluate applications for credit and deal with security documentation and that as Soy Developers Limited was a guarantor, and not their client, they had to check the directorship of the company and confirm whether it had consented to guaranteeing the loan as well as whether there was a resolution under seal to that effect.

92. DW2 stated that at the time of the registration of the charge, they had not been given the share transfer form 203A; that it is their lawyers who conducted a search at the companies' registry; that the company's resolution was signed by Dr. Koech and Mr. Jirongo who presented themselves as directors

of the Plaintiff and that he was not sure if there was any written communication between City Finance and Soy Developers Limited.

93. It was his evidence that he is not sure of the precise date but the Kshs. 30milion must have been disbursed sometime in 1992; that they had a letter from Soy Developers Limited attaching the original title and that the letter dated the 10th April, 1992 is erroneous because Soy Developers Limited were guarantors and did not borrow any monies.

94. DW2 informed the court that the letter of 10th January, 1992 makes reference to a telephone conversation relating to directorship of Soy Developers meaning that as at the time, they had not provided the documents and that he has never dealt with Mr. Kogo in respect to the transaction and never paid him Kshs 2million as alleged.

95. It was his evidence on re-examination that funds were disbursed after documentation had been done; that the legal charge and certificates were provided; that the registration of the charge at lands was on 13th December, 1991; that the letter of 10th January, 1992 was to enable the registration of the charge and that he cannot remember if as at 10th January, 1992, money had been paid to Sololo.

96. He stated that their lawyers Chwale Advocates carried out the searches; that he saw the name of Mr. Kogo in the Memorandum; that he never dealt with him in the transaction but had known him before; that he worked with Mr. Kogo's sister-in-law and his family and wife and that they were family friends; that he never discussed the issue of the loan to Sololo Investments with Mr. Kogo when the documents were presented to the bank.

97. DW3 was Patrick Lubanga Mutuli, an Advocate of the High Court of Kenya. He adopted his witness statement dated 17th September, 2019 as his evidence in chief.

98. It was his evidence that in December, 1991, while working at Chawla & Company Advocates he prepared a charge instrument over the suit property to secure advances of Kshs 30million on the instructions of City Finance Limited; that the charge was executed by David Koech and Cyrus Jirongo; that he prepared the document and it was not upon him to attest to the same and that he gave them the charge and other documents for execution by their lawyers.

99. He testified that the charge was returned to them and they registered the same in December, 1991; that the chargor was Soy Developers Limited and David Koech and Cyrus Jirongo were presented as its Directors; that there were share transfer forms and form 203A, duly filed at the Companies registry showing that they were the directors and that he conducted a personal search at the registry which revealed that the documents had been filed.

100. It was his testimony that the receipt was valid and there was a counter copy in the company file; that a clerk in their office conducted the search; that the instructions he received from the bank were accompanied with the original title; that he was told that part of the funds, Kshs 10million, were for the purchase of Soy Developers Limited by Mr Koech and Jirongo and that by purchasing the company, they would own the suit property.

101. According to DW3, instead of direct sale of the land, they purchased the company shares which was cheaper; that the shares were being purchased from Mr. and Mrs. Sammy Kogo and that he knew them during the transaction because they followed up on their payments.

102. DW3 stated that at the bank, he was dealing with David Mutua Muoki who was the one signing the letter of instructions; that he never saw the letter dated 10th January, 1992 seeking the share transfer forms and form 203A from Jirongo and Koech; that by 10th January, 1992, the charge had already been registered and that they did not have the originals but copies of the share transfer forms and form 203A.

103. DW4 was Justus Munene Munyu, a valuer by profession, practicing under Daytons Valuers Limited. He stated that he carried out a valuation of the suit property on the instructions of Cyrus Jirongo, who informed him that he was the Director of Soy Developers. He adopted his valuation report which he produced as an exhibit.

104. It was his testimony that the property is a vacant piece of land in Upper hill; that the land is in the name of the 3rd Defendant; that as the land is a vacant plot, they used the comparable method; that the market value of the property was Kshs 600million as at that time and that he had seen the different valuation reports including the report adduced by the 2nd Defendant

105. It was his evidence that the report by Kinyua Koech shows a clear undervaluation of the property; that although they said they used comparable methods, they did not indicate which trends they used to give a value of Kshs 23million; that in 2003, Upper hill was upcoming as a commercial hub for Nairobi to decongest the CBD and that the land in the same neighborhood and acreage was Kshs 300million.

106. DW5 was Josiah Mugendi Njagi, a senior clerical officer working with the Business Registration Services, formerly Registry of Companies. He adopted his witness statement dated 23rd May, 2023 as his evidence in chief and produced his bundles of documents as 1DEXB2.

107. It was his evidence that he obtained the documents in respect of Soy Developers from the scanned images from the company server; that these are the only documents for Soy Developers as it does not have any physical file; that he has a letter dated 20th November, 2005 in which the Registrar states that she could not conduct a search and that the position as at 20th November, 2008 was that the MEMOART of the company was not in the file.

108. In cross-examination, DW5 stated that electronic records are as valid as physical records; that this is not the only company whose physical records they don't have; that the records show that the Directors of Soy Directors are Sammy Kogo and Antoinnette Boit; that he has form 203 dated 12th April, 1989; that it is not possible that form 203A could have disappeared; that between 1991 and 2008 there were no annual returns for the company; that he has the returns of 1990 and 1992 filed on different dates; that the bulk filing of the returns happened in 2015; that the returns were filed up to 2015 at the same time and that he does not have the letter dated 15th May, 2018.

109. DW6 was Mikah Lekeuwan Nabosi currently with the Central Bank of Kenya. It was his evidence that he was a liquidation agent of Post Bank Credit; that he had been seconded to Kenya Deposit Insurance Corporation and was there from 4th July, 2013 to 7th June, 2021. He adopted his witness statements dated 27th January, 2o2o and 23rd March, 2022 as his evidence in chief and produced the documents attached thereto as 2DEXHB1 and 2DEXHB2.

110. It was his evidence that in 1992, the bank charged the suit property; that the collateral was sold upon default; that Soy Developers filed the suit claiming the land belongs to it; that the borrower was Cyperr Projects International Limited who borrowed the sum of Kshs 50million and that the security provided was in the name of Soy Developers Limited.

111. He stated that the borrower provided the title; that the bank has to conduct a search to establish the ownership of the security and if there are any encumbrances; that they did not establish the ownership of the land because that was left to the Advocates as is the norm; that Chwale Advocates were the bank's Advocate but he does not recall the specific Advocate who drew the charge and that the charge is dated 25th September, 1992 and valuation should have been undertaken before registration.

112. DW6 stated that Koech valuers gave the value of the land at the time of selling the land on 10th March, 2005 for purposes of realizing the security; that statutory notices were issued and that the land was sold in 2005 for Kshs 23million in conformity with the valuation.

113. It was his evidence that in this case, the security was a title in the name of Soy Developers and a written consent was required which was given by Cyrus Jirongo and David Koech and that they did not conduct a search to establish directorship of Soy Developers Limited but relied on the representation of Mr. Jirongo and Dr. Koech.

114. DW6 confirmed that the standard procedure mandates that valuation must be done before lending money; that he has not seen such a valuation report on record; that the loan being 50M, it would not be prudent for the bank to accept security whose value was below Kshs 50million and that he is not sure how the loan of Kshs 50M accumulated to Kshs 16B over 12 years considering the interest 23%; and that the same is not possible.

115. It was his further evidence on cross examination that the payments were never recorded under the borrowers account although the property was sold; that they have never demanded the money from Sololo outlets; that he does not know how the buyer of the suit property was identified; that ASL paid the purchase price to Post Banks Lawyers; that according to the records, no payments were recorded under the account of the borrower and that they have not filed a Defence to the 3rd Defendant's counterclaim.

116. DW6 stated during re-examination that the records from Central bank shows the money was paid to Post Bank; that the full amount of Kshs 23, 000,000 was accounted for; that they received Kshs 16million and the balance was withheld by the lawyers as legal fees and that Soy Developers Limited does not owe the bank any money.

117. DW7 was Fredrick Kinyua, a registered valuer. He adopted his report dated 10th March, 2005 prepared on the instructions of Deposit Protection Fund, the liquidator agent for Post Bank as his evidence in chief. He stated that the report was signed by himself and another individuals in the firm.

118. It was his evidence that the search conducted on 8th March, 2005 showed that the property was owned by Soy Developers and had an encumbrance being a charge registered in favour of Post Bank for Kshs 50million as at 1992.

119. It was his evidence that he is unaware of any valuation undertaken to secure the loan; that depending on the relationship between the bank and the client, it was possible to get a loan more than the value of the security; that the report by Bageine Karuya Limited in 1999 returned a value of Kshs 35million; that at the time he did his report, the economy was performing poorly; that he cannot comment on the report by Lloyd Masika which set the value of the property in 2006 at Kshs 370million and that the current value of the land is about Kshs 600million.

120. DW8 was Kartik Patel, the Finance Director of the 3rd Defendant, ASL Limited. He adopted his witness statement dated 12th June, 2017 as his evidence in chief and produced the bundle of documents as 3DEXB1.

121. It was his evidence that on 27th April, 2005, TR Consultants approached them with an offer to buy the suit property from the 1st Defendant; that on 10th May, 2005, they accepted the offer; that the firm of Kimani & Michuki Advocates informed them that they were authorized to enter into the sale agreement and that prior to entering into the agreement, they carried out a search which showed that the property had been charged to Post Bank.

122. According to DW8, they purchased the suit property at the price of Kshs 23million; that they paid a deposit of Kshs 2.3 million which was duly acknowledged by Kimani & Michuki who issued them with a receipt and that on 24th May, 2006, they paid the balance of the purchase price being Kshs 10, 700,000/= to their Advocates for onward transmission to Kimani Michuki Advocates.

123. DW8 testified that the suit property was the subject in *Darelle Limited Plaintiff v ASL Limited & 2 Others* [2015]eKLR in which the Court found them to be the lawful proprietors of the suit property; that the aforesaid judgement was upheld by the Court of Appeal; that the Chief Lands Registrar also dealt with the suit property and found in their favour and that he is unaware of any transaction between the Plaintiff and other Defendants.

124. During cross-examination, he stated that he was personally involved in the transaction; that the sale was by the bank exercising its statutory power of sale; that he knows the process and it is not necessary that the security is of a higher value and that it is possible to borrow more than the value of the security.

125. DW8 admitted that for service of statutory notices to be valid, they must have been served through either personal service or registered post and not by ordinary post; that the mode of service to Soy Developers Limited was by ordinary post; that he never confirmed that the amount of Kshs 16B claimed was due and that TR Consult informed them that the bank was selling the suit property of a client in default.

126. It was his further evidence on cross examination that he is aware that the bank never advertised the property for sale; that he is unaware of whether the owner of the land was consulted before its sale by private treaty; that the charge indicated that the principal borrower was Cyperr Limited; that although the instructions for the sale made reference to a public auction, they purchased it by private treaty and that the Plaintiff was never involved in negotiations over the purchase of the property.

127. He stated that the instructions were that the property be sold by way of public auction but the same was sold by private treaty; that they did not sue the Plaintiff in the consolidated cases because they did not buy the property from it but from Post Bank and that the sale was not an issue in those suits.

Submissions

128. The Plaintiff's Counsel submitted that neither the 1st Defendant nor any of its nominees has ever acquired any proprietary interest in the suit property having not completed the agreement; that as regards the company, the agreement of 18th November, 1991 was for the sale of the suit property and not the sale of shares and that the alleged extrinsic evidence to the contrary is inadmissible as set out in Section 97 of the *Evidence Act* and affirmed by the Courts in *Twiga Chemicals Industry v Allan Stephen Reynolds*[2014]eKLR and *Fidelity Commercial Bank Ltd v Kenya Grange Vehicle Industries Limited*[2017]eKLR.

129. According to Counsel, in alleging that the agreement indicated that the suit property would be transferred through transfer of shares, the 1st Defendant is asking the Court to re-write the agreement and that as affirmed by the Court of Appeal in *National Bank of Kenya v Pipe Plastic Samkolit(k)Ltd*(2002)2 EA and reiterated in *Pius Kimayo Langat v Co-operative Bank of Kenya Ltd*[2017]eKLR, Courts cannot rewrite contracts between parties.

130. Counsel for the Plaintiff contends that in claiming that the suit property belongs to the Plaintiff and simultaneously that it belonged to Jonathan Moi, the 1st Defendant is approbating and reprobating and that they are estopped by the doctrine of Estoppel by Deed. Reliance in this respect was placed

on the cases of *Greer v Kettle*[1938]AC 156 and *Edward Nyingi Mukundi v Terry Wanjiku Kariuki & Another*[2020]eKLR.

131. It was submitted that in any event, by virtue of the principle of *nemo dat* expressed in *Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maina*[2019]eKLR, being that one cannot give what he does not have, the Plaintiff could not confer upon the 1st Defendant or its nominees the rights to shares actually owned by Sammy Boit Kogo and Antoinnette Kogo.

132. It was asserted that the registration of a person as a director and/or shareholder can only be proven by way of evidence and that in view of the conflicting evidence in this regard, this claim must be disregarded by the Court.

133. Counsel submitted that in view of the fact that the Plaintiff's directorship never changed, the charges created over the suit property on behalf of both CFL and PBC were invalid and therefore incapable of conferring any enforceable interest upon them; that as stated by the Court in *Bugerere Coffee Growers Ltd Sebaduka*[1970] EA, actions taken in the name of the company not authorized by its bonafide directors are of no consequence and that the Court in *Chevron (K) Limited v Harrison Charo Wa Shutu* [2016]eKLR affirmed that a company as an artificial body can only act through the agency of its organs, the board and shareholders.

134. It was submitted that the impugned charges were registered without any due diligence being undertaken, a critical aspect as espoused by the Court in *Daniel Kipruto Metto v ChaseBank (K) Limited* [2018]eKLR and that the evidence in this case shows the existence of a guarantee contract without the primary lending contract renders the guarantee contract void.

135. Counsel for the Plaintiff submitted that the purported exercise of the statutory power of sale was illegal for lack of a valid statutory notice. Reliance in this respect was placed on the cases of *Trust Bank Limited v Eros Chemist Ltd*[2000]eKLR and *Elizabeth Wambui Njuguna v Housing Finance Company of Kenya Ltd*[2006]eKLR.

136. Counsel submitted that the chargee herein has failed to prove service of the statutory notice whose onus falls on it as stated by the Court of Appeal in Ochieng & Another v Ochieng & 2 Others[1995-1998]2 EA, 260 and that similarly, failure to serve the principal debtor with the statutory notice rendered the same void as appreciated by the Courts in *David Ngugi Ngaari v Kenya Commercial Bank*[2015]eKLR and *East African Ventor v Agricultural Finance Corporation & 4 Others*[2022]eKLR.

137. According to Counsel, the suit property was sold at an undervalue and in the circumstances, justice dictates that the sale is invalidated. Counsel cited the cases of *East African Ventor Co Ltd v Agricultural Finance Corporation*[2017]eKLR and *Cuckmere Brick Co Ltd v Mutual Finance Ltd*[1971]2 ALL ER 633.

138. It was submitted that the fact that the suit property was sold by private treaty contrary to the 2nd Defendant's express instructions to sell it by way of public auction invalidates the same and that in The *Hon Attorney General v Orbit Chemical Industries* [2019]eKLR, the Court held that when an advocate acts contrary to instructions issued by a client, his actions are not binding on the client.

139. Counsel submitted that in *Samuel Kamere v Land Registrar, Kajiado*[2015]eKLR, the Court found that in order to be considered a bona fide purchaser for value, one must prove that they acquired a valid and legal title, carried out due diligence to determine the lawful owner and paid valuable consideration and that the Supreme Court in *Dina Management Limited v County Government of Mombasa & 5 Others* 2021[2023]KESC 30(KLR) held that where a party's root of title has been challenged, he cannot benefit from the doctrine of bonafide purchaser.

140. Counsel urged that the Plaintiff's suit is not statute barred as the same is not based on, and does not seek to enforce any rights or obligations under the agreement of 18th November, 1991; that the claim is founded on fraud and as held by the case of *Justus Tureti Obara v Peter Koipeitai Nengison* [2014]eKLR time begins to run upon discovery of the fraud and that in this instance, fraud was discovered in 2015 and the suit filed in the same year.

141. As regards the competence of the suit, Counsel submitted that the same is not incompetent having been duly instituted by the Plaintiff's bonafide directors and that the 3rd Defendant's contention that their title was recognized in previous proceedings has no basis as the Plaintiff and PBC though necessary parties, were not parties to the aforesaid suits.

142. The 1st and 5th Defendants' Counsel submitted that a reading of Article 162(2)(b) of the *Constitution* as read with Section 13 of the *ELC Act* makes it apparent that this Court has no jurisdiction to entertain the issue between it and the Plaintiff centered on the directorship and shareholding of Soy Developers Limited and whether the property was lawfully charged to the lenders and that in determining its jurisdiction, the Court should be guided by the sentiments in *Co-operative Bank of Kenya Limited v Patrick Kangethe' Njuguna & 5 Others*[2017]eKLR.

143. Counsel submitted that the Plaintiff's suit against the 1st and 5th Defendants is statute barred by virtue of Section 4(1)(a) of the *Limitation of Actions Act* being founded on contract and tort; that the Plaintiff's right on the property crystallized on 15th January, 1993 when the 1st Defendant in response to a demand letter, informed the Plaintiff that it had made full payments and ended on 15th January, 1999.

144. According to counsel, the claim as regards the transfer of shares and change of directorship is a claim in tort falling under the purview of Section 4(2) of the *Limitation of Actions Act* which expired on 21st October, 1995.

145. Counsel submitted that the Plaintiff's attempts to bring themselves within the exception of limitation by alleging fraud does not lie in view of the evidence adduced and that with due diligence, the Plaintiff could have discovered the alleged fraud earlier especially considering the fact that after taking possession in 2006, the 3rd Defendant erected signs on the property.

146. It was submitted by Counsel for the 1st and 5th Defendants that the Plaintiff's witness conceded to being aware of the fraud upon the titles reconstruction in 2008 and that the Plaintiff should have initiated action for the alleged fraud within 3 years of 2006-2008.

147. As regards whether the Plaintiff had established any claim for fraud as against the 1st and 5th Defendants, Counsel submitted that no evidence has been demonstrated in this regard; that as held in *Salomon v Salomon* AC 1971, a company is distinct from its members and alleged tortious actions by its directors cannot bind the company and that similarly, the Plaintiff company has no property in the shares of Sammy and Antoinette Kogo.

148. Counsel for the 1st and 5th Defendants submitted that the sale of the suit property by the 2nd Defendant to the 3rd Defendant in exercise of its statutory power of sale was fraudulent and/or irregular having not conformed to the law and that the 1st and 5th Defendants' Counterclaim is merited and should be upheld.

149. The 2nd Defendant's Counsel submitted that the original Plaint was defective not having been signed and dated contrary to Order 2 Rule 16 of the *Civil Procedure Rules*; that as stated by the Court in *Southern Engineering Co. Limited v Heady Berge Limited & Another* [2019] eKLR, the same is a mandatory and not technical requirement going to the very root of the pleadings.

150. Counsel submitted that that there was no competent affidavit in verification of the initial Plaint filed in Court on 13th February 2015, in violation of Order 4 Rule 2 of the *Civil Procedure Rules*; that the Plaintiff's claim is statute barred and that it knew or ought to have known about the fraud earlier than 2015 when it moved the Court.

151. It was submitted that as held by the Court in *Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited*[2001] eKLR, once property is offered as security, it by that very fact becomes a commodity for sale; that the Plaintiff has departed from his pleadings contrary to Order 6 Rule 6 of the *Civil Procedure Rules* and that dealing with the same issues albeit in a criminal case, the Supreme Court in *Cyrus Shakhalanga Jirongo v Soy Developers Limited and 9 Others*[2021]eKLR stated that the institution of civil proceedings, simultaneously with criminal proceedings evinced mischief and dishonesty which the Court should not countenance.

152. The 3rd Defendant's Counsel submitted that the Plaintiff's claim is statute barred, a position affirmed by the Supreme Court in *Jirongo v Soy Developers Ltd & 9 Others* (Petition 38 of 2019) [2021] KESC 32 (KLR) (16 July 2021) and that pursuant to Section 7 of the *Limitation of Actions Act*, the Plaintiff ought to have filed a suit for recovery of land within 12 years, that is by 2003. Instead, it was submitted, it filed the present suit in the year 2015, which is 24 years out of time.

153. Counsel submitted that that the principal of stare decisis means this Court is bound by the decision and findings of the Supreme Court aforesaid and that having been aware there was a charge in favour of Post Bank registered against the suit property and the same had not been discharged, Kenagri and Cyperr Projects must have been alive to the fact that the suit property could be sold under the provisions of the charge for default.

154. Counsel submitted that ASL is the lawful proprietor of the suit property as upheld by the Court in ELC 24 of 2008 consolidated with ELC 567 of 2009 and affirmed by the Court of Appeal on appeal in Civil Appeal No 403 of 2017 and that in the circumstances, this Court cannot inquire into the ownership of the property and reach a different conclusion than the Court of Appeal. Counsel cited the cases of *Bellevue Development Company Ltd v Francis Gikonyo & 7 Others*[2018]eKLR and *Cami Graphics Limited v Chief Registrar of Judiciary & Others* [2024] KEHC 2999 (KLR).

155. In any event, submitted Counsel, the totality of the evidence shows that ASL purchased the property in good faith for valuable consideration and paid stamp duty without any notice of fraud of defect in the title.

156. Counsel submitted that notwithstanding the Plaintiff's absence in the previous suit, the determination with respect to the property was a judgement in rem; that as explained by the Court in *John Omolo Oracha & 3 Others v Kenya Petroleum Refineries Ltd &3 Others* [2017]eKLR, a judgement in rem operates on a thing or status rather than against the person and binds all persons to the extent of the interest in the thing and that allegations of fraud as against the 3rd Defendant have not been proven.

157. Counsel submitted that the Plaintiff is not entitled to the orders sought as the equity of redemption was extinguished upon the sale of the property to it by Post Bank as affirmed by the Courts in several decisions which he quoted.

158. The Plaintiff filed supplementary submissions on 26th April, 2024. Counsel submitted that where a matter is multi-faceted such as in the present case, the Court should apply the test of the pre-dominant issue; that the Plaintiff's suit as against the 1st and 5th Defendants is not statute barred not being based on contract or tort and that the 2nd Defendant has raised new issues by way of submissions, a practice that is unacceptable as affirmed by the Courts.

159. According to Counsel, the 3rd Defendant's plea to have their Plaint struck out on account of being defective is contradictory in light of the fact that they filed a Defence to the aforesaid defective Plaint; that they ought to have filed a substantive application to strike out the Further Amended Plaint and that in any event, failure to date a pleading/ affidavit is not fatal as stated in Order 19 Rule 6 of the *Civil Procedure Rules* and as affirmed by the Court in *Panchal Trading(K) Limited v NF Metals Corporation*[2021]eKLR.

Analysis and Determination

160. Vide the present suit, the Plaintiff seeks, inter-alia, rectification of the register to have itself registered as the sole proprietor of the suit property, permanent injunction restraining interference with the suit property, general damages for disturbance of its right to quiet possession and compensation for violation of its constitutional rights to property.

161. It is the Plaintiff's case that it was allocated the suit property sometime in 1989; that in 1991, it entered into an agreement with the 1st Defendant for the sale of the company and its only asset, the suit property and that pursuant to the agreement, it handed over the 1st Defendant the title to the suit property upon being paid 10% of the purchase price. It is the Plaintiff's case that the 1st Defendant thereafter failed to complete the purchase and refused to return the title.

162. According to the Plaintiff, its various attempts to get the title from the 1st Defendant and through the Lands Registry was futile and that in 2015, they received information that the property was registered in the 3rd Defendant's name having been sold to it by the 2nd Defendant in exercise of its statutory power of sale.

163. The Plaintiff asserts that the registration was fraudulent; that the sale between themselves and the 1st Defendant having failed, no change of directorship of the Plaintiff ever occurred and it remained the sole owner of the suit property and that subsequently, all transactions conducted on the suit property by the 1st Defendant, to wit, the charge, leading to the sale to the 3rd Defendant were void.

164. On the other hand, it is the 1st and 5th Defendants' case that vide an agreement entered into on 18th November, 1991, Sammy Boit Kogo and Antoinnette Kogo (PW1 and PW2) transferred all their shares, rights and interests in the Plaintiff to Cyrus Jirongo and David Koech and that they were paid the agreed purchase price of Kshs 20million and duly executed transfer of their shares to Cyrus Jirongo and Davy Koech aforesaid, who took over as directors of the Plaintiff.

165. They contend that Davy Koech and Cyrus Jirongo as directors of the Plaintiff executed a charge over the suit property in favour of Citi Finance to guarantee a loan to Sololo Limited and thereafter another charge to Post Bank Credit Limited to guarantee an overdraft facility of Kshs 50million to Cyperr Projects International Limited.

166. It is the 1st and 5th Defendants' case that through the present proceedings, they learnt that the suit property was sold by the 2nd Defendant to the 3rd Defendant in a purported exercise of its statutory power of sale.

167. They contend that the aforesaid sale was illegal having been at a gross undervalue and having been sold by way of private treaty; that no valid statutory notice was served upon the Plaintiff at all and that the purported demand for the sum of Kshs 16 billion is patently incredible and unjustifiable.

168. The 1st and 5th Defendants assert that this Court lacks jurisdiction to entertain the matter as the main issue between it and the Plaintiff centers on who the bona fide directors and shareholders of Soy

Developers are. They contend that in determining whether either the Plaintiff or 1st and 5th Defendants' claim is competent, this Court must determine the directorship and shareholding aforesaid.

169. On its part, the 2nd Defendant, while conceding that the Plaintiff was the first registered owner of the suit property asserts that it sold the property to the 3rd Defendant in exercise of its statutory power of sale as chargee upon issuance of the requisite notices in accordance to the law.

170. The 3rd Defendant asserts that it purchased the suit property from the 2nd Defendant who was selling the same in exercise of its statutory power of sale as chargee following default by the Plaintiff in repaying the loan it advanced to it and that arising from the aforesaid sale, the Plaintiff's equity of redemption was extinguished and it acquired an absolute and indefeasible title to the suit property.

171. The 3rd Defendant contends on a without prejudice basis that the legitimacy of its proprietorship of the suit property was the subject of ELC 567 of 2008 as consolidated with ELC 24 of 2008 and cannot be the subject of re-determination by this Court. The 4th Defendant did not participate in the proceedings.

172. In view of the foregoing narration, and having taken into account the pleadings, evidence, testimonies and submissions, the following arise as the issues for determination;

i. Whether this Court has jurisdiction to entertain this suit?

ii. Whether the Plaint and/or the 1st and 5th Defendants' Counterclaim are fatally defective?

iii. Whether the Plaintiff's claim and/or the 1st and 5th Defendants claim are statute barred?

iv. Whether there was a transfer of the Plaintiff and/or the suit property to the 1st Defendant?

v. Whether there was a lawful charge over the suit property?

vi. Whether the 2nd Defendants sale of the suit property was tainted with illegalities and/or irregularities?

vii. Whether the 3rd Defendant's title is protected as a bonafide purchaser for value?

viii. Whether the 1st and 5th Defendants' Counterclaim is merited?

ix. Whether the 3rd Defendants Cross-claim is merited?

x. What are the appropriate orders to issue?

173. It is trite that jurisdiction is everything. The significance of jurisdiction was succinctly captured by Nyarangi, J.A. in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1:

> "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

174. This position was affirmed by the Court of Appeal in the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR which stated as follows:

> "So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once

it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain."

175. The broad jurisdiction of the Environment and Land Court is donated by Article 162(2) of the *Constitution* of Kenya which provides as follows:

> " Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to- (b) the environment and the use and occupation of, and title to, land..."

176. Pursuant to the constitutional mandate above, Parliament enacted the *Environment and Land Court Act*, No 19 of 2011. Section 13(2) of the Act provides that:

> " In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes—(a)relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;(b)relating to compulsory acquisition of land (c)relating to land administration and management;(d)relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e)any other dispute relating to environment and land."

177. Vide the present suit, the Plaintiff seeks, inter-alia, for a declaration that it is entitled to ownership of the suit property, permanent injunction restraining interference with the suit property and compensation for violation of its proprietary rights. It is the Plaintiff's case that it is the sole proprietor of the suit property and has not parted with possession thereof.

178. According to the Plaintiff, the contract it entered into for the sale of the suit property to the 1st Defendant was not completed and no rights in the said property were transferred. It seeks to have the 3rd Defendant's title to the property revoked.

179. The 1st Defendant equally lays claim to the suit property. It contends that it purchased the Plaintiff company together with the suit property. While conceding to have charged the suit property to the 2nd Defendant, it seeks to impugn the sale of the suit property by the 2nd Defendant to the 3rd Defendant on account of fraud in the exercise of the statutory power of sale. In the Counter Claim, the 1st and 5th Defendants seek, inter-alia, for cancellation of the 3rd Defendant's title as well as a declaration that they are the bonafide directors of the Plaintiff.

180. The 3rd Defendant maintains that it is a bonafide purchaser for value having purchased the property from the 2nd Defendant as chargee and that the Plaintiff's equity of redemption has been extinguished.

181. Considering the foregoing narration, it is clear that the dispute herein is in respect to ownership of the suit property, which can only be determined by determining the issue of directorship of the Plaintiff company. The dispute also concerns the legitimacy of the 2nd Defendant's exercise of its statutory power of sale of the suit property which resulted in the acquisition of the title by the 3rd Defendant. This is clearly "a mixed grill matter."

182. So how is a court to determine such a matter. Initially, there were two schools of thought within the superior courts. One school favoured the 'pre-dominant purpose test' whereas the other school rooted for the 'pre-dominant issue before court test'.

183. The proponents of the former include Ngugi, J (as he was then), who rendered himself in *Suzanne Achieng Butler & 4 Others v Redhill Heights Investments Limited & Another* (2016) eKLR as follows:

> " 23. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.
>
> The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse...
>
> In my view, the following factors are significant in determining the nature of the contract; a) the language of the contract; b) the nature of the business of the vendor; c) if the contract is mixed, the intrinsic worth of the two parts – land acquisition and other services or provision of materials; d) The gravamen of the dispute – whether rooted in contests about ownership, deficiency in title, occupation or use of the land or whether the genesis of the dispute is something else like the quality of services offered, construction, works and so forth; and e) the remedies sought by the Plaintiff.
>
> At the same time, however, it is imperative that a Court should not approach jurisdiction in an ultra-technocratic fashion as an essentialist parsing of sticks in a bundle. Jurisdiction is a substantive standard aimed at ensuring only the right court or tribunal clothed with the legitimate mandate deals with a dispute or controversy. It is not a jurisprudential thaumatrope to keep litigants guessing to which Court their controversy belongs at the pain of having their timeously pleaded case struck out for not pigeon-holing their claim in the correct box. The correct approach to jurisdiction is one which treats the question functionally as opposed to technically; one that looks at the constitutional objectives in creating equal status Courts as opposed to engaging in an essentialist, taxonomical and categorical analysis."

184. Munyao, J was for the other test. In *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & Another* [2018] eKLR the learned Judge argued as follows:

> " 25. ... On my part, I would modify the above test, and hold the position that what is important when determining whether the court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before court, for I think that the purpose of the transaction, may at times be different from the issue or subject matter before court. Let us take the transaction of a charge as an example. The predominant purpose of creating a charge is for one to be advanced some financial facilities. However, when it comes to litigation, the predominant issue may not necessary be the money, but the manner in which the chargee, is exercising its statutory power of sale. Here, I trust that you will see the distinction between the predominant purpose of the transaction

> and the predominant issue before court. That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant's predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC."

185. The Court of Appeal had an occasion to dealt with the issue. In *Joel Kyatha Mbaluka t/a Mbaluka & Associates Advocates v Daniel Ochieng Ogola t/a Ogola Okello & Co Advocates* [2019] eKLR, it held as follows:

> "We reiterate the position taken in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna* (supra), that in construing whether the ELC had jurisdiction in a matter, the consideration must be the dominant issue in the dispute and whether that issue relates to the environment and the use and occupation of, and title to, land."

186. The Court is so guided. Considering the nature of the dispute before this Court, the Court harbours no doubt that the dominant issue herein is the title to the suit property. In determining this question, the Court is well within its mandate to inquire into the legitimacy of the 1st and 5th Defendant's claim that they are the bonafide directors of the Plaintiff and therefore the rightful owners of suit property.

187. As regards the question on the legitimacy of the 2nd Defendant's exercise of its statutory power of sale, this is a question firmly within the mandate of this Court considering the allegation by the Plaintiff that the suit property should not have been charged by the 1st and 5th Defendants in the first place, the same having not passed to the said Defendants.

188. Another jurisdictional issue has been raised by the 3rd Defendant, to wit, that this Court is prohibited from determining this matter because the question of the ownership of the suit property was determined by the Court in ELC 567 of 2008 as consolidated with ELC 24 of 2008.

189. According to the 3rd Defendant, the said matter settled any and all disputes regarding ownership of the suit property as judgements on land ownership issued by Courts of competent jurisdiction are judgments in rem, conclusive as against the whole world, and not open to challenge herein.

190. In contrast, the Plaintiff asserts that they were not parties to the proceedings in the Darelle case aforesaid and the judgement was in any event procured on the basis of misrepresentation.

191. Defining what constitutes a judgement in rem, Odunga J. (as he was then) in *Abukar G Mohamed v Independent Electoral and Boundaries Commission* [2017] eKLR cited with approval the decision in *Pattni v Ali & Another (Isle of Mann (Staff of Government Division)* [2006] UKPC 51 in which reliance was sought from *Jowitt's Dictionary of English Law* (2nd Edition.) P. 1025-6 to the effect that:

> "A judgment in rem is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is also declared by the adjudication...So a declaration of legitimacy is in effect a judgment in rem."

192. The Court has perused the decision in *Darelle Limited Plaintiff v ASL Limited & 2 Others* [2015] eKLR. This suit involved a dispute between Darelle Limited and the 3rd Defendant herein each claiming proprietorship of suit property and holding a title thereto. In its determination, the Court

found that the grant issued to the 3rd Defendant was a genuine one emanating from the Lands office whereas the grant issued to Darelle Ltd having been acquired from Johnstone Chemos was a forged title.

193. The Court also found that the 3rd Defendant's title was first in time as against Darelle Ltd's title and that the transfer to Darelle Ltd was undertaken in breach of the Court orders restraining interference with the suit property. Ultimately, it upheld the 3rd Defendant's title.

194. Vide the present suit, the Plaintiff and the 1st and 5th Defendants lay claim to the suit property. They each allege fraud with respect to the 3rd Defendant's acquisition thereto. The Plaintiff asserts that the 1st Defendant had no rights to deal with the property, leading to the charge which eventually led to the sale of the property to the 3rd Defendant.

195. The 1st and 5th Defendants contend that the exercise of the statutory power of sale was illegal. Indeed, it is undisputed that the Plaintiff herein and the 1st and 5th Defendants were not parties to the Darelle case.

196. Taking into account the foregoing narration, it is immediately clear that the issues is this suit were not subject to the Court's determination in the Darelle case, being the validity of the charge of the suit property, its subsequent sale and transfer to the 3rd Defendant in exercise of the 2nd Defendant's statutory power of sale, and the legitimacy of the 3rd Defendant's title in light thereof.

197. The assertion by the 3rd Defendant not only runs contra to the right to a fair hearing as espoused under Articles 50 as read with Article 25 of the *Constitution*, but is an affront to the right to property which the Plaintiffs and the 1st and 5th Defendants seek to protect vide this suit.

198. Considering a similar objection, the Court in *Lakeview Developments Limited v Belgo Holdings Limited & another* [2021] eKLR, this court noted as follows:

> "The *Land Act* provides at Section 7 the methods through which land may be acquired. These include allocation, land adjudication process, compulsory acquisition, prescription, transfers, transmissions and long term leases. This court does not agree with the 1st Defendant's contention that a judgement in rem can confer title more so where there is an allegation that the title which was the subject of previous proceedings was obtained through fraud or that it was unlawfully acquired. In this court's view, since the Plaintiff is challenging the transfer of the Suit Property from the Plaintiff to the 1st Defendant, then that is the determination that will have to be made by the court in this suit."

199. In the same vein, the matters before the Court in the Darrelle case leading to the determination having been different from the issues herein, it cannot be said that the Court of Appeal decision affirming the same activated the principle of res judicata and that this Court is precluded from determining the matter.

200. Similarly and with utmost respect, the observations by the Supreme Court in *Cyrus Shakhalanga Khwa Jirongo v Soy Developers Ltd & 9 Others* [2021]eKLR have nothing to do with the current trial. The matter therein arose from entirely different proceedings, to wit, Judicial Review proceedings. In the end, the Court finds that it is duly vested with jurisdiction to determine this matter.

201. The 2nd Defendant contends that the original Plaint herein was defective and subsequent thereto, the Further Amended Plaint is defective rendering the suit fatal. It is their case that the original Plaint was neither dated nor signed contrary to Order 2 Rule 16 of the *Civil Procedure Rules* and that further, the verifying affidavit was filed after the Plaint, meaning that there was no competent affidavit verifying the Plaint.

202. In response, the Plaintiff asserts that this contention by the 2nd Defendant was not raised in its pleadings and is a new issue raised by way of submissions which runs contra to the law; that nonetheless the Plaint was duly signed and dated 16th February, 2015 and that the verifying affidavit was duly commissioned and dated 16th February, 2015.

203. The Plaintiff maintains that even if the 2nd Defendant's assertion was true, there is a stamp indicating that the Plaint was filed on 13th February, 2015 and that the fact that the verifying affidavit bears a later date is not fatal and may have been caused by an error of the receiving court official.

204. Having considered the 2nd Defendant's pleadings, it is noted that they did indeed raise the issue of the competence of the suit on account of the facts aforesaid. Order 2 Rule 16 of the *Civil Procedure Rules* provides as follows:

> " Every pleading shall be signed by an advocate, or recognised agent (as defined by Order 9, rule 2), or by the party if he sues or defends in person."

205. Whereas order 4 Rule 2 stipulates:

> " (2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1) (f) above."

206. The Court has perused the Court file and notes that the original Plaint filed therein is duly signed and dated 16th February, 2015. The verifying affidavit is equally duly signed and dated 16th February, 2015. It may well be that the copies of the documents aforesaid served upon the 2nd Defendant were not signed. This cannot however impugn the suit as the pleadings filed in Court are duly executed.

207. As regards the claim that the verifying affidavit was filed after the Plaint, it is noted that the stamps on the Plaint and the verifying affidavit both indicate 13th February, 2015 and nothing falls on the allegation that the verifying affidavit was filed after the Plaint.

208. The only discrepancy in the circumstances is the fact that the Plaint dated 16th February, 2015 was filed earlier, on 13th February, 2015. This is of course not possible and the Court agree that it points to a mistake on the date of the stamp which was used to receive the documents considering that 13th was a Friday and 16th, a Monday.

209. In any event, the same does not constitute a material defect going to the root of the matter and cannot warrant the striking out of the suit. As aptly expressed by the Court of Appeal in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & Others* [2013]eKLR, deviation from and lapses in form and procedures which do not go to the jurisdiction of the court, or the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical.

210. In the same case, the court held that it is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to the provisions of procedural law which at times create hardships and unfairness.

211. The 2nd Defendant further contends that the Plaintiff vide the Further Amended Plaint takes a different position to what was pleaded in the original Plaint contrary to Order 2 Rule 6(1) of the *Civil Procedure Rules*.

212. The said provision provides as follows:

> "(1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit. (2) Subrule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative."

213. The nature of the objection as raised by the 2nd Defendant is an objection to the amendment of the Plaint. The best time to have raised this objection would have been upon amendment of the pleading. The 2nd Defendant did not do so. The Further Amended Plaint is properly on record. Indeed, the 2nd Defendant filed a Defence to the same. In the circumstances, the Court cannot backtrack to consider whether the amendment was proper. This objection fails.

214. The Plaintiff contends that the Counterclaim as raised is fatally defective. It is its position that the Counterclaim introduces new parties, contrary to Order 7 of the *Civil Procedure Rules* and that the only recourse open to the 1st and 5th Defendants was to take out third party proceedings pursuant to Order 1 Rule 15 of the *Civil Procedure Rules*.

215. Order 7 of the *Civil Procedure Rules* speaks to Defences and Counterclaims. With respect to Counterclaims, Order 7 Rule 3 provides as follows:

> "A Defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the Plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such setoff or counterclaim shall have the same effect as a cross-suit, so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the Plaintiff before trial, if in the opinion of the Court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to Defendant to avail himself thereof."

216. On the other hand, Order 7 rule 8 of the *Civil Procedure Rules* provides as follows:

> "Where a Defendant by his defence sets up any counterclaim which raises questions between himself and the Plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be Defendants to such cross-action, and shall deliver to the Court his defence for service on such of them as are parties to the action together with his defence for service on the Plaintiff within the period within which he is required to file his defence."

217. Order 7, Rule 9 further provides:

> "Where any such person as is mentioned in rule 8 is not a party to the suit, he shall be summoned to appear by being served with a copy of the defence, which shall be served in accordance with the rules for regulating service of summons."

218. It is clear from the foregoing provisions that the law anticipates that a Defendant may bring a Counterclaim not only as against the Plaintiff, but as against other parties who may not be parties to the original the suit. The objection in this respect fails.

219. The Defendants maintain that the Plaintiff's suit is statute barred by virtue of the *Limitation of Actions Act*. They assert that the Plaintiff's claim is founded on a transaction that occurred in 1991 and that its claim being founded on contract and/or tort and/or recovery of land is statute barred.

220. To contextualize the objections under this head, it is necessary to set out the relevant provisions of the *Limitation of Actions Act*, Cap 22. Section 4 of the *Act* prescribes the limitation period for the institution of suits in regard to various causes of action. Section 4(1)(a) provides that the limitation for actions founded on contract is six years whereas as under Section 4(2), actions founded on tort have a limitation period of three years.

221. Section 7 prohibits the bringing of an action to recover land after the end of twelve years from the date on which the right of action accrued or, if it first occurred to some person through whom he claims, to that person.

222. The first port of call in determining whether a claim of statute bar is merited is a determination of the cause of action. In the case of *Edward Moonge Lenguuranga v James Lanaiyara & Another* [2019] eKLR, the Court defined a cause of action as a set of facts sufficient to justify a right to sue to obtain property or enforcement of a right against a party; a legal theory upon which the Plaintiff brings a suit.

223. Looking at the Further Amended Plaint, it is clear that the Plaintiff's cause of action against the Defendants is founded on fraud. There is no allegation of breach of contract or indeed any claim founded on tort. Therefore sections 4(1) and (2) are inapplicable.

224. The Plaintiff seeks to recover land and this claim falls under the province of Section 7 of the *Limitation of Actions Act*. As rightly stated by the Plaintiff, where an action is founded on fraud, time under Section 7 of the *Limitation of Actions Act* does not, by dint of Section 26 of that *Act*, begin to run until the fraud is discovered. This position was affirmed by the Court of Appeal in the case of *Kenya Ports Authority v Timberland(K)Ltd* [2017] eKLR as follows:

225. Section 26 of the *Limitations of Actions Act* provides as follows:

> " Where, in the case of an action for which a period of limitation is prescribed, either— (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or (b) the right of action is concealed by the fraud of any such person as aforesaid; or (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.. Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which— (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made."

226. Nonetheless, it is not enough to state without more that fraud was discovered at a particular time. Section 26 of the *Limitation of Actions Act* requires a party to show that they had exercised due diligence. In *Margaret Wairimu Magugu v Karura Investment Ltd & 4 Others* [2019]eKLR, the

Court of Appeal relied on the exposition by the Supreme Court of England in *Paragon Finance v D B Thackerar & Co.* [1999] 1 All 400 at 418B-D, where Millett L J opined that:

> "The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take."

227. The Defendants maintain that the Plaintiff should reasonably have been aware of the alleged fraud earlier than indicated on account of the fact that the Plaintiff was duly served with a statutory notice and failed to redeem its property and that upon acquiring title in 2006, the 3rd Defendant took possession and fenced the suit property.

228. According to the Defendants, between the years 2007-2008, due to an ongoing dispute over the suit property with Chemos & Darelle Limited, the 3rd Defendant put up caveat emptors in the newspapers and signages on the suit property; that further, the Plaintiff had by its own earlier admissions stated that it became aware of adverse interests in the suit property sometime in 2008.

229. On its part, the Plaintiff states that after the collapse of the sale agreement between itself and the 1st Defendant, and after numerous futile attempts to have the 1st Defendant return the title. It sought for the same from the Lands registry which continuously informed them that the file was lost.

230. Throughout their testimony, PW1 and PW2 maintained that the 1st Defendant's director informed them that he had lost the title which they had given him sometimes in 1992, and that they were not aware of any transaction in respect to the title until 2015. It was PW1's evidence that on 14th February, 2015, one Mr. Lubulelah, Lands Registrar, called him and informed him that the title had resurfaced at the lands office, and that tis when he learnt about the fraud.

231. The Court has considered the evidence. The Plaintiff has adduced numerous letters addressed to the land registry spanning several years from 1991, as well as copies of the search documents. The latest search document being one dated 12th March, 2014. Neither the searches nor the correspondence elicited any response.

232. Indeed, PW1 maintained that all along, the Mr. Jirongo informed him that he had misplaced the title. This court has no reason to doubt that assertion. Indeed, DW3, an employee of City Bank informed the court that although he knew PW1 at a personal level, and also as a director of the Plaintiff, he did not inform him when Mr. Jirongo charged the suit property in favour of City Bank in 1992.

233. Consequently, it is the finding of this court that there is no evidence to show that PW1 and PW2 knew or ought to have known that the suit property was charged to City Finance and Post Bank by the 1st Defendant, or at all.

234. The evidence adduced also shows that the 3rd Defendant acquired title to the suit property in 2006. On or about June, 2007, it sought and was granted permission to fence the property and in 2008, it instituted a suit to recover the property from Johnstone Kiplimo Chemos.

235. The 3rd Defendant has also produced evidence of caveat emptors published in the newspapers in October 2007 and August, 2008 as well as correspondence from the Ministry of Lands in the years 2009 and 2010 indicating that the title was registered in its name.

236. It is apparent that the Plaintiff's director, PW1, followed up with the registry in a bid to trace its title. The Court also finds it probable that the Plaintiff not having been a party to the Court proceedings in 2008 was not aware of the same, and may justifiably not have been privy to the caveat emptor

publications in the newspaper. Questions as to receipt of the statutory notices are heavily disputed by the Plaintiff, and especially by PW1.

237. Nonetheless, the Court considers that for an owner of property, a physical inspection of the property constitutes a critical and reasonable aspect of due diligence. If the Plaintiff's officers had done so, they would undoubtedly have been alerted to a foreign presence on the suit property alerting them to possible fraudulent activities sometime in 2006-2007.

238. In the letter dated 11th June, 2007, PW1 points to knowledge of possible fraudulent activities. The letter by PW1 states that "there is a possibility that Mr Johnstone Kiprimo Chemos has our title deed that we have been looking for many years. This is due to the fact that we understand that he has offered for sale the said piece of land as he is purporting to hold the original title deed."

239. In view of the foregoing, the Court agrees that the Plaintiff with reasonable diligence ought to have discovered the fraud earlier than 2015. In view of the 3rd Defendant's evidence on having taken possession and fenced the property sometime in 2007, and considering the Plaintiffs' letter aforesaid, the Court finds that the Plaintiff's discovered/or reasonably should have discovered the fraud in 2007, albeit without the crucial document to institute a suit, to wit, an official search.

240. Being a claim for recovery of land, the Plaintiff had 12 years from the said year, that is 2007, to institute the suit being sometime in the year 2018. Having filed the suit in 2015, it is the finding of the court the suit is within the statutory timelines.

241. Moving on to the 1st and 5th Defendants' claim, they seek inter-alia for a declaration that they are the bonafide directors of the Plaintiff and cancellation of the sale of the suit property to the 3rd Defendant.

242. The 3rd Defendant impugns their claim to the suit property stating that the same having accrued upon the 3rd Defendant's purchase of the suit property on 24th August, 2005 is statute barred, the Counterclaim having been filed in 2018 and that having charged the property, and the same not having been discharged, they must have been alive to the fact that the property could be sold in default.

243. Indeed, the 1st and 5th Defendants cause of action as against the 3rd Defendant in respect of the property arose upon its sale in 2005. The Counterclaim, having been filed in 2018, is approximately 13 years after the fact. The Defendants contend that they discovered the fraud in respect of the property during the current proceedings. No further particulars have been given in this regard.

244. The Court concurs with the position in *Dickson Ngige Ngugi v Consolidated Bank Ltd (Formerly Jimba Credit Corporation Limited & Another* [2020] eKLR that once property has been charged, the chargor is presumed to be alive to the fact that the property could be sold under the provisions of the charge for default.

245. Nonetheless, like the Plaintiff, the 1st and 5th Defendants were not party to the proceedings in the Darelle Case and cannot be blamed for not having been aware of the same nor been privy to the caveat emptor notices by the 3rd Defendant. However, it behooved them to undertake an occasional physical search of the property which would have alerted them of the 3rd Defendant's presence thereon especially upon the fencing of the property sometime in 2007.

246. The Court finds that the 1st and 5th Defendants with due diligence should have discovered the fraud sometime in the year 2007 and had 12 years from thereon to institute the suit which would have been sometime in 2019. Their claim is valid.

247. At the heart of this dispute is the question of directorship/ownership of the Plaintiff which is intricately tied to the ownership of the suit property. This issue is highly contested and each side was

obligated to prove its case. This position is succinctly captured in Sections 107, 109 and 112 of the *Evidence Act*. Section 107 provides as follows:

> "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

248. And Sections 109 and 112 of the same *Act* state as follows:

> "109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

249. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR stated as follows:

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
>
> "Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

250. By way of brief undisputed background, the Plaintiff was incorporated on 13th April, 1989 under certificate number C 39917. Its Directors were Sammy Arap Kogo and Antoinette Boit. It is equally not disputed that the suit property was first allotted to the Plaintiff vide a letter of allotment dated 4th April, 1989 and duly registered in its name. There is no contention regarding the process of allocation and registration of the suit property into the Plaintiff's name.

251. The Plaintiff, under the directorship of Sammy Kogo and Antoinnette Boit, entered into an agreement on 18th November, 1991. According to the Plaint, the agreement was for the sale of the "Plaintiff and all its assets including the suit property." The 1st and 5th Defendants too maintain that they agreed to purchase the suit property as the sole asset of the Plaintiff, which sale was to be in the form of acquisition and transfer of all the shares in the Plaintiff company to the 1st Defendant's directors, Shakhalaga Khwa Jirongo (Jirongo) and Davy Koech.

252. It is the Plaintiff's contention, through PW1 and PW2 (Sammy Kogo and Antoinnette Boit respectively), that they gave the title to the suit property to Jirongo pending completion of the sale

agreement and that the 1st Defendant did not complete the purchase price and subsequently, the contract lapsed.

253. According to the Plaintiff, the 1st Defendant remained with the title and proceeded to transact with it; that at the time of the transactions aforesaid, the Plaintiff was still the registered owner of the property, there having been no change of directorship and shareholding of the Plaintiff.

254. On the other hand, the 1st and 5th Defendants assert that the 1st Defendant duly fulfilled its part of the bargain by paying the entire purchase price pursuant to which the Plaintiff was transferred to it.

255. Both the Plaintiff and the 1st and 5th Defendants have adduced copies of the agreement dated 18th November, 1991. The agreement is between Soy Developers Limited as the vendor and Shakhalaga Khwa Jirongo t/a Kenagri Products Limited as the purchaser. Clause (c) of the agreement provide as follows:

> " The vendor has agreed to sell to the purchaser and the purchaser has agreed to purchase all that piece of land hereinbefore fully described Vacant and with no improvements erected and being thereon at the price of Kenya Shillings Twenty Million only."

256. The piece of land is described as All that piece of land known as and registered as Title No IR 47029, LR 209/11151 and situated in Nairobi Upperhill area in the Republic aforesaid containing a measurement of 0.4712 of a hactare. The terms of the agreement aforesaid make no reference to the transfer of the Plaintiff, or change of directorship of the Plaintiff. It only makes reference to purchase of the land, the suit property.

257. As a general rule, where the terms of a contract and/or deed are explicit and unequivocal, the Court is obliged to give effect and meaning to the said terms. The Court must reject an invitation to re-write the contract at the instance of either Party.

258. Discussing this, the Court of Appeal in The *Speaker Kisii County Asembly & 2 Others v James Nyaoga Omariba* (2015) eKLR, stated as hereunder:

> " The 1st appellant's attempt to vary the terms of the letters of appointment, in our view, offends the provisions of Sections 97 and 98 of the *Evidence Act*, Chapter 80 Laws of Kenya, which attempt we must reject... This is not the first time we are doing so. In the case of *John Onyancha Zurwe v Oreti Atinda alias Olethi Atinda* [Kisumu Civil Appeal No. 217 of 2003] (UR), we cited, with approval, *Halisbury's Laws of England* 4th Edition vol. 12, on interpretation of deeds and non Testamentary Instruments paragragh, 1478 as follows:-
>
> "Extrinsic evidence generally excluded:
>
> Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the document. Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document."

259. Speaking to the rationale of this rule, the learned authors of *Odgers Construction of Deeds and Statutes* (5th edn.) at p.106 posited as follows:

> " The supporting rationale for this rule is that, since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements or terms should

not be considered when interpreting that written contract agreement, as the parties had consciously decided to ultimately leave them out of the contract. In other words, one may not use evidence made prior to the written contract to contradict the ultimate contract that has been reduced into writing."

260. With respect to its exceptions, the Court of Appeal in *Fidelity Commercial Bank Limited v Kenya Garage Vehicle Industries Limited* [2017] eKLR, stated as follows:

> "The rule of exclusion of negotiations prior to entry of a contract as well as the parole evidence rule are subject to a number of exceptions. For instance, evidence of surrounding circumstances will be admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible to more than one meaning, but not to contradict the language of the contract when it has a plain meaning. Extrinsic evidence of terms additional to those contained in the written document will be admitted if it is shown that the document was not intended to express the entire agreement between the parties. If the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement. In *Gillepsie Bros. & Co. v Cheney, Eggar & Co.* (1896) 2QB 59 Lord Russell C.J. expressed this as follows;
>
> "...although when the parties arrive at a definite written contract the implication or presumption is very strong (sic) and such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement."

261. It is clear from the pleadings and the testimony by the Plaintiff and the 1st Defendant that there was an intent to dispose of the company as well as the suit property. Vide his statement, PW1 states that around the year 1991, the Plaintiff entered into a sale agreement with the 1st Defendant for the purchase of the Plaintiff and all its assets including the suit property. PW2 confirmed the same.

262. This is supported by various correspondences such as the letter of 14th January, 1993, demanding payment of the "sum of Kshs 10,000,000/= being the balance of the purchase price in respect of the above mentioned company together with the parcel of land cited above and which is owned by the company."

263. The issue of whether the agreement was completed, and in particular whether the 1st Defendant paid the full purchase price and subsequently whether any rights in the company was of great contention as between the Plaintiff and the 1st Defendant.

264. Out of the agreed purchase price of Kshs 20million, it is the Plaintiff's case that it only received the sum of Kshs 10million which was duly acknowledged by its Counsel on 5th December, 1991. After this amount was paid, it is the Plaintiff's case that the title document was released to the 1st Defendant, and not any other document including the Memorandum and Articles of Association and the signed transfer forms.

265. On its part, the 1st Defendant states that it paid the total sum of Kshs 27million as follows: Kshs 10million to Oraro & Rachier Advocates by cheque; Kshs 7million in cash to Jonathan Moi; Kshs 7miilion and Kshs 1 million by cheque to Jonathan Moi and Kogo respectively, and Kshs 2million by bearer certificates to Kogo totaling Kshs 27million.

266. Beginning with the payments to Sammy Boit (PW1) through bearer certificates in the sum of Kshs 2million, he denies receipt of the same. DW1 conceded on cross-examination that he did not have a copy of the same.

267. Similarly, DW3, who purportedly issued the said bearer certificate to PW1, stated that he has never dealt with Mr. Kogo in respect to this transaction and never paid him Kshs 2million as alleged. Ultimately, the payment of this amount to PW1 was not proven.

268. With respect to the payment of Kshs 1million and 7 million by cheque to Sammy Boit (PW1) and Jonathan Moi (deceased) respectively, the 1st and 5th Defendants have adduced credit advice vouchers no 853150 and 853134 from National Bank of Kenya. They also adduced into evidence a letter dated 14th August, 2019 from Mr Paul B Mureithi, Director of Operations, National Bank.

269. The aforesaid letter indicates as follows:

> " We have reviewed the matter and have established that the subject cheques were paid to the beneficiaries after presentation through special clearance on the 11th May, 1992."

270. Attached to the letter were the 5th Defendants' bank statement. The statement show a debit of Kshs 7million and 1 million respectively on the 11th May, 1992.

271. Vide a subsequent letter from the National Bank dated the 20th November, 2019, the bank clarified that their response vide the letter of 14th August, 2019 was on the basis of their review of the client's statement as against the vouchers presented by the customer. They noted thus:

> " In the absence of our records for the above transactions effected 27 years ago, we are unable to confirm the payee account numbers for the beneficiaries and the recipient banks.
>
> Certify the vouchers received from Mr S.K Jirongo since the same did not emanate from the Bank as we cannot trace the originals in light of the above."

272. The 1st and 5th Defendants contend that PW4 admitted on cross-examination that he did not investigate Mr. Kogo's accounts and that the investigations with respect to whether the Kshs. 7million and 1 million purportedly paid to Mr. Kogo and Jonathan respectively were ever received is not yet complete.

273. The Court has keenly considered these circumstances. It being the 1st and 5th Defendants' case that they paid the aforesaid sums, the evidential burden of proof in the first instance that they paid Kshs. 7million and 1 million to Mr. Kogo and Jonathan respectively lay on them and only after sufficiently discharging the same could the burden shift to the Plaintiff.

274. In the circumstances, the only documents produced in this respect having not been authenticated and there being no other evidence in this respect, the evidence tendered did not attain the bar to shift the evidential burden to the Plaintiff. In view of the foregoing, the Court finds these sums have not been proven.

275. The 1st and 5th Defendants also state that they paid Kshs 7million in cash to Jonathan Moi. Regarding this cash payment of Kshs 7 million, the 1st Defendant has adduced an acknowledgement note with respect to the aforesaid payment. The note indicates;

> " I Sammy Kogo ...do hereby irrevocably authorized you to pay on behalf of Soy Developers and in consideration of my transferring all my shares and those of my wife to you Mr Shakhalaga Khwa Jirongo and your nominees...and shall forthwith surrender all documents

pertaining to the above company inclusive of all registration documents and any assets owned by the company including its company seal and the title documents which have been handed over to you already.....we will have no other claim on you or your companies or nominees on payment of Kshs 7million to Mr Jonathan Moi".

276. PW1 denied having signed the authorization aforesaid and the deed of indemnity. PW5's evidence vide his report supported the contention that Mr Kogo did not indeed sign the indemnity. PW1 also maintained that he was not privy to any payments between Mr. Jirongo and Mr. Jonathan Moi.

277. PW3, equally denied having been privy to this meeting and/or exchange of monies whereas Gerald Bomet and Sammy Nyamweya did not give any evidence in this respect. In view of the conflicting testimony in this respect and in the absence of any other evidence supporting the payment aforesaid, the Court finds that the same has not been proved.

278. Even if the Court were to take the position that the sums to Jonathan Moi were duly paid, can they be attributed to the sale agreement? The Court thinks not. It is well settled that as a general rule, a contract cannot confer rights or impose obligations on strangers to it, that is, persons who are not parties to it.

279. The Court of Appeal had an opportunity to and deliberated on the doctrine of privity at length in *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another* (2015) eKLR. The Court rendered itself as under:

> " In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co Ltd v SElfridge & Co Ltd* [1915] AC 847, Lord Haldane, LC rendered the principles thus:
>
> > " My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."
>
> In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them *Agricultural Finance Corporation v Lendetia Ltd* (supra), *Kenya National Capitalcorporation Ltd v Albert Mario Cordeiro & Another* (supra) and *William Muthee Muthami v Bank Of Baroda*, (supra).
>
> Thus in *Agricultural Finance Corporation v Lendetia Ltd* (supra), quoting with approval from *Halsbury's Laws of England*, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:
>
> > " As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it..."

280. Discussing the exceptions to the doctrine, the Court of Appeal in the case of Aineah Liluyani Njirah v Agha Khan Health Services [2013]eKLR stated thus:

> " There are now many exceptions to the privity rule, both at common law and in the statute books. They developed in an ad hoc fashion as a response to specific situations where the courts or the legislatures ascertained a need to grant third parties the right to enforce a contract made for their benefit.[11] Second, a third party should be able to enforce a term of the contract when the contract expressly states that the third party has a right of

enforcement, regardless of whether or not the contract benefits the third party. Third, the third party should have a right to rely on a term of a contract which excludes or limits the liability of the third party, provided that was the intention of the parties."

281. None of these exceptions come into play. The situation is quite the contrary. The 1st and 5th Defendants allege that Sammy Boit and Antoinnette were proxies of Jonathan Moi in the Plaintiff company and that they had failed to remit to Jonathan Moi his share of the purchase price.

282. A proxy refers to an agent legally authorized to act on behalf of another. Stating that Sammy Boit and Antoinnette were proxies is akin to stating that they had no rights over the Plaintiff and any claim in that respect should be directed towards Jonathan Moi. No evidence was adduced to show that that was the case in respect of the ownership of the Plaintiff

283. Ultimately, it is the Court's finding that the 1st Defendant did not meet its part of the bargain under the agreement. The 1st Defendant only paid to the Plaintiff's advocates Kshs. 10million leaving a balance of Kshs 10millionwhich has never been paid todate.

284. The next question is whether there was actual transfer of the Plaintiff and subsequently the suit property to the 1st Defendant. This is a critical issue noting that at all times in the impugned transactions, the title in the suit property remained in the names of "Soy Developers Limited" and the 1st Defendant's transactions with the suit property was on the basis of its directorship thereof.

285. The English Case of *Salomon v Salomon* [1896]UKHL 1, [1897] AC established the principle of corporate personality that provides that a company is a legal person separate from its directors, shareholders, employees and agents. This means that upon registration, the law treats a company as a separate legal entity that can sue or be sued in its own name and own assets separately from its shareholders.

286. Nonetheless, because the law is cognizant of the fact that this legal person cannot function without the input of natural persons that created it, laws and regulations set out the manner in which the business of this corporate person should be carried out.

287. At the time of the transaction in question, the relevant law was the *Companies Act* Cap 486(now repealed). The Plaintiff was incorporated on the 13th day of April, 1989 and issued with certificate number 39917. Section 17 of the *Companies Act* 486(repealed) provided thus;

> "(1) A certificate of incorporation given by the registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under this Act."

288. It is not disputed that at the time of incorporation, the Plaintiff had two Directors, Sammy Arap Kogo and Antoinnette Boit, each holding one share. A share is a unit of ownership in a Company. It is the 1st and 5th Defendants' case that the aforesaid Sammy Arap Kogo and Antoinnette Boit transferred their shares and consequently all their rights in the company to the 1st Defendant

289. Section 75 of the repealed *Act* provided that shares of any member of a company shall be movable property transferable in a manner provided by the Articles of the company. This placed the Articles as the focal point on the manner of transfer. However, Section 77 had the following restriction:

> " Notwithstanding anything in the articles of a company, it shall not be lawful for the company to register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to the company:
>
> Provided that nothing in this section shall prejudice any power of the company to register as shareholder or debenture holder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of law."

290. Section 83 provided thus;

> " A certificate, under the common seal of the company, specifying any shares held by any member shall be prima facie evidence of the title of the member to the shares."

291. Considering the Plaintiff's Articles of Association, the relevant clauses which make reference to transfer of shares are Clauses 3 and 6. Clause 3 provides as follows:

> " The unissued shares of the company, subject to the provisions of these Articles shall be at the disposal of the board of directors which may allot, grant options over or otherwise dispose of them to existing members of the company at such times and on such terms and conditions as the Board may think proper, provided that no shares shall be issued at a discount except in accordance with Section 59 of the *Companies Act*."

292. Clause 6 provides as follows:

> " Every member or other person who intends to transfer shares shall give notice in writing to the board of his intention, and such notice shall constitute the board of his agent for the sale of the said shares in one or more lots at the discretion of the board to the members of the company, at a price to be agreed upon by the vendor"

293. What is clear from the foregoing is that the transfer of shares was only effectual once there was a "a proper instrument of transfer" in this case being a share transfer deed, duly executed, registered and thereafter a certificate issued in that respect.

294. With respect to change of directorship, the same was evinced by a notice of change of directorship pursuant to Section 201 of the *Companies Act*. Procedurally, there was the requirement for a board resolution authorizing the change of directorship.

295. The 1st and 5th Defendants assert that they were given the original company registration forms, to wit the original Memoarts and the company seal. It was DW1's evidence that they duly executed the transfer of shares and the same was deposited with the firm of Oraro and Rachier Advocates to undertake the formalities of registration. DW1 however conceded on cross-examination to not having any copies of the same.

296. Their assertion in this regard was supported by DW3, who testified to having had sight of the share transfer forms in the process of creating documents for the charge in favour of City Finance Limited. These copies were however not adduced. Even as he said this, DW3 could not explain how as at 10th January, 1992, Citi Finance was seeking from the 5th Defendant the share transfer forms and form 203A

in respect of the Plaintiff when the charge had been registered almost a year earlier (13th December, 1991).

297. DW6 also stated on cross-examination that that they did not conduct an official search to establish directorship of Soy Developers and relied on the representations by Mr Jirongo and Koech, and on a personal search that was conducted by the firm's law clerk.

298. On his part, DW5, an officer at the Business Registration Services, formerly Registrar of Companies, testified that the company has no physical file and the records therein are based on scanned images from their electronic records. He stated that as per their records, the directorship of the company is as from the time of incorporation to date, to wit, Sammy Arap Kogo and Antoinnete Boit.

299. Correspondence from the Registrar of Companies dated 15th May, 2018 indicates that no annual returns were filed from the period of 1991 to 2015 and that bulk filing of annual returns was undertaken on 14th January, 2014 by PW1.

300. The 1st and 5th Defendants are categorical that the records in the companies' register are not credible due to the bulk filing of returns filed by the Plaintiff and contend that there was at some point in time interference with the Companies records. They assert that due to the foregoing circumstances, the Court cannot make a finding of directorship in favour of Sammy Boit and Antoinnette Kogo.

301. Indeed, it is clear that the records at the companies' registry are less than ideal. The filing of the Plaintiff's annual returns was irregularly and inconsistently done. However, apart from this, there is absolutely no evidence to show that any transfer of the shares of the company as required by law ever took place to give credence to the suggestion that the same were duly filed and had been fraudulently removed.

302. Contrary to the 1st and 5th Defendant's assertion, the lack of clarity as regards these records works against them noting the principle of evidence law as set out under Section 3(4) of the *Evidence Act* which provides that a fact is not proved when it is neither proved nor disproved.

303. In the circumstances, the Court is unable to make a finding that there was a change of shareholding of the Plaintiff from Mr. Kogo and Mrs. Boit to Mr. Jirongo and Dr. Koech or at all. That being the case, no one had the legal mandate to charge the suit property other than Mr. Kogo and Ms Boit representing the Plaintiff.

304. Further, having not proven payment of the purchase price, the assertions by the Defendants that Sammy Arap Kogo and Antoinnette Boit hold the Plaintiff in trust for the 1st Defendant has no basis and equally fail.

305. The next issue is whether the charge registered against the suit property in favour of the 2nd Defendant was lawful. It is evident from the testimonies of DW3 and DW6, both of whom were involved in charging the property to Citi Finance and subsequently to the 2nd Defendant, that although they recognized the importance of verifying the company's directorship as part of due diligence, they failed to carry out this essential step.

306. Having established that Shakalagha Jirongo and Davy Koech are not, and were not directors of the Plaintiff at the time of registration of the two charges in favour of City Finance and Post Bank, or at all, it follows that they had no authority to engage in any transactions involving the suit property.

307. Consequently, any actions they undertook regarding the suit property were without effect and constituted a nullity. As Lord Denning expressed in *Macfoy v United Africa Co. Ltd.* (1961) 3 All ER 1169:

> "If an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

308. The 1st Defendant's actions, or any one else other Mr. Kogo and Ms Boit, could not bind the Plaintiff. Ultimately, there was no valid charge over the suit property.

309. It is by now apparent that the issue of whether the 2nd Defendant could sell the suit property in exercise of its statutory power of sale must be in the negative. The legal charges over the suit property were not lawfully executed on the Plaintiff's behalf to secure the loans advanced to the 5th Defendant.

310. Ultimately, the Plaintiff and its directors were innocent parties whose property was fraudulently used to secure loans they were not aware of.

311. The Plaintiff, the 1st and 5th Defendants have averred that the suit property was sold at a gross undervalue; that the statutory demand was manifestly excessive; that the property was sold by private treaty instead of private auction and that the proceeds were never credited into the account of the 5th Defendant nor remitted to Post Bank (the 2nd Defendant).

312. The suit property is registered pursuant to the provisions of the retired *Registration of Titles Act*. In the circumstances, the manner by which a mortgagee exercised its power of sale was regulated by the *Transfer of Property Act*, 1882 also repealed.

313. Beginning with the aspect of statutory notice, the same is provided for under Section 69A of the *ITPA* (repealed) which provides as follows;

> "(1) A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until- (a) notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or (b)some interest under the mortgage is in arrear and unpaid for two months after becoming due; or (c) there has been a breach of some provision contained in the mortgage instrument or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon."

314. The Plaintiff and the 1st and 5th Defendants contend that the statutory notice was never served upon the Plaintiff and/or the principal debtor and the same renders the sale invalid. On its part, the 3rd Defendant contends that this is an issue that was raised by way of submissions; that the Plaintiff was in any event duly served with the notice and that there is no requirement for service of the statutory notice upon the principal debtor.

315. Beginning with the assertion that this issue was not pleaded, nothing falls on it. The same is evident in the 1st and 5th Defendants' Counterclaim. The 2nd Defendant adduced into evidence a copy of the

statutory notice dated 2nd March, 2004 which was purportedly addressed to the Plaintiff. The Court notes that the notice was sent to the Plaintiff vide Postal Box 48180 Nairobi. The 2nd Defendant admitted that no notice was sent to the principal debtor

316. The statutory notice specifies the nature and extent of the default of the chargor, the amount required to be paid within a period of 3 months and that the chargee will proceed to sell the property in default either by public auction or private treaty.

317. As to the mode of service, the statutory notice is indicated to have been served by registered post as well as by ordinary post. Nonetheless, the Plaintiff has denied receipt of the notice aforesaid. The Court of Appeal in *Nyagilo Ochieng and Another v Fanuel Ochieng and 2 Others* [1995-1998] 2 EA 260 was categorical that unless the receipt of statutory notice is admitted, posting thereof must be proved and only then will the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the *Interpretation and General Provisions Act*, Cap 2, Laws of Kenya.

318. No evidence of this nature was adduced and the Court finds that there was no service of the statutory notices to either the Plaintiff and/or the 5th Defendant.

319. As regards the propriety of the statutory demand, it was PW1's evidence that basic arithmetic will confirm that if the interest rate of 23% per annum, as against the borrowed sum of Kshs 50million, was to be applied, the sum due from the date of the charge being 1992 to the issuance of the notice on 2nd March, 2004 cannot amount to Kshs 16 billion. According to the Plaintiff, it would be approximately Kshs 200million.

320. DW6, a liquidation agent at the 2nd Defendant was at pains to explain how the loan of Kshs 50million accumulated to Kshs 16B over 12 years considering the interest stipulated in the charge was 23% per annum. He conceded that the same was not possible. The Court finds that the statutory demand was manifestly excessive.

321. The other issue was the manner of the sale of the suit property and its value. It is common ground that the property was sold by way of private treaty. The Plaintiff seeks to impugn this mode of sale asserting that this was contrary to the instructions of the bank's liquidation agent.

322. Section 69(1) of the *Transfer of Property Act* (repealed) provides the following in this respect:

> " A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as the mortgagee's statutory power of sale and for the purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage-money, or part thereof, immediately due and payable."

323. Indeed, a reading of the foregoing provision supports the position that under the Act, a chargee was allowed to sell the charged property in any of the two ways. The above notwithstanding, Courts

have held that public auctions should be the first recourse before regard is had to sale by private treaty. The Court in *Sharok Kher Mohammed Ali & Another v Southern Credit Banking Corporation Limited*[2008]eKLR expressed it best, thus;

> " As stated earlier the rule against clogging or fettering the equity of redemption relates to the very essence of an equitable right to redeem the mortgaged property. The right to redeem a charged mortgaged property cannot be feltered or clogged by any stipulation other than under the right procedure. I think the procedure adopted by the bank is in contravention of the law and equity. In HCCC No. 265 of 2000 *Joseph Siro Mosioma v H.F.C.K & 3 Others* I addressed my mind as to whether financial institutions had powers to sell up a charged property by a private treaty. In that ruling I stated that the bank officials and/or agents in selling a property by private treaty must address their minds to the drastic effects of depriving the owner of the charge property. My position was the banks are required to give a fair amount of time and/or notice in addition to giving the mandatory statutory notice under the relevant laws before an attempt to sell the property by private treaty is endeavoured. I also deprecated the practice of banks rushing to sell the charged or mortgaged properties through private treaty without giving adequate notice and without attempting to sell the same by public auction. It was my view in that ruling that there cannot be any sale by private treaty when there has been no previous attempts to sell the subject property by public auction. In my humble view there must be evidence or attempts to sell the charged property through a public auction which failed either through a conduct of the borrower or some other issues relevant to the case.
>
> I reiterate my position in that ruling that a mortgage cannot at his convenience deal with the mortgage property in the manner he deems fit by resorting to sell by private treaty at a first instance. The right to sell by private treaty is not available and cannot be exercised by the mortgage unless and until the mode of public auction has been attempted but failed due to the conduct of the borrower, where a chargee resorts to sell by private treaty without attempting to sell by public auction the resulting transaction would be void ab initio. In this case the bank purported to sell the suit property through a private treaty before it had given the mandatory statutory notice required under section 69A of *ITPA*, and without attempting to sell by public auction. That was absolutely illegal and in contravention of the clear provisions of section 69A of *ITPA*. I make a finding that an illegal transaction cannot be a basis to confer a right on a third party especially like the present defendant whose conduct is somewhat suspicious."

324. The Court associates itself with the foregoing position. It is apparent that the intention of the law in the exercise of statutory power of sale by the chargee is to give the chargor as much latitude and time as possible to exercise his equity of redemption. In sales by way of public auction, another notice is anticipated under the Auctioneers Rules which gives the chargor more time to exercise the right of redemption.

325. Further, private treaty is open to abuse, especially where the chargor is not involved. As seen in the circumstances herein, the 3rd Defendant was alerted about the sale of the suit property by a broker and informally so. DW8 was at pains to explains how the broker became aware that the bank wanted to sell the property, and at how much.

326. With public auction, the reserve price is usually advertised and there is transparency in the process. This is not so with private treaty which is usually secretive and opaque as happened herein.

327. The Court therefore finds that notwithstanding the provisions of section 69(1) of the ITPA, the chargee should have first attempted public auction before resorting to private treaty. In resorting to sell the suit property by way of private treaty in a discreet and opaque manner before attempting public auction, the 2nd Defendant acted fraudulently.

328. The next issue is whether the property was sold at an undervalue. The Court in *Peter Kamau Ikigu v Barclays Bank of Kenya & Manor* [2013] eKLR persuasively set out the general law on this subject when it expressed itself as follows:

> " Valuation is a matter of opinion hence it is prudent that evidence touching on the valuation of properties be based on some empirical evidence or data in the absence of which the standard expected cannot be met. Whereas the mortgagee is expected to exercise the power of sale in a prudent way, with due regard to the interests of the mortgagor on the surplus sale moneys, he is not a trustee for the mortgagor as regards the exercise of the power of sale and has his own interest to consider as well as the mortgagor, and provided he keeps within the terms of the power, exercises the power bona fide for the purposes of realising the security and takes reasonable precautions to secure a proper price the Court will not interfere, nor will it inquire whether he was actuated by any further motive. A mortgagee is entitled to sell at a price just sufficient to cover the amount due to him provided the amount is fixed with regard to the value of the property."

329. The suit property was sold to the 3rd Defendant for the sum of Kshs 23million. In support of its sale in this respect, the 2nd Defendant through DW7, a land valuer, produced the valuation report dated 10th March 2005 which it relied on when selling the suit property. The report shows that the suit property was valued at Kshs. 35million in open market and its forced sale value was Kshs 23million.

330. In contrast, the Plaintiff adduced into evidence a valuation report dated 30th October, 2015 which put the market value of the suit property as at 2015 at Kshs 610million and a letter dated 22nd March, 2022 stating that the property was Kshs 370 million as at 12th March, 2006.

331. The 1st and 5th Defendants adduced into evidence two valuation reports. One dated 21st July, 1999 setting the value of the suit property at Kshs 35,000,000 as at the aforesaid date and another dated 29th July, 2019 stating that the property was Kshs 650 million as at 2019.

332. In the case of *Zum Zum Investment Limited v Habib Bank Limited* [2013] eKLR, the Court discussed the parameters for consideration where the question of whether property was undervalued pursuant to a statutory sale arose. It stated as follows:

> " It is not sufficient for the Applicant to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Applicant must satisfactorily demonstrate why the valuation report that the Respondent intends to rely on in disposing of the suit property does not give the best price obtainable at the material time...The Applicant needs to show, for instance, that the Respondent's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done before the time of the intended sale."

333. In view of the evidence before this court, the Court finds that nothing has been brought forward to dislodge the report by DW7. Critically, no valuation has been brought with respect to the value of the property in 2005 for purposes of comparison.

334. The Court, not being an expert in this respect, needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property. This has not been provided and the Court is unable to make a finding that the sale of the suit property to the 3rd Defendant was at a gross undervalue.

335. As regards the claim that the proceeds of the sale were never remitted to the 2nd Defendant, the Court opines that nothing much falls on this allegation. The 2nd Defendant has not disputed receipt of the proceeds of the sale. It was DW6's evidence that the records from Central bank shows the money was paid to Post Bank; that the full amount of Kshs 23million was accounted for and that they received 16million and the balance was withheld by the lawyers as legal fees.

336. As regards whether the monies were credited into the 5th Defendant's account, this appears not to have been done. This constitutes a grave irregularity. Procedurally, monies received after the sale of charged property ought to be credited into the loan account for purposes of taking accounts and knowing the position of the loan.

337. In the end, the Court finds that the 2nd Defendant's sale of the suit property to the 3rd Defendant was tainted with irregularities and illegalities.

338. I now turn to the issue of whether the 3rd Defendant was a bona fide purchaser for value, and whether it has a valid title. It is not in dispute that the suit property is currently registered in the name of the 3rd Defendant herein pursuant to a transfer of 5th April, 2006 under the *Registration of Titles Act*. Consequently, the law applicable to the 3rd Defendant's title is the *Registration of Titles Act* (repealed).

339. Section 23 (1) of the *Registration of Titles Act* provided as follows:

> "The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive of evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party."

340. Discussing this provision, the Court of Appeal in *Ashit Patani & 2 Others v Dhirajlal V Patani & 2 others* [2017]eKLR stated thus:

> "Under RTA the protection arises from the provisions of section 23, which requires the court to consider a certificate of title issued to the purchaser under that Act as conclusive evidence that the person named therein is the absolute and indefeasible owner thereof subject to any encumbrances, easements, restrictions and conditions contained therein. The said section prohibits the challenge to such certificate of title on any ground other than fraud or misrepresentation to which the registered owner is proved to be party. There are numerous authorities which have construed that section but the bottom line is that the protection is for a bona fide purchaser for value without notice and who is not privy to any fraud or misrepresentation."

341. It is trite that fraud must be specifically pleaded and proved. This position was affirmed by the former Court of Appeal of Eastern Africa in the case of *R. G. Patel v Lalji Makanji* (1957) EA 314, which stated thus:

> " Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

342. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. This position was reiterated by the Court of Appeal in the case of *Demutila Nanyama Pururmu v Salim Mohamed Salim* [2021]eKLR relying on its earlier decision exposition in *Kinyanjui Kamau v George Kamau* [2015]eKLR as follows:

> " ...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR 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; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

343. The Court has carefully considered the pleadings. Both the Plaintiff and the 1st and 5th Defendants have set out particulars of fraud as against the 3rd Defendant. The particulars of fraud set out against the 3rd Defendant by the Plaintiff include, purchasing the suit property having full knowledge that the 1st Defendant had no authority to act for the Plaintiff.

344. On their part, the 1st and 5th Defendants maintain that the sale of the suit property to the 3rd Defendant was fraudulent on account of the defects in the 2nd Defendant's exercise of its statutory power of sale discussed under the previous head.

345. Having considered the evidence, the Court is not convinced that fraud as against the 3rd Defendant has been proved by either the Plaintiff or the 1st and 5th Defendants. The 3rd Defendant was not a party to the first impugned transaction between the Plaintiff and the 1st Defendant, neither was it a party to the 1st Defendant's charge of the suit property to the 2nd Defendant.

346. While there was illegality in the manner in which the 2nd Defendant exercised its statutory power of sale, no direct fraud can be attributed to the 3rd Defendant. However, even if the 3rd Defendant was not a party to the fraud, the title it holds was fraudulently and illegally charged by the 1st and 5th Defendants, which I have already discussed above, and the same is null and void.

347. I say so because a party with a tainted title cannot pass such a title to a third party. The Supreme Court in *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) held that establishing a good root of the title is the first step in establishing whether a party is a bona fide purchaser for value, and had this to say:

> " To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment...Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible...

> Article 40 of the *Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired."

348. This Court need not say more. The Apex Court's decision is clear that there can be no protection offered to a purchaser with respect to a title whose root is defective or marred by illegality. In the circumstances, the 1st Defendant had no title to the property, entitling it to charge the same. It therefore follows that the purported exercise of the statutory power of sale and the purchase of the property by the 3rd Defendants was void.

349. On whether the 1st and 5th Defendants' Counterclaim is merited, the Court has found that the 1st Defendant has never been a director of the Plaintiff and has not established any proprietary claim to the suit property. In the circumstances, the 1st and 5th Defendants have not established their claim which is hereby dismissed.

350. The 3rd Defendant instituted a Cross-claim against the 2nd Defendant claiming against it, in the event the claim against by Plaintiff and/or the 1st and 5th Defendants succeeds. The 1st and 5th Defendants have alleged that the Court did not give directions with respect to the hearing of the Cross-suit.

351. The Court opines that nothing much falls on this assertion. The Cross-claim is essentially a Counterclaim whose determination is done concurrently with the main suit. All the parties had due notice of the claim in the cr0ss-claim.

352. It is noted that the 2nd Defendant did not file a Defence to the Cross-claim which went undefended. Consequently, having found in favour of the Plaintiff and having found that no fraud has been attributed to the 3rd Defendant, the Court finds the Cross-claim to be merited. However, the 3rd Defendant is only entitled to the purchase price that it paid to the 2nd Defendant, with interest at court rates, and not the current value of the suit property as claimed.

353. The Plaintiff has sought as against the Defendants general damages for disturbance of its right to quiet possession of the suit property and compensation for violating of its constitutional right to property. This being a matter of a civil nature, and there not having been any declarations as to constitutional violations, the Court finds the prayer for compensation for constitutional violations misplaced and will not award any.

354. Speaking to the law on damages, the Court of Appeal in *Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd* [1992] KLR 177 stated that:

> " The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty."

355. The Plaintiff has not provided any guidance as to the quantum of general damages that it seeks. Considering that none of the parties are in possession of the suit property, and the suit property having appreciated in value over time, I decline to award the Plaintiff general damages as claimed.

356. In the end, the Court finds that the Plaintiff has established its case on a balance of probabilities. The court also finds that the 3rd Defendant has partially succeeded in its cross-claim, and proceeds to make the following determinations:

    a. The 1st and 5th Defendants' Counterclaim be and is hereby dismissed with costs to the Plaintiff.

b. Judgement is entered in favour of the Plaintiff in the following terms:

   i. Permanent injunctive orders do and are hereby issued restraining the Defendants, including the 3rd Defendant, or their agents, servants, employees or anyone acting under their directions from encroaching, alienating, dividing, transferring, selling, charging, developing or in whatever and whichever manner and way dealing with all that property known as LR No 209/11151, Grant Number 47029 and contained in Land Survey Plan Number 138623.

   ii. A Mandatory Injunction does hereby issue directing the 4th Defendant to rectify the Lands Register and reflect the Plaintiff, whose directors are Sammy Arap Kogo and Antoinnette Boit, as the sole registered owner of the suit property.

   iii. The Defendants shall bear the costs of the suits.

c. Judgement is entered in favour of the 3rd Defendant in the Cross-claim as follows:

   i. The 2nd Defendant shall pay to the 3rd Defendant the sum of Kshs 23 million with interests thereon at Court rates from the date of filing this suit to the date of payment in full.

   ii. The 2nd Defendant shall indemnify the 3rd Defendant against the order of costs against it.

   iii. The 2nd Defendant shall bear the costs of the Cross claim.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF JULY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Munyua & Dr. Arwa for Plaintiffs

Mr. Githua for Odari for 3rd Defendant

Mr. Koyyoko for 1st and 5th Defendants

Mr. Wanjohi for Katiku for 2nd Defendant

Court Assistant: Tracy