Petrazo Limited (Formerly Brighton Limited) & another v New Oshwal Distributor Limited & 4 others (Environment & Land Case E031 of 2022) [2024] KEELC 6704 (KLR) (8 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6704 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE E031 OF 2022

LL NAIKUNI, J

OCTOBER 8, 2024

BETWEEN

PETRAZO LIMITED (FORMERLY BRIGHTON LIMITED) ..... 1ST PLAINTIFF

FUSION FOOD LIMITED ..... 2ND PLAINTIFF

AND

NEW OSHWAL DISTRIBUTOR LIMITED ..... 1ST DEFENDANT

PRIME BANK (K) LIMITED ..... 2ND DEFENDANT

TRITON PETROLEUM COMPANY LIMITED (IN RECEIVERSHIP) .... 3RD DEFENDANT

TRITON SERVICE STATION LIMITED ..... 4TH DEFENDANT

JAGUAR PETROLEUM COMPANY LIMITED ..... 5TH DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to a suit instituted through the Amended Plaint dated 31st March, 2023 by Petrazo Limited (Formerly Brighton Limited) and Fusion Food Limited, the 1st and 2nd Plaintiffs herein against New Oshwal Distributor Limited, Prime Bank (K) Limited, Triton Petroleum Company Limited (in Receivership), Triton Service Station Limited and Jaguar Petroleum Company the 1st, 2nd, 3rd, 4th and 5th Defendants herein respectively.

2. Upon service of the pleading and summons to enter appearance, the 1st Defendant entered appearance through filing of a Memorandum of Appearance dated 25th March, 2022 and filed on 29th March, 2022 and subsequently filed their Statement of Defence on 18th May, 2022 dated 17th May, 2022. Likewise,

the 2nd Defendant entered appearance through filing of a Memorandum of Appearance dated 8th April, 2022 and filed their Statement of Defence on 11th May, 2022 dated 5th May, 2022. Indeed, while the matter was spiritedly contested by the 1st and 2nd Defendants herein, from the records, the Honourable Court never got access to any pleadings filed by the 3rd, 4th and 5th Defendants. Thus, as it follows apart from the 3rd Defendant, I discern that Judgement in default be entered against the 4th and 5th Defendants in favour of the Plaintiffs against these parties pursuant to the provision of Order 10 Rules, 4, 5, 6 and 7 of the Civil Procedure Rules, 2010.

3. From the face value, the matter appeared rather complex mainly as it involves too many incorporated legal corporate entities, the nature of which the parties conducted their business, the intricate issues surrounding the business activities and with bulky documentations. Despite of this, the Honourable Court has attempted to simplify the case as much as possible without jeopardizing its merit at all.

II. Description of the Parties in the suit

4. Both the 1st and 2nd Plaintiffs were described as a limited Company duly incorporated under the Laws of Kenya. The 2nd Plaintiff carried out the business of a restaurant and convenient stores within the County of Mombasa, of the Republic of Kenya.

5. The 1st Defendant was described as a corporate body duly incorporated pursuant to the Laws of Kenya with its registered offices situated in Kenya. Whilst, the 2nd Defendant was described as a corporate body duly incorporated pursuant to the Laws of Kenya with its registered offices situated in Kenya. The 3rd Defendant (In receivership) was described as a corporate body duly incorporated pursuant to the Laws of Kenya with its registered offices situated in Kenya. The 4th Defendant was described as a corporate body duly incorporated pursuant to the Laws of Kenya with its registered offices situated in Kenya and the 5th Defendant was also described as a corporate body duly incorporated pursuant to the Laws of Kenya with its registered offices situated in Kenya.

III. Court directions before the hearing

6. Nonetheless, on 23rd May, 2024, the Honourable Court fixed the hearing dated on 7th June, 2024 with the parties having fully complied with the provisions of Order 11 of the Civil Procedure Rules 2010. The matter proceeded for hearing by way of adducing "viva voce" evidence at some point through a hybrid virtual session with the Plaintiffs' witness (PW - 1) testifying in Court on 7th June, 2024 at 10.00 am after which they marked their case closed. Thereafter, the 1st and 2nd Defendants summoned their witnesses (DW - 1 and DW - 2) respectively on the 25th June, 2024 after which they marked their cases closed. The Honourable Court provided directions on filing of written submissions thereof.

IV. The Plaintiffs' case.

7. From the filed pleadings, on or about 20th September, 2002, the parcels of land known as - Plot No. Msa/Block XXIII/206 and Plot No. Msa/Block XXIII/210 (Hereinafter referred to as "The Suit Properties") were legally transferred from their respective previous proprietors to the new proprietor, Triton Petroleum Company Limited. In the year 2004, Triton Petroleum Company Limited, permitted its sister company Triton Service Stations Limited, the 4th Defendant to develop the suit properties the by setting up inter alia a petrol station, restaurant, convenient stores and service bay.

8. The 1st and 2nd Plaintiffs noted that on 19th December, 2008, Triton Petroleum Company Limited, was put under receivership. However, the business in the suit properties being Triton Petroleum Company Limited, continued under the name and style of Triton Service Stations Limited, the 4th Defendant. On or about the year 2011, Triton Service Stations entered into a Lease Agreement with Jaguar Petroleum

Company Limited, the 4th Defendant under the said Lease Agreement, Jaguar Petroleum Company Limited was to take over the operations of all the petrol stations countrywide registered under the name of Triton Petroleum Company Limited and Triton Service Stations Limited.

9. In the year 2011, Jaguar Petroleum Company Limited, the 5th Defendant herein entered into a Lease Agreement on 25th February, 2011, with Brighton Limited (Currently Petrazo Limited) & Fusion Foods limited the 1st and 2nd Plaintiffs herein, wherein the Plaintiffs took over the operations of the petrol station and all the other businesses located in the suit properties.

10. Jaguar Petroleum Company Limited, the 5th Defendant and the Plaintiff mutually agreed that rent payable would be paid either directly or through settlement of expenses of Silver Crest Enterprises Limited, Gormet Ventures Limited, Triton Convenient Stores Limited and Triton Gas Stations Limited, which companies were part of the larger Group of Companies under the Triton Petroleum Company Limited. These expenses included overhead expenses such as staff salary, maintenance of property and utility expenses as mutually agreed by both parties and which rent the Plaintiffs had at all material times settled in accordance with the terms of the agreement.

11. Upon request by the 5th Defendant, the Plaintiff also agreed to pay rent by settling the Staff dues of Triton Service Stations Employees. Additionally, upon request by the Executive the Chairman of Triton Petroleum Limited, Mr. Yagnesh M. Devani, the Plaintiff agreed to pay rent of a sum of Kenya Shillings Twelve Million, Five Hundred Thousand Only (Kshs. 12,500,000.00) by offsetting Mr. Yagnesh Devani's debts and lawyers' fees for the professional services rendered thereof. This amount was treated as rent and on that account inter alia, the Plaintiff was to operate the Business on a lease basis.

12. As at 28th February, 2013, upon reconciliation of the accounts, Jaguar Petroleum Company Limited owed the Plaintiff a sum of Kenya Shillings Twelve Million, Two Hundred and Ninety-Four Thousand, Nine Hundred and Twenty Shillings Only (Kshs. 12,294,920.00). At all material times, from the year 2011, the Plaintiff had been occupying the suit premises and operating various businesses based on the Lease Agreement over the suit properties.

13. While in occupation and possession of the suit premises, the Plaintiffs had complied with all laws and by laws and had always obtained and paid for al requisite licenses for the premises. The status of the premises necessitated renovation, and thus the Plaintiffs invested a sum of Kenya Shillings Two Million, One Hundred and Seventeen Thousand, Seven Hundred and Seventy-Seven and Twenty Cents Only (Kshs. 2,117,777.00) to make a coffee house on the suit properties.

14. The Plaintiffs had also invested a sum of Kenya Shillings Eighteen Million, One Hundred and Sixty-Three Thousand (Kshs. 18,163,000.00) in purchase and/or repair and maintenance of the machines and equipment such as generators, pumps, underground tanks among others installed in the suit property. That in the year 2020, the Plaintiffs renovated the restaurant by making major repairs including replacement of the roof and tiles which renovation was worth a sum of Kenya Shillings Ten Million, Five Hundred and Ninety-Four Thousand Eight Hundred and Sixty-Five and Forty-Eight Cents Only (Kshs. 10,594,865.48). As at the date of filing this suit, the Plaintiffs had invested a whopping sum of Kenya Shillings Forty-Three Million, One Hundred and Seventy Thousand, Five Hundred and Sixty-Two and Sixty-Eight Cents Only (Kshs. 43,170,562.68) on developing the suit property.

15. The Plaintiff had caused an independent valuation of their total investment in the suit property and the same was currently valued at a sum of Kenya Shillings Forty Two Million (Kshs.42,000,000.00) which the Plaintiff hereby claim.

16. The Plaintiffs contended that at all material times, the parties herein had continued to engage in business based on mutual trust and cultural/friendship ties. Thus, some of the decisions were mutually agreed upon by way of oral discussion based on the principle of gentlemen agreements. On or about February, 2022 one of the directors of the Plaintiffs, Mr. Manoj Shah received a telephone call from one – Mr. Ben Kingori, a tenant, who indicated to him the suit properties had been acquired by the 1st Defendant and that there were plans to have the Plaintiffs vacate the business premises including the petrol station.

17. Out of abundance of caution, the Plaintiffs caused a search to be conducted on the suit properties on 10th February, 2022 only to notice that the suit properties had been fraudulently transferred to the 1st Defendant and charged to the 2nd Defendant on or about December, 2021. The Plaintiffs averred that the said transfer was fraudulently, without any basis in law. As such, they sought the intervention of this Honourable Court

18. The Plaintiffs relied on the following particulars of fraud:-

    i. That for instance there was a registered caution as against the titles on or about 15th November, 2012 Triton Gas Stations Limited which Caution had since been removed fraudulently vide an Application dated 16th November, 2021 executed by one Kumar Mashru Sanjan Kishor, a person not known to the 4th Defendant as a director.

    ii. That whereas the proprietor of the suit properties, Triton Petroleum Company Limited went into receivership on of about 19th December, 2008, it had now emerged that there was a charge registered in favour of the Kenya Commercial Band (KCB Bank) on 10th February, 2009;

    iii. That whereas the suit properties had a registered charge as against the Bank of India, there was no record on how the same was removed and the property transferred free of any encumbrance;

    iv. That the process of purchase, acquisition and transfer of the suit properties was clouded in mystery and the records could not with certainty show how the transaction has since happened and titles of the suit properties vested on the 1st Defendant

19. Further the 1st Defendant had since written demanding rent a move that the Plaintiffs were certain was calculated to have them bundled out of the suit properties despite having heavily invested and developed the same thereby immensely contributing to its current market value which the Plaintiffs reasonably believed included the developments and maintenance carried out by the Plaintiff over the years.

20. The Plaintiffs had invested in the said property over the years. Indeed, they reasonably believed that the said investment was duly taken into consideration for purposes of the purchase price of the suit property and which portion, the Plaintiffs were entitled to.

21. The alleged transfer of the suit properties was not only done fraudulently, but was part of a well-choreographed scheme to frustrate and deny the Plaintiffs an opportunity to carry on with its business and recoup their legal and valid investments.

22. The entry of the Plaintiffs into the property was neither by fraud or craft, but was through a well negotiated business framework with a proprietary right of purchase had the legal proprietor sought to dispose the property. That they heavily invested in the suit property and as a tenant, they ought to have been duly informed and/or notified of the intended sale and transfer of the property and compensation duly paid to them. The illegal and/or unlawful actions of the Defendants if left unabated shall irredeemably affect the Plaintiffs' businesses and rights on the suit property and the premises.

23. The actions by the Defendants were a well-orchestrated plan to deprive the Plaintiffs of its rights over the property and if left unchecked, the Plaintiffs stood, to illegally, unprocedurally and unjustly lose the possession of the suit properties as well as their hard earned investments on the premises.

24. The Plaintiffs averred that there was no other suit pending and/or that there had been no previous proceedings between the Plaintiffs and the Defendants over the same subject matter and that despite demands and notices of intention to sue, the Defendants had failed and/ neglected to accede to the Plaintiffs' demands. The Plaintiffs also admitted to the jurisdiction of the Honourable Court.

25. The Plaintiffs stated that in the circumstance, the Plaintiffs prayed that Judgment be entered in their favour against the Defendants as follows:-

    a. An Order of Permanent Injunction restraining the 1st and 2nd Defendants whether by themselves, their agents, employees or otherwise howsoever, from interfering with the Plaintiff/ Applicant's quiet possession of all that property known as Plot No. Msa/Block XXIII/206 and Plot No. Msa/Block XXIII/210;

    b. A declaration that the sale and transfer of all that property known as Plot No. Msa/Block XXIII/206 and Plot No. Msa/Block XXIII/210 to the 1st Defendant is illegal, invalid and a nullity by reason of fraud;

    c. That in the alternative to (a) and (b) above the Defendants be jointly and severally held liable to compensate the Plaintiffs all the investment on the suit property totaling Kenya Shillings Forty-Two Million Only (Kshs. 42,000,000.00);

    d. Interests on c above

    e. The Costs of the Suit; and

    f. Any other and/or further relief the Honourable court deems fit to grant

26. The Counsel for the Plaintiffs commenced the case through making a brief opening remarks. He stated that in the matter, the Plaintiffs from their filed Plaint dated 16th March, 2022, were the tenants of Triton Services. They were allowed to caused and indeed undertook extensive development on the suit properties. In the course of time, they improved it to tune of a sum of Kenya Shillings Forty-Two Million (Kshs. 42, 000, 000.00)) as per the evidence adduced and particularly the valuation report by the engaged Land valuers.

27. According to the Learned Counsel, they have incurred colossal amount of expenses. The Plaintiff were surprised when the owners came to ask them to vacate the premises. As result of that, they sought for the Court intervention. Hence, in the long run, they would be seeking for reimbursement of the expenses incurred

28. The Plaintiff called their witness PW - 1 on 22nd February, 2023 at 1.45 pm where he averred that: -

A. Examination in Chief of PW - 1 by Mr. Ruwa Advocate.

29. PW - 1 testified in English and under oath. He identified himself as MR. MANOJ SHAH. He was the director of Petrazo Limited, the 1st Plaintiff herein. He had filed a witness statement dated 16th March, 2022. He had a filling Petro station. He had filed a list of documents as Plaintiff dated 16th March, 2022 which was a bundle and another further list of documents dated 25th May, 2024. He relied on the witness statement and these documents in support of his case hereof.

B. Cross examination of PW - 1 by Mr. Clapton Advocate.

30. PW - 1 confirmed that he knew the Director of Triton Petroleum Company Limited and that he also knew Mr. Devani as well. They were good friends and he knew him fairly well. He told the court that Mr. Devani operated from Mombasa and Nairobi and in the year 2008 Triton was placed under receivership.

31. According to the witness there was no discharge while Triton was under receivership but it still went on operations under other companies. This was done by the Directors of Triton Petroleum Limited. The witness told the court that he could be having the documents to that effect. He confirmed that they should have been under the official receiver, but Triton Petroleum Company Limited owned all the suit land. He was not aware of the person who made the decision to transfer the assets for Triton Petroleum to the 3rd Defendant. He had mentioned it in his statement indicating how this information was captured.

32. PW - 1 further told the court that it was the year 2011 when the transfer was effected to Triton Service Limited/Jaguar Petroleum Company Limited. According to him, he supposed that it may have been void - as per paragraph 5 of his statement. It was Triton Petroleum Limited that was under receivership from there onwards the 3rd Defendants took over the operations of the said company and the assets. This was through an agreement dated 2011.

33. However as far as he was concerned, Triton Petroleum Services Limited upon being placed under receivership transferred its assets in the year 2003. While doing this, he confirmed that they had never received any consent from the official receiver to do so. As Triton Service Station Limited, they entered into a Lease Agreement dated 20th November, 2010 with Jaguar Petroleum Company Limited – the 3rd Defendant terms and condition stipulated. It was 20 years from 20th November, 2010 which agreement was signed by Mr. Kailesh Joban Putra and George Atwetwe who the witness supposed were not directors but employees of the 3rd Defendant.

34. He was not aware whether or not these assets had been discharged by the Bank of India. To the best of his knowledge, from the different banks where the assets were charged were never involved in these transactions from the beginning. It simply meant they were charged without involving the banks. He was aware of the lease agreement dated 12th August, 2008. It was between Triton Petroleum Limited on the one hand as the lessor and Triton Services Station Limited as the Lessee. It was for 20 years from 12th August, 2008. It was signed by Mr. George Dicks Attewe and Mr. Kalesh Joban Putra who were not the Directors of the 3rd Defendant. He knew them as being employees for many years and they had never conducted an official search at the Company Registry to establish whether these were directors or not, by obtaining the CR – 12 Form.

35. With reference to the two lease agreements for 20th November, 2010 and 12th August, 2008, PW - 1 confirmed that the signatures were not the same/identical. It showed that they had been signed by different people. There were no names on the leases and hence he could not tell who exactly signed them. He was not aware of Civil Case HCCC. No. 462 of 2009 - who the parties were and what it was all about and its outcome thereafter.

36. With reference to pages 37 to 47 of the Bundle of documents by the 1st Defendant, the witness told the court that it indicated that the Civil case – "HCCC No. 462 of 2009 - Triton Gas Station Limited – Versus - Zahir Sheikh & Others" was heard and determined by Hon. Justice Ibrahim. He further refuted being in touch with it nor knowing anything about the case. He was not aware that Mr. Devani had been charged for forgery. On 28th November, 2008 there was a charge by Triton Petroleum

Company Limited and Bank of India for property Mombasa/Block XXIII/200 for a sum of Kenya Shillings Fifty Six Million (Kshs. 56,000,000/-). It was not registered.

37. PW - 1 reiterated that there was an official search conducted in the year 2011 but which indicated by then that there was no charge registered. Unfortunately, he did not have the documents in his hands right there in Court but he did know it was there. He refuted that his recourse should be against the two persons who signed the agreements purporting to be the Directors, yet they were mere employees and also for doing so without the consent from neither the bank nor the official receiver as required by law.

38. PW - 1 told the court that he did not know it was the two (2) people who signed the two (2) leases on their behalf but he did not have a legal confirmation to the effect that they were directors or not. According to the witness, the 3rd Defendant – Jaguar was not under Receivership it was the one they were paying out rent to. With reference to paragraph 9 of the witness statements – it stated that up[on request by the executive chariman of Triton Petroleum Limited - Mr. Yagnesh M. Devani the Plaintiff agreed to pay rent of a sum of Kenya Shillings Twelve Million (Kshs. 12,000,000/-) by offsetting Mr. Devani's debts and lawyers' fees. This amount was treated as rent and on that account the Plaintiffs was to operate the Business on a Lease basis.

39. PW - 1 could not recall the names of the Lawyers who received the money. He was instructed by his friend. The said instructions were not before court in this case but they were in other pending cases. He confirmed that extensive renovations of the premises whereby they invested a sum of Kenya Shillings Two Million One seventeen Thousand Seven Seventy Seven Hundred (Kshs. 2,117,777/-) to make the premises better for running business and a sum of Kenya Shillings Eighteen Million (Kshs. 18,000,000/-) in repair and maintenance of the machines and equipment such as generators, pumps, underground tanks mounted on the suit properties. These were necessitated by there being heavy rainfall and leakages. The place had been in bad state of affairs yet they needed to carry out their businesses and so they had to put a generator and pump station.

40. According to PW - 1 they serviced them so that they could effectively run their business on the suit land. With reference to page 99 of the 1st Defendant's bundle of documents, it was an advertisement for sale of properties by Triton the official Receivers of the properties belonging to Triton Petroleum Company Limited. The witness confirmed that the bank had the power to sell the property by Triton Petroleum Services Limited which went under receivership in the year 2008.

41. PW - 1 told the court that in the year 2012, they placed a caution against the properties which he confirmed were under receivership. They wanted to recover their money from the person who was buying the properties and the land. They were not taking any chances at all. He stated that he did not know that the Charge by the Bank of India was discharged. The Bank of India never sued them nor anybody for the unlawful Discharge of Charge if at all. They paid rent to Jaguar Petroleum Company Limited – 3rd Defendant. The lease they entered with Jaguar Petroleum Limited was in his list of documents. He was not sure whether the said lease was ever registered or not. His lawyers were the one who knew about this as they were the ones who handled the transaction.

42. PW - 1 reiterated that on page 102 of the 1st Defendant's bundle there was an agreement dated 25th May, 2013 – it was between Triton Petroleum Company Limited (under Receivership), KCB, Eastern and Southern African Trade and Development Bank and VKM Ltd. for two properties MSA/Block XXIII/206 and MSA/Block CCIII/250. On page 109 it showed having been signed by George Attewe.

C. Cross examination of PW - 1 by Mr. Mutua Advocate.

43. PW - 1 confirmed that they sued Prime Bank of Kenya Limited – the 2nd Defendant herein. This was because the bank charged their property and that they illegally caused the transfer of it to some 3rd

Party – he was not sure they did an error. Their claim was for the payment of the money owed to them by the Defendants. There was the monies used for the intensive and extensive repair and renovations caused to the suit premises on the understanding that we would undertake their business enterprises and activities smoothly but which never occurred at their behest. As far as he was concerned, the Prime Bank Limited were not liable on the monies owed. He had not asked for the property to be reverted back to the Plaintiffs. He had no interest in Prime Bank Limited and for them using the title as security when they took occupation of the premises in the year 2011. He knew who the owner of the land was. He was aware that the property (ies) were under Receivership and the appointed officer concerned. One was capable of buying the property even if it was under a lease. He confirmed that there was a lease and it had been sub – leased to them to continue leasing it. The lease was with Jaguar Petroleum Limited who to him was the owner of the land. He had an understanding with Triton Petroleum Ltd. They executed an agreement to that effect.

D. Re - examination of PW - 1 by Mr. Ruwa Advocate.

44. PW - 1 confirmed that the company that was under Receivership was Triton Petroleum Company Limited and not Triton Services Station Limited – there should not be that confusion. What he knew was that the two (2) gentlemen – Mr. George Attewe and Mr. Kailesh Joban Putra were directors of Triton Services Stations Limited and Jaguar Petroleum Limited though he never verified from the Company registry. He had never worked for Jaguar Petroleum Co. Limited nor Triton Petroleum Co. Limited (under Receivership) to know or appreciate their internal Administrative and operations structures hence he would not know these details as to who was a director or Employee, he could only assume.

45. PW - 1 reiterated that they had never received any communication from the official receiver on any issue on the subject matter. During the management of the property by the official receiver the Plaintiff was never involved at all. The Plaintiffs were never present. He confirmed that the Plaintiff remitted all the rents Jaguar Petroleum Company Limited. Triton Petroleum Company Limited. (under Receivership) was the legal owner of the land. None of the companies herein ever contested that they were paying rent to Jaguar Petroleum Company Limited. Whether there had been any due diligience conducted onto the property, they left that to the two gentlement to deal and they informed them all was well that was with reference to page 19 and 12 of the Plaintiff's bundle of documents dated 19th November, 2009.

46. On 7th June, 2024 the Plaintiffs marked their case closed through their Counsel Mr. Ruwa Advocate.

V. 1st The Defendant's case

47. The 1st Defendant filed its Statement of Defence dated 17th May, 2022 denying the contents as alleged in Paragraphs 9 and 10 of the Plaint and puts the Plaintiffs to strict proof thereof. However, without prejudice to the above, the 1st Defendant stated that, by the Plaintiffs' own admission, the process of Receivership commenced in the year 2008. Therefore, dealing with the 3rd Respondent's properties whilst in Receivership, knowingly and without the Receiver's written consent or approval, renders all transactions or dealings by the Plaintiffs with 3rd Respondent's properties null and void ab initio,.

48. According to the 1st Defendant, the Plaintiffs were thus barred from purporting to benefit from their illegality. From the foregoing it clearly evinces that the Plaintiffs connived with the 3rd Defendant to deny the debtors of the 3rd Defendant (who was under Receivership) by fraudulently concealing funds payable to the debtors/collections by the Receiver and illegally channeling the funds of the Receivership. The Plaintiffs' transactions/dealings purportedly between 3rd, 4th and 5th Defendants were thus illegal ab initio and, unenforceable by this Honourable Court because they're tainted with fraud and illegalities.

49. The 1st Defendant stated that it had lawfully and properly acquired Title No. Mombasa/Block XXIII/206 and Title No. Mombasa/Block XXIII/210 ("the Suit Properties") and was the only lawfully registered and beneficial owner of the Suit Properties and, hence, the only party entitled to the economic benefit and profits of the Suit Properties. The 1st Defendant denied the contents of Paragraphs 11, 12 and 13 of the Plaint and puts the Plaintiffs to strict proof but provisionally, states that even if the allegations made thereto were to be true, the 5th Defendant's actions and promises to the Plaintiffs were legally invalid and unenforceable in law since, the same were done devoid of any locus to deal where, the assets were already subject to the Receivership. Therefore, the Plaintiffs' cause of action severally lays against the 5th Defendant in personam and the remedies sought could not be claimed from the 1st and or 2nd Defendants.

50. Having not carried out due diligence, the Plaintiffs were denied the shielding provided by law to a bona fide purchaser for value without Notice. They were not innocent purchasers of a license to use the Suit Properties without notice of third parties' claims. To the contrary, having known that the properties herein belonged to a company in Receivership, they had Proper and Adequate Notice that the 5th Defendant had no locus standi to give the promises it purportedly made but none the less, they chose to proceed and disregard that irregularity. The 1st Defendant stated that, "the loss lies where it falls" and no remedies can be granted by this Honourable Court against it.

51. Even if the allegations that, the Plaintiffs mutually agreed to pay rent to third parties as alleged specifically in Paragraph 13 of the Plaint were to be valid, there was no basis for such allegations since no nexus is drawn through production of evidence of the Plaintiffs to substantiate the allegations that all these companies were subsidiaries of the 3rd Defendant/Respondent who none the less, remains an independent and distinct person in law. The allegations were by design meant to misguide the Court into finding for the Plaintiffs in the absence of any evidence which must fail because, as already stated, these alleged Agreements were void for lack of consent from the Receiver. The allegations under Paragraph 13 of the Plaint are a testimony that the legitimate funds of the 3rd Respondent were illegally diverted to other alleged 'larger group of Companies' despite the proceeds from the said properties ought to belong to the receivership fund.

52. The allegations in Paragraph 15 of the Plaint to wit, the purported offsetting of personal debts of one Yagnesh Devani amounted to an illegal exercise against the 3rd Respondent's debtors as the said Yagnesh Devani was nowhere shown with a registered interest in the Suit Properties was with no locus to direct such off setting since the 3rd Respondent was already in receivership. The Plaintiffs were not entitled to remedies arising from their illegal transactions. They intended to cross examine the executors of documents provided by the Plaintiffs.

53. No evidence had been offered of any purported payments made towards the alleged arrears in salary payments of the staff/employees of the 'larger group of companies' as claimed in the Plaint. Such colossal amounts could not by law be agreed upon without any written agreement under the Contracts Act. Therefore, the allegations were misleading and false. The 1st Defendant denied the contents of Paragraph *16*.

54. It was not in contention that, the Plaintiffs occupied the suit premises and operate businesses therein. However, they only occupied the suit premises as Tenants and they had not orbited into purchasers of the same. The 1st Defendant remained the lawful purchaser for value of the suit premises and is in fact the registered owner. Therefore, whether or not the Plaintiffs were Tenants was inconsequential to the 1st Defendant's ownership rights. During the existence of their alleged Tenancy, the Plaintiffs had not acquired and/or registered any interest in the Suit Properties. The 1st Defendant's interest is that all

Tenants should, from dated 9th March 2022, the date of receipt of the Notice of Change of ownership/ request for rent pay to it as the lawful and registered and beneficial owners of the Suit Properties. It goes without saying that, having entered into the premises through an illegitimate process without the written permission of the Receiver, the Plaintiffs remain 'Tenants at will'. The 1st Defendants denied the contents of paragraph *17*.

55. In answer to the allegations made in Paragraph 18 of the Plaint, the 1st Defendant stated that, the Plaintiffs' having admitted to being in occupation of the Suit Properties as Tenants and carrying out a wide range of businesses, were mandated to procure the said licenses in compliance with the law. However, that fact alone never conferred any superior legal rights against the 1st Defendant who were the registered owners. The allegations made in Paragraphs 19,20, 21 and 22 of the Plaint were denied. The 1st Defendant stated that, the contentions of renovations, maintenance of machines and equipment as admitted by the Plaintiff to be 'a whopping sum' could not be based as alleged on mutual trust and cultural/friendship. Such were mere allegations knowing well that the 3rd Defendant was in Receivership and accountability ought to be proved to the Receiver such sums were spent without the written approval of the Receiver.

56. Further, the alleged machinery and equipment therein were chattels capable of relocation and not fixtures incapable of movement. The renovations and improvements alleged to had been made thereto, were ordinarily intended to improve the profit margin of the Plaintiffs and not to acquire an interest in the premises. The contents of Paragraphs number 23 and 24 were denied in toto and the Plaintiffs would be required to prove them to the required degrees. The 1st Defendant reiterated that as a lawful purchaser for value of the Suit Properties, which are commercial premises, it was their right to seek for rent.

57. The 1st Defendant denied all the allegations made in Paragraph 25 of the Plaint. It was absurd to suggest that a search revealed that the 1st Defendants was involved in fraud. A search never not disclose the alleged fraud. To the contrary, the Plaintiff admitted that the 1st Defendant was the registered proprietors. The Plaintiffs' cause of action severally laid against the 5th Defendant in personam and the remedies sought could not be claimed from the 1st and or 2nd Defendants.

58. In response to Paragraph 26 of the Plaint, the 1st Defendant denied in toto, the contents of the said Paragraph to wit, that in its processes of transfers of ownership the 1st Defendant committed any fraud. The 1st Defendant reiterated that, the processes of transfer of ownership were commenced procedurally and completed without any fraud or illegalities on its part or otherwise as evinced by documents. The 1st Defendant further stated that: -

    a. It was not in doubt and as it was also admitted by the Plaintiffs that, the 3rd Defendant was the owner of the suit property.

    b. The Suit Properties was lawfully sold vide an Agreement for Sale dated 25th May 2013 ("the Sale Agreement") between the 3rd Defendant, Kenya Commercial Bank Limited ("KCB") and Eastern and Southern African Trade and Development Bank ("PTA") to VKM Limited (now Grant Thornton Consulting Limited) devoid of any encumbrances and/or undisclosed third-party interests based on the following as stated and reproduced from the recitals on the said Sale Agreement: -

        i. By the Debentures particulars of which appear in the First Schedule [of the Sale Agreement] ("the KCB Debentures" and "the PTA Debentures"), TPL [the 3rd Defendant] charged in favour of KCB and PTA by way of a First Charge all its undertaking goodwill assets book-debts (including but not limited to debts under

future contracts which when made would or may constitute book debt relating to the business of the Vendors[the 3rd Defendant, KCB and PTAJ) movable and immovable property fixed assets plant and machinery including tools spare parts and replacements therefor and including also fixtures and fittings whatsoever and whosesoever both present and future (other than agricultural land as defined in Section 2 of the Properties Control Act, Chapter 302 of the Laws of Kenya) and its uncalled capital for the time being to secure advanced to TPL [the 3rd Defendant].

ii. By the Legal Charges (hereinafter called "the Legal Charges") particulars of which appear in the Second Schedule hereto [of the Sale Agreement] TPL [the 3rd Defendant] Charged in favour of the KCB and PTA ALL THAT piece of land known as Title Number Mombasa/Block XXIII/206(hereinafter called "the First Property") supplemental to the KCB Debentures and the PTA Debentures. The Legal Charges incorporate a Chargee's statutory power of sale.

iii. TPL [the 3rd Defendant] defaulted under the provisions of the KCB and PTA Debentures and by Deeds of Appointment of Receivers further particulars of which are set out in the Fourth Schedule hereto [of the Sale Agreement] KCB and PTA appointed the Receivers to act as Receivers and Managers of TPL [the 3rd Defendant].

iv. KCB and PTA issued statutory notices to TPL [the 3rd Defendant]in accordance with the provisions of the law demanding payment of all sums due and secured by the Legal Charges which notices have now expired.

v. TPL [the 3rd Defendant] is also registered as proprietor of ALL THAT piece of land known as Title Number Mombasa/Block XXIII/210 (hereinafter called "the second property" and together with the First property called "the Property") [the suit properties].

vi. KCB and PTA, as Chargee, in exercise of the powers conferred upon it by the Legal Charges have agreed to sell to the Purchasers and the Purchaser has agreed to buy the First Property.

vii. TPL [the 3rd Defendant] has also agreed to sell the Second Property to the Purchaser and the Purchaser has agreed to buy the Second Property.

viii. KCB PTA and TPL [the 3rd Defendant] and the Purchaser have agreed to sell the Properties jointly.

59. According to the 1st Defendant, the suit properties were sold for the sum of Kenya Shillings Ninety-Five Million Five Hundred Thousand (Kshs.95,500,000/-) and a deposit of Kenya Shillings Twenty-Eight Million Six Hundred and Fifty Thousand (Kshs.28,650,000/-) was paid to the 3rd Defendant, KCB and PTA through their Advocates the Law firm of Messrs. Walker Kontos pursuant to the terms of the Sale Agreement.

60. Subsequent to the payment of the said Deposit, between the years 2013 and 2020, various cases/proceedings were filed and instituted with respect to the 3rd Defendant and including the Suit Properties and other assets of the 3rd Defendant which effectively put the said sale of the Suit Properties in abeyance until determination of the said cases/proceedings. The cases/proceedings involved the 3rd, 4th and 5th Defendants herein as well as KCB, PTA and other parties. The various cases and proceedings culminated in a Consent recorded on or about 10th July 2020 the upshot of which was that KCB

and PTA may proceed to conclude the disposal of the various properties assets of the 3rd Defendant including the Suit Properties.

61. The property known as Title Number Mombasa/Block XXIII/210 was previously charged by the 3rd Defendant to Bank of India who were paid off by KCB and PTA in concurrence with the 3rd Defendant pursuant to the said Consent for the purposes of the sale of the Suit Properties without encumbrances (as required under the terms of the said Sale Agreement) subsequent to which Bank of India duly discharged their charge and realized the title to KCB's Advocates, Messrs. Walker Kontos. The Purchaser of the Suit Properties exercised its right to nominate under the Sale Agreement and proceeded to nominate and assign its rights and obligations under the Sale Agreement to the 1st Defendant vide a Deed of Assignment dated 8th December, 2020 whereby Grant Thornton Consulting Limited (formerly VKM Consulting Limited) assigned all its rights and obligations as a purchaser under the Sale Agreement to the 1st Defendant with the knowledge and consent of the 3rd Defendant, KCB and PTA.

62. The facts as above stated were well within the knowledge of the Receiver of the 3rd Defendant as well as KCB and PTA. In the event that KCB and PTA did not join in this suit as Interested Parties then the 1st Defendant will seek leave of the Honourable Court to join them in as Third Parties in this matter. The 1st Defendant stated that its obtained finance from the 2nd Defendant for the balance of the purchase price due under the Sale Agreement and the process and usual manner charged the Suit Properties to the 2nd Defendant to secure the said amount borrowed to pay the balance of the purchase price. The 2nd Defendant at the request of the 1st Defendant issued its usual undertaking/guarantee in favour of the 3rd Defendant, KCB and PTA through their Advocates Messrs. Walker Kontos for the said amount to facilitate the release of the titles for the Suit Properties for the purposes of effecting a transfer of the same to the 1st Defendant and a legal charge there over in favour of the 2nd Defendant.

63. According to the 1st Defendant, upon completion of registration of the registration formalities, the 2nd Defendant proceeded to debit the account of the 1st Defendant and released the balance due to the 3rd Defendant, KCB and PTA through their Advocates, Messrs. Walker Kontos. The 1st Defendant denied specifically in toto each and every material allegation of fraud in its processes of the Transfers of ownership and reiterates that, the processes of transfer of ownership were commenced procedurally and completed without any fraud or illegalities on its part or otherwise as evinced by documents. From the foregoing with respect to the Suit Properties, transfers for each property were prepared and registered accordingly.

64. The above chronology was supported by the following documents: -

    a. On Mombasa/Block XXIII/210

        i. Stamp Duty receipt dated 2nd November, 2020 for the Discharge of Charge by Bank of India;

        ii. Discharge of Charge by Bank of India dated 27th October, 2020 registered on 20th December, 2021

        iii. Application for removal of Caution by Triton Gas Station Limited dated 16th December, 2021 registered on 20th December, 2021

        iv. Application for Removal of Caution by Kumar Mashru Sanjay Kishor dated 16th November 2021 registered on 20th December, 2021

v. Stamp Duty receipt dated 15th December, 2021 for the Transfer to New Oshwal Distributors Limited

vi. Transfer dated 10th December, 2021 to New Oshwal Distributors Limited registered on 20th December, 2021.

vii. Stamp Duty receipt dated 17th December, 2021 for the Legal Charge to Prime Bank Limited;

viii. Legal Charge dated 17th December, 2021 in favour of Prime Bank Limited by New Oshwal Distributors Limited registered on 20th December 2021;

ix. Certificate of Lease to New Oshwal Distributors Limited issued on 20th December,2021;

x. Official Search dated 21st December, 2021 confirming that the Suit Properties and registered in the name of New Oshwal Distributors Limited and are charged to Prime Bank Limited.

b. Mombasa/ Block XXIII/206

i. Discharge of Charge by KCB dated 23rd September, 2021 registered on 20th December, 2021;

ii. Application for removal of Caution by Kumar Mashru Sanjay Kishor dated 16th November, 2021 registered on 20th December 2021;

iii. Stamp Duty receipt dated 15th December, 2021 for the Transfer to New Oshwal Distributors Limited;

iv. Transfer by Chargee dated 10th December, 2021 to New Oshwal Distributors Limited registered on 20th December 2021;

v. Stamp Duty receipt dated 17th December, 2021 for the Legal Charge to Prime Bank Limited:

vi. Legal Charge dated 17th December.2021 in favour of Prime Bank Limited by New Oshwal Distributors Limited registered on 20th December 2021:

vii. Certificate of Lease to New Oshwal Distributors Limited issued on 20th December,2021;

viii. Official Search dated 21st December, 2021 confirming that the Suit Properties and registered in the name of New Oshwal Distributors Limited and are charged to Prime Bank Limited.

65. Thus, the allegations of fraud and/or fraudulent transfer of the said properties were baseless and at best stated in ignorance of the law. The contents of Paragraphs 27 to 32 of the Plaint were denied. In view of the foregoing matters, the 1st Defendants averred that: -

a. It was not liable for any allegation as claimed or at all.

b. The Plaintiffs were not entitled to prayers sought. They do not possess any proprietary Rights/ interests in the Suit Properties save, for usage in accordance to agreement as Tenants and payment of rent subject to terms and conditions as set by the Landlord

c. The Plaintiffs were not in any position to seek for Declarations to invalidate the transactions above as invalid. This prayer can only be made by vendors but not Tenants.

d. Accordingly, the 1st Defendant has been wrongfully sued and should not be a party to this suit.

66. According to the 1st Defendant, in the premises this suit was bad in law, incompetent and does not disclose any cause of action against the 1st Defendant and should accordingly, be dismissed with costs. The 1st Defendant denied that any demand has been made on him as alleged or at all. They admitted to the jurisdiction of the court.

67. On 25th June, 2024 at 11.30 am the 1st Defendant called DW - 1 who testified as follows after the Learned Counsel Mr. Clapton Advocate open with the following remarks that the case before court was where the Plaintiff claims entitlement from a group of companies which were under official Receivership. Their argument that such a claim was wrong/illegal. They had a witness who was an expert and factual witness on this matter. Their duty today was to proof that all the allegations from Plaint dated 31st March, 2022 were mere falsehood and hence shall proceed to call their first witness – Mr. James Singh Advocate.

A. Examination in chief of DW - 1 by Mr. Clapton Advocate.

68. DW - 1 testified under oath and in English language. He identified himself as JAMES GITAU SINGH ADVOCATE. He was an Advocate of High Court of Kenya of 30 years experience and practiced law at the Law firm of Messrs. L.J. Advocates, LLP. At all material times he acted for the 1st Respondent. He filed a witness statement dated 15th May, 2024 and which he adopted as his evidence and list of documents (34) as 1st Defendant Exhibits numbers 1 to 34. He was present and heard the evidence of the Plaintiff. He was the Advocate for the Plaintiff and the Defendant and his observation was that, he had been acting for the Plaintiff and the official receiver for the 4th Defendant. He knew Mr. Manoj Shah who was the Director of both the Plaintiffs. He was engaged by Mr. Yagnesh Devani as a Caretaker of his properties In Mombasa. They included the suit properties – Mombasa/Block/XXIII/210 and Mombasa/Block/XXIII/206 which were registered in the names of Triton Petroleum Company Limited. All the allegations of fraud and/or fraudulent transfer of the said properties made by the Plaintiff were thus entirely baseless. They were encumbered save for a charge in favour of the Bank of India dated 28th November, 2008 for a sum of Kenya Shillings Sixty Five Million (Kshs. 65, 000, 000.00/=). His firm represented the Triton Group of Companies and Mr. Devani up to the time he fled the country.

69. After Mr. Devani fled the country Triton Petroleum Company Limited, Triton Services Stations Limited and other companies owned by him were placed under Receivership by several Banks.

70. The dispute emanated from two properties MSA/Block XXIII/206 and 210. The Certificated of Lease. The all claimed to have acquired possession after executing the lease agreement, under the schedule – the Lessor being the proprietor. The Lessor should be Triton Petroleum Company Limited. Hence anything on this document was erroneous.

71. DW - 1 stated that he had seen the leases. Firstly, they bore several anomalies. They were not properly executed nor registered. Indeed, firstly, the execution of the lease between Jaguar Petroleum Limited and Fussion Food– lacked certification by the People who executed it as required under Section 110 of the RLA. Thirdly it purported to 20 years, anything over 1 years ought to be registered. Fourthly, He testified that there were no Board of Directors in Charge of operations, several managers and employees fraudulently took control of the sale of the assets that belonged to Triton Companies. For instance the execution of documents which had two signatures – by Mr. Kailesh Johanputra and Mr. George Dick

Atwete. Mr. Atwete had been employed at the DW – 1's offices as a Court Clerk while Mr. JohanPutra had been previously been a Junior Manager in Charge of marketing for Triton Group. DW – 1 stated that Mr. JohanPutra took over control of the Petrol Stations and started to operate them as though they were his personal property. On Page 19, there was a Letter of Offer to the Sub-Lease dated 25th February, 2011 neither of these gentlemen were directors of Triton Petroleum Limited. Thus, it is for this reason that a suit was filed. Their Advocate was compelled to pay penalties.

72. Fifthly, after the properties for Triton Companies were placed under Receivership, only the Receiver manager could have entered into contracts or leases on behalf of the Triton Companies. However, things were done on contrary. On the lease it's on consideration. See Clause G. – states that the amount to be agreed upon. Its contrary to the provisions of law – Section 23 of the Law of Contract – it has to be in writing. It makes the illegal. The 2nd Lease on Page 12 had not been registered. No execution part was required under the provision of Section 110 of the RLA. Its executed by the same parties. It held that the Triton Petroleum were the owners which was not true. The property was owned by difference proprietors as shown from the Certificate of Lease.

73. Additionally, the properties were also charged to various banks including the Bank of India at the time the leases were executed and consent from these Banks to lease out would have been required.

74. DW – 1 informed Court that on the suit property there was a petrol station, a shop and a restaurant. They were operated by Mr. Devani's wife. This was after Mr. Devani fled the country.

75. According to DW - 1, it was admitted that the property was subject to a charge and it was under receivership. Hence in the given circumstances no lease would have been entered. Both the two (2) leases breach the provisions of Section 3 of the Law of Contract. With regard to where the Plaintiff claimed possession there was no lease between them of the land ad them. What exists was a letter of offer on Pages 12 and 13. The execution part bears a signature by only one person. It has been two signatures. It was alleged that the property was given to them by Jaguar Petroleum Company Limited. It was required to be registered taking that it is for 20 years. There was no follow up.

76. When referred to page 13 of the Plaintiff's bundle, DW - 1 told the court that there was evidence of any payment by Plaintiff to Jaguar of a sum of Kenya Shillings Four Fifty Thousand (Kshs. 450,000/-) and the stamp duty and the Letter of Offer on Page 19. Clause (9) this would have required a variation as required by the Provisions of Section 3. With reference to paragraph 15 of the Plaint, the witness stated that by this time there was appointed a caretaker of Mr. Devani's property in Nyali and the Petrol Station when the property was advertised for sale its Mr. Manoj who showed us the property. they dashed to claim Directorship and entered an agreement – for the Lease. All these were fraudulent. The Petrol Station was operated by Mr. Devani. With reference to page 29 and 38 of HCCC No. 462 of 2009 the witness stated that the parties Triton Gas Station Ltd and what it sought to shop. There was a ruling at page 33. At page 39 was another case filed by Triton Gas Station HCCC 590 of 2009. It was admission on Paragraphs *4*, *8* and *9* on ownership of the property and it was under the receivership. It was all fraudulent. The execution of the affidavit.

77. The witness told the court that at page 78 of the Defendant's Bundle and the directors were charged in a criminal case Page 73 to 74. The property was never transferred after another 3rd Party came up and shown interest – Sahara – Pages 140 to 142 (Refer) until an agreement was reached with the Bank of India. The transfer was eventually done. With reference to page 160 to 170, the witness stated that its not clear how the Plaintiff nor Mr. Manoj came into ownership or occupation of the suit property but it must have been after Mr. Devani left the county. The Plaintiff were not in possession of the suit property. Clearly, it was without the consent of the Receiver Manager, the Chargees and/or Triton

Companies Limited. What was before the court was perpetration of fraud by Mr. Manoj. The suit should be dismissed with costs.

B. Cross examination of DW - 1 by Mr. Ruwa Advocate.

78. DW - 1 reiterated that the suit property was owned by Tritton Petroleum Company as shown under Page 4 of the Certificate of Title. It was Mr. Manoj who took him to see the property at Nyali and Petrol Station. They may have been other Advocates who handled the property. He was from that Triton Petroleum Ltd which had been put under receivership. The other company's associated with it had their assets were put under Receivership. He had never acted for the Plaintiff. He only acted for the 1st Defendant.

79. DW - 1 contended that the 3rd Defendant was already under Receivership. On the fraudulent leases as noted from the leases – one can only convey an interest in a written document as per section 3 of the Contracts Act and he still held that the documents presented were fraudulent. He confirmed that when they tried to take possession, it was when they found that the Plaintiffs were in occupation of the land. This property was always registered in the name of Triton Petroleum Company and when we wanted to sell it.

80. When referred to Pages 39 to 109 there were advertisements and sale agreement, he visited the property with Mr. Manoj on 2013, he was not aware that the Plaintiffs were in possession. All along they knew that Mr. Mannoj was managing the property. They only came to know of the real facts of the matter after the Plaintiff filed the case. Mr. Devani fled from the Country. In 2009 there was a Restaurant there. Despite of them fleeing the country there was a restaurant and shop in operation in 2009. He confirmed that by that time 2009, Mr. Devani and the wife had fled the country.

81. With reference to the discharge of charge, the witness stated that between the Plaintiff and the Prime Bank – he referred the Court to the 2nd Defendant's bundle. When he visited it's the Triton Services Station Limited yet they had no consent of the official Receiver Manager. With reference to page 24 of his bundle of documents was a picture of the Petrol station and admissions of the Plaintiffs. He was aware that he was involved in some criminal cases.

C. Re - examination of DW - 1 by Mr. Clapton Advocate.

82. DW - 1 confirmed that the assets were placed under the control of the Receiver Manager. From the default of the leases it could not be confirmed that they were good leases. He carried out due diligence when they bought the property – they were not interested on the vacant possession. He was aware that Mr. Devani had not come back to the County.

83. The 1st Defendant marked their case closed on 25th June, 2024 through their counsel on record Mr. Clapton Advocate.

VI. The 2nd Defendant's case

84. The 2nd Defendant filed their Statement of Defence dated 5th May, 2022 where the 2nd Defendant averred that save to admit the proprietorship of the properties known as Title Numbers Mombasa/Block XXIII/206 and Mombasa/Block XXIII/210 (hereinafter 'Suit Properties') as pleaded at paragraph 8 of the Plaint, the 2nd Defendant was a stranger to and denied the rest of the averments at paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17,18, 19, 20,21, 22 and 23 of the Plaint.

85. The 2nd Defendant averred that save for admission that as at February 2022 the 1st Defendant was the registered proprietor of the Suit Properties, the 2nd Defendant made no admission to the rest of the

averments in Paragraphs 24, 25 and 26 of the Plaint and in particular denies the allegations made therein that their transfer to the 1st Defendant and charge to the 2nd Defendant was characterized by any fraud as alleged or at all and all and singular particulars of the alleged fraud pleaded at paragraph 26 of the Plaint are denied in toto.

86. The 2nd Defendant averred that as the registered proprietor of the Suit Properties and by virtue of the provisions of Sections 24, 25 and 26 of the *Land Registration Act*, 2012, the 1st Defendant as the indefeasible owner thereof could and indeed created in its favour a valid and legally protected interest thereon by way of a registered legal charge. The Plaintiffs had no registrable interest over the Suit Properties or any other interest thereon capable of being protected in law and therefore their claim herein in so far as it related to ownership, use and/or possession of the Suit Properties was entirely misconceived.

87. The 2nd Defendant reiterated the foregoing and averred that it was a stranger to and made no admission to the averments at Paragraphs 27, 28, 29, 30, 31 and 32 of the Plaint. The 2nd Defendant made no admission to the averments at paragraphs 33 of the Plaint. No demand and/or notice of intention to sue according to the 2nd Defendant ever preceded the institution of this suit and if any were issued which is denied, the 2nd Defendant averred that it was not obliged to make good the Plaintiffs' claim for the reasons aforestated. The jurisdiction of the Honourable Court was admitted but the 2nd Defendant averred that the Plaintiffs were not entitled to any of the reliefs sought in the suit.

88. The Counsel on record Mr. Mutua Advocate made the following opening remarks. He stated that the 2nd Defendant's case was to show that he was the registered proprietor of the Charges for the suit property. The Charges were created in his favour. The 2nd Defendant exercised his right and as confirmed under the provision of Sections 24, 25 and 26 of *Land Registration Act*. The relationship did not make them a necessary party to suit. It was a claim for pecuniary compensation. It was improper to have dragged them in the proceedings.

89. The 2nd Defendant called its witness DW 2 on 25th June, 2024, who testified as follows:-

A. Examination in Chief of DW - 2 Mr. Mutua Advocate.

90. DW - 2 gave sworn evidence and testified in English language. He identified himself as GEORGE WACHIRA MATHUI. He was employed by Prime Bank Ltd. as a Senior Manager – Legal Section for the last 8 years. He prepared a statement on 17th May, 2024 and he confirmed the signature. He adopted the same as his evidence in chief. He had referred to several documents dated 17th May, 2024 which were 15 documents as the 2nd Defendant's Exhibits 1 to 15 admitted and produced. He relied on them in support of his case.

91. DW – 2 stated being aware of the claim by the Plaintiff. There was no basis upon which the 1st Defendant's right to ownership of the suit property would be impeached at the instance of the Plaintiff. In respect of the two (2) properties there was no registered interest to the Plaintiff but there was a charge in favour of the 2nd Defendant. The Plaintiff would not make any claim over the property nor call for the cancellation of the title deed.

92. The 1st Defendant created legal charges were created in favour of the 2nd Defendant. The title was used a security for the repayment of a principal sum of Kenya Shillings Seventy Million (Kshs. 70, 000, 000.00/=) were not affected in any way to the leases mentioned in these property. The leases were not registered.

B. Cross Examination of DW - 2 by Mr. Ruwa Advocates.

93. DW - 2 confirmed that the bank conducted due diligence before the charging of the two (2) properties. They found that the properties were charged to other financial institutions and hence they did not do anything before the registration. The Bank had an interest in the property and the title as whole. Indeed the Land Valuers as Agents of the Bank would always visit the property but in this case he was not aware this happened. The bank was not a concerned whether the Plaintiff was in occupation or not of the suit property. They were dealing with the Official Receiver Manager. The Land Valuer would be sent to check on the physical occupation and the valuation of the property but in the instant case he was not awate that this took place or not.

94. The witness stated that there were cautions registered against the property; the caution was placed by Triton Gas Station. He was referred to Paragraph 4 of the statement and Pages 50 to 53. With reference to page 54 of the bundle, DW - 2 told the court that the charge was for 27th October, 2020. It was registered in December. With reference to page 57 of the bundle, the witness stated that it was signed the charger – Bank of India. It was certified on 10th September,2020 and charge was dated 27th October, 2010 it was signed a month later.

95. With reference to Page 65 of the Bundle the witness reiterated that the charge dated 17th September, 2021 Page 84 of the Bundle. It appeared to be 8th November, 2020, it would suppose the accretion was done one year after it was drawn. At page 42 of the bundle, the director signed on 13th September, 2021 dated 10th December, 2021. With reference to page 50 to 53 it was an application to remove caution dated 16th November, 2021, the witness stated that the applicant was Triton Gas Station – Triton Gas was never put under receivership. At the time of the property being put under Receivership the Bank may have visited the property prior to the registration of charge.

96. DW - 2 confirmed that he only dealt with documentations on the subject matter but nothing else. When they were served with the pleadings when they came to know who were in physical occupation of the property for such property with a colossal amount, the bank had interest the property even if it was not registered.

C. Re - examination of DW - 2 by Mr. Mutua Advocate.

97. DW - 2 reiterated that he had seen the pleadings by the Plaintiff. There was no claim or indication that the Plaintiffs assets and the interest in the service of proprietorship over these two titles. The charges were created in favour of the Bank by the 1st Defendant from the official searches showed that the proprietor of these properties was 1st Defendant.

98. The 2nd Defendant marked their case closed on 25th June, 2024 through their counsel Mr. Mutua Advocate.

VII. Submissions

99. On 25th June, 2024 after the Plaintiffs and Defendants marked the close of their cases, the Honourable court directed that the parties file their submissions within stringent timeframe thereof on. Pursuant to that on 27th July, 2024 the Honourable court reserved a date to deliver its Judgement on 8th October, 2024.

A. The Written Submissions by the Plaintiffs.

100. The Plaintiffs through the Law firm of Messrs. S. Ruwa & Co. Advocates filed their written submissions dated 15th July, 2024. Mr. Ruwa Advocate commenced the submissions by stating that the Plaintiffs Petrazo Limited and Fusion Foods Limited hereby presented their written submissions in support of their case. These submissions outlined the Plaintiffs' case, the evidence adduced, the Defendants' case, the matters in issue, and a prayer for relief.

101. On the Plaintiffs' case, the Learned counsel submitted that Petrazo Limited and Fusion Foods Limited, were the occupants of Plot No. Msa/Block XXIII/206 and Plot No. Msa/Block XXII/210 (hereinafter referred to as the 'suit properties'). The Plaintiffs asserted that they had been in open and uninterrupted occupation of the suit properties since the year 2012, having acquired leasehold interests from the 5th Defendant, who held a Lease Agreement with the 4th Defendant. Equally, the 4th Defendant held a Lease issued by the 3rd Defendant Triton Petroleum Company Limited.

102. The Learned Counsel contended that the Defendants had sought to unlawfully dispossess them and interfere with their peaceful enjoyment and possession of the suit properties. Despite the Plaintiffs' legitimate leasehold interest and occupancy, the Defendants have acted in a manner that has disrupted the Plaintiffs' business operations and caused substantial harm. The Plaintiffs had adduced the witness evidence of Mr. Manoj Shah who provided a detailed witness statement and supporting documents. Furthermore, the said witness testified in court, adopting the Witness Statement and producing the Plaintiffs' bundle of documents in support. These were admitted as evidence as Plaintiffs Exhibits 1-11.

103. On the case of the Defendants, the Learned Counsel submitted that the Defendants, New Oshwal Distributors Limited and Prime Bank (K) Limited, deny the Plaintiffs' claims. They argued that the Plaintiffs had no legitimate claim to the suit properties, asserting that any occupancy or improvements made by the Plaintiffs were unauthorized and that the Plaintiffs were aware of the properties' encumbrance and the subsequent transfer of ownership to the 1st Defendant.

104. During the hearing, Mr. James Gitau Singh Advocate testified that he was aware of the existence of a Petrol Station, a Restaurant, and a Service Bay at the suit property. He conceded that even after the flight of Mr. Devani, activities continued on the suit land and currently continues. He further admitted that at the time of purchasing the suit land, the 1st Defendant did not expect to receive vacant possession and knew there were other interests on the suit property. His testimony revealed that they never visited the suit land or send a representative to either identify the land physically or even value it, indicating an attempt to avoid admitting awareness of the Plaintiffs' existence and interest on the suit property. Mr. Singh alleged that the directors who signed the Lease Agreements were not bona fide directors of the 3rd, 4th, and 5th Defendants. However, the Plaintiffs' exhibits contain a CR - 12 Form issued in the year 2009 clearly showing the official directors of the 4th Defendant.

105. According to the Learned Counsel, the Defendants relied on the witness statements of Mr. James Gitau Singh and Mr. Mathui, in addition to the bundle of documents filed by them in support of their defence.

106. On the matter in issue and detailed arguments on key issues and on the issue of whether the Plaintiffs held a valid leasehold interest in the suit properties, the Learned Counsel averred that the Plaintiffs had established a valid leasehold in the suit properties by virtue of their continuous, open and peaceful occupation, supported by documentary evidence and witness testimony. The Plaintiffs' leasehold interest in the suit properties stemed from a series of leases and sub leases between the 3rd, 4th and 5th Defendants and ending with a a lease agreement between the 5th Defendant and Plaintiffs. This

relationship was characterized by mutual assent, consideration, and the essential elements of a lease. The Plaintiffs' occupation was with the explicit consent and knowledge of the previous owner, as evidenced by lease agreements, correspondence, and witness testimony.

107. The Learned Counsel contended that the Defendants had attempted to cast doubt on the existence and validity of a Leasehold relationship between the previous registered owner and the Plaintiffs. The Defendants had pointed out a series of inadequacies in the documents relied upon by the Plaintiffs as evidence of an existing valid Leasehold interest on the suit properties. They had invited the court to find that the Lease documents ought to be invalidated for the reason that they contain inadequacies in terms of execution and non-registration.

108. The Learned Counsel further submitted that the court was invited by the Defendants to make a finding that Leases for a period of more than two years are required to be registered and therefore the failure to register the leases that conferred interest upon the Plaintiffs renders the leases void and unenforceable against the Defendants. It was not disputed that the Lease Agreements which the Plaintiffs places reliance upon are unregistered. However, the Learned Counsel submitted that whereas an unregistered lease could not be used to evidence title or create a legal estate, it can be utilized for collateral purposes, such as proving possession or tenancy. By virtue of Section 36(2) of the *Land Registration Act*, such a Lease remains enforceable as a contract between the parties. To buttress on this pint, the Counsel cited the decided case of "Jomo Kenyatta University of Agriculture &Technology – Versus - Kwanza Estates Limited [2021] eKLR", the court implicitly recognized the enforceability of unregistered leases under certain circumstances, reinforcing the principle that an unregistered lease remains a valid contract between the parties. Furthermore, the Plaintiffs' continuous and open occupation of the suit properties since year 2012 serves as proof of tenancy and gives credence to their claim that they are tenants on the suit premises.

109. The Learned Counsel also submitted that the doctrine of Part Performance was applicable in this case for the reason that the Plaintiffs have taken significant actions in reliance on their tenancy agreement with the 3rd to 5th Defendants. The Plaintiffs had not only occupied the suit properties for over a decade but had also made substantia improvements. They invited the Court to be persuaded by the case of "Thrift Homes Limited – Versus - Kays Investment Ltd [2015] eKLR", where the court recognized that a tenant's substantial improvements contribute to the property's value and should be considered in disputes over property interests. The Plaintiffs' occupation and reliance on the lease constitute part performance, further supporting the enforceability of the lease.

110. Additionally, the Counsel referred Court to the doctrine of estoppel prevents the Defendants from denying the Plaintiffs' leasehold interest, given their knowledge of the Plaintiffs' occupation and investments. The Plaintiffs had established that they had been in continuous and open occupation of the suit properties since 2012. This assertion was supported by lease agreements that clearly indicate their legitimate basis for occupation. Furthermore, witness testimonies and exhibits produced in court corroborate this position. The court held in the case of "Sisto Wambugu – Versus - Kamau Njuguna [1983] eKLR" that continuous and open occupation is a critical element in establishing a party's interest in land. The Plaintiffs' uninterrupted occupation for over a decade strengthens their claim to the leasehold interest in the suit properties.

111. According to the Learned Counsel, the Defendants had not produced any evidence to dispute this tenancy arrangement. In "Kenya National Capital Corporation Ltd – Versus - Albert Mario Cordeiro & another [2014]eKLR", the Court emphasized the importance of written agreements in establishing tenancy rights. The Plaintiffs' lease agreements provide clear evidence of their bona fide tenancy status. Mr. James Singh Gitau's testimony revealed that the 1st Defendant did not expect Plaintiffs' tenancy and were aware of the ongoing activities on the suit land. His further admission that the 1st Defendant

neither visited the suit land nor sent representatives to inspect or value it indicated an attempt to avoid acknowledging the Plaintiffs' interest.

112. On the issue of whether the Plaintiffs were entitled to be compensated for costs incurred in improving the suit properties Learned Counsel submitted that the Plaintiffs made substantial improvements to the suit properties, acting in reliance on their leasehold interest and the express consent of Mr. Devani who the Defendants conceded was the owner and Chairperson of the various entities, including the 3rd, 4th and 5th Defendants. These improvements significantly enhanced the value of the properties and were made with the expectation of continued occupancy. The Learned Counsel further submitted that the Plaintiffs are entitled to compensation for the improvements. They relied on the well-established principles of Unjust Enrichment and Equitable Relief.

113. Furthermore, they submitted that the Plaintiffs' contributions to the property's value give rise to a constructive trust in their favor. The Plaintiffs' improvements have significantly increased the market value of the suit properties. They relied on the decided case of "Thrift Homes Ltd (Supra)", where the court recognized that a tenant's substantial improvements can contribute to the property's value and should be considered in disputes over property interests. The Plaintiffs' investments had undeniably enhanced the suit properties, reinforcing their claim to a leasehold interest.

114. They also submitted that the Plaintiffs were entitled to protection of their leasehold interest and compensation for the cost of improvements on the suit property. The principle of unjust enrichment, dictates that one party should not be unjustly enriched:- "at the expense of another and it applies to the present dispute. In "Republic – Versus - Public Procurement Administrative Review Board & 2 others Ex Parte Pelt Security Services Limited [2018] eKLR", the court emphasized the need for fair compensation in cases of unjust enrichment. The Plaintiffs' investments in the suit properties had undeniably enriched the Defendants, warranting equitable relief in the form of compensation. The Plaintiffs investments in the suit properties had undeniably enriched the Defendants, warranting equitable relief in the form of compensation.

115. On whether the Conveyance of the suit properties to the 1st Defendant is Valid, the Learned Counsel submitted that the transfer of the suit properties to the 1st Defendant and Charge Receiver, the Purchaser, and the Chargee, deliberately avoided visiting the suit properties Defendants. The Plaintiffs were thus not afforded an opportunity to assert their rights Plaintiffs by depriving them of their leasehold interest and investments in the properties. During the cross-examination of the witness for the 2nd Defendant, several anomalies were highlighted in the instruments that purportedly conveyed proprietary interest to the 1st Defendant. The court should note, as was even acknowledged by the 2nd Defendants' own witness, that there are glaring inconsistencies in these documents:

    i. The Discharge of Charge produced by the 2nd Defendant as Exhibit Number 9 is dated 27th October 2020, registered on 20th December 2021, and attested by the Bank's lawyers on 10th September 2020.

    ii. Exhibit 14, a Charge dated 17th December 2021, was attested by the Advocate of the 2nd Defendant on 8th December 2020, a clear year before it was drawn.

    iii. Exhibit 5 contains a Transfer dated 10th December 2021, which was executed by the directors of the Chargee in the presence of one Julia Kanai, Advocate, on 13th September 2021, three months before the document was even drafted.

116. The Learned Counsel argued that these discrepancies render the instruments conveying proprietary interest in the suit properties to the 1st Defendant incurably defective. In the case of "Kenya Commercial Bank Limited – Versus - Specialized Engineering Co. Ltd [1982] KLR 485", the Court

of Appeal held that documents conveying property must be free from material inconsistencies to be enforceable. Furthermore, in the case of "Samuel Kariuki Mwangi & another – Versus - Njuru Mwangi [1986] eKLR", the Court of Appeal emphasized the importance of good faith and proper due diligence in transactions involving property conveyance. The lack of these elements in the current case invalidates the purported transfer.

117. The Learned Counsel submitted on the issue of whether the interest of the Plaintiffs in the suit properties was extinguished by virtue of the transfer to the 1st Defendant, that the Plaintiffs' leasehold interest and investments in the suit properties have not been extinguished by the transfer to the 1st Defendant. The Plaintiffs held a reasonable expectation that their interests would be protected upon the transfer of ownership from the 3rd Defendant to another party. This expectation was grounded in formal tenancy agreements and approvals granted by the previous owner. The principle of legitimate expectation, as elucidated in the case of:- "Communications Commission of Kenya & 5 others – Versus - Royal Media Services Limited & 5 others [2014] eKLR", supports the protection of parties who have relied on established practices and approvals. The Plaintiffs had a legitimate expectation that their leasehold interests would be recognized and safeguarded.

118. Furthermore, the Defendants were estopped from denying the existence of the Plaintiffs' leasehold interest. Their actions and conduct were inconsistent with their contention that Mr. Yagnesh Devani could not enter into tenancy arrangements due to receivership. In the matter of "S. H.Sheikh – Versus - Gulf Importers Ltd [1957] EACA", the court held that estoppel prevented a party from denying facts they previously acknowledged or acted upon. The 1st Defendant's witness testified that the availability of the suit properties for sale was facilitated through a Deed of Settlement involving Mr. Devani.

119. This Deed relied on transactions between Mr. Devani, the companies associated with him, and various creditors. Therefore, the Defendants' assertion that Mr. Devani was unable to enter into similar arrangements with other stakeholders is untenable. The Plaintiffs have demonstrated that Mr. Devani requested them to make advance payments to alleviate his financial obligations. This fact has not been controverted by the Defendants, except to challenge the legality of such arrangements.

120. They respectfully submitted that in light of the evidence adduced, the Plaintiffs had met both the factual and legal thresholds required to assert their leasehold interests.

121. In conclusion and in light of the above arguments and supporting evidence, the Learned Counsel submitted that they had established their case on a balance of probabilities. The Plaintiffs had demonstrated their legitimate leasehold interest, the substantial improvements made with the previous owner's approval, and the Defendants' failure to acknowledge and compensate for these interests. Mr. James Gitau's testimony further supported the Plaintiffs' case by revealing the Defendants' knowledge of other interests on the suit property and their attempts to avoid admitting awareness of the Plaintiffs' existence and interest.

122. They prayed that this Honourable Court decided the case in favour of the Plaintiffs, orders the Defendants to compensate the Plaintiffs for commutation of their leasehold interest and the cost incurred by the Plaintiffs on account of improvements on the suit properties and other related costs incurred by the Plaintiffs in the course of their tenancy relationship. They also invited the Honourable court to grant any further reliefs deemed just and equitable.

B. The Written Submissions by the 1st Defendant

123. The 1st Defendant through the Law firm of Messrs. Taibjee & Bhalla Advocates LLP filed their written submissions dated 9th August, 2024. Mr. Clapton Advocate commenced the submissions by poetically

stating that the lurking behind the facade of a suit herein, was a multi-facet fraud hydra presumably orchestrated by the Plaintiffs in cahoots with 3rd Parties. In the submissions their intent was to unclothe the suppositions that the Plaintiffs jointly clinically tailored their fraudulent scheme with an intention to dupe the court and where necessary to wade off the 1st Defendant's rightful claim.

124. According to the Learned Counsel it was uncontested that it was largely conceded during the hearing that the suit property was encumbered in favour of several Banks who had registered charges meaning no transactions could be undertaken affecting the title unless with the Consent. That when the registered owner failed to pay the Charge, was placed under Receivership by several Banks including Kenya Commercial Bank and the PTA Bank in the year 2008. All its assets revolved into the hands of the Official Receiver.

125. The Plaintiffs were aware of all this and or ought to have been aware if only they cared to gently scratch beneath the surface. They nonetheless entered into Lease agreements with persons purporting to be Directors of the then registered company. The Plaintiffs did not carry a company search before signing Leases with them. It was established during the hearing from DW - 1 who was the company's lawyer that the persons with whom the Plaintiffs' signed leases were phonies and not Directors of the Company but even then, the company was now under receivership and the powers of Directors had ceased.

126. At the time of entering into the purported leases, there were injunctive orders which had not been lifted in the Civil case of:- "Nairobi HCC No. 1 of 2009, Kenya Commercial Bank Limited – Versus - Yagnesh Devani & Triton Petrol Stations" obtained by the Official Receiver staying any dealings with inter on the suit properties herein. In the exercise of powers vested in their office, the Receiver Managers advertised the properties for sale. By a letter dated 21st February 2013 the 1st Defendant informed the Receiver Managers Advocates that they were interested in the properties at a sum of Kenya Shillings Eighty Five Million (Kshs. 85,000,000/-) and upon following all necessary steps, the 1st Defendant purchased and was issued a title for the suit property herein. Consequently, on their part it was their goal and mandate to establish as hereunder:-

    a. Nothing could have validly been done affecting the suit property contrary to the injunction issued in Nairobi HCC No. 1 of 2009 (supra)

    b. Since the property was to the knowledge of the Plaintiffs charged, it ought to have been apparent that the Plaintiff needed to obtain the Consent of the several Banks before attempting to acquire any interest in the suit property. Any agreement entered purporting to affect the interest of a secured registered creditor is null and void.(emphasis supplied)

    c. The company under receivership could only transact through the receiver or with the receiver's Consent.

    d. Without undertaking a company search to establish the Directors of the company with which the Plaintiffs entered agreement with, the Plaintiffs lost legal protection that would ordinarily vest in Bona fide purchasers for value without notice.

    e. At the time the Plaintiffs and the fraudsters signed the purported leases, the suit properties were duly charged to banks and further, the mandate of the company directors were vested in the Official Receiver.

127. The Learned Counsel submitted that they should be resolving the questions hereunder which they believed were central to unlocking the issues herein.

128. On the central subject matter, the Learned Counsel relied on the following issues:-

a. Whether the 1st Defendant legitimately obtained the suit property herein and was therefore entitled to protection against third parties.

b. Whether the two Leases signed between the Plaintiffs and the fraudulent third parties, without the Consent of either the Receiver or of the Bank are valid and enforceable against the 1st Defendant who purchased with the requisite Consents?

c. Whether having failed to undertake due diligence of either a land Search or a Company CR - 12 search and, consequently entering into agreements with fraudulent third parties, the Plaintiffs are entitled to compensation from the newly registered proprietor for the money paid to fraudsters without authority from the official receiver/the Bank?

d. Has the money used by the Plaintiff been spent by today's date if indeed their agreements were valid?

129. On whether the 1st Defendant legitimately obtained the suit property herein and was therefore entitled to protection against third parties. The Learned Counsel averred that during the hearing DW - 1, Mr. James Singh Gitau testified that he was the lawyer for Triton Petroleum Company Limited which had charged all assets to both Kenya Commercial Bank and Eastern and Southern African Trade and Development Bank (PTA) by several Debentures which culminated in a corporate Debenture dated 17th September, 2008 showing all the securities. When Mr. Yagnesh Devani (Director of Triton Petroleum Company Limited) was charged with conspiracy to defraud, he entered into a Deed of Settlement dated 16th March 2009 whereby the charges were to be dropped subject to Mr. Yagnesh pledging the assets listed in the Deed to the Banks.

130. The Learned Counsel submitted that the Receiver managers advertised the properties for sale. By a letter dated 21st February, 2013, the 1st Defendant informed the Receiver Managers Advocates through his office that they were interested in the properties at a sum of Kenya Shillings Eighty Five Million (Kshs. 85,000,000/-). That by an email dated 24th April 2013, Walker Kontos Advocates informed him that their client would agree to sell the property at a sum of Kenya Shillings Ninety Five Million Five Hundred Thousand (Kshs. 95, 500, 000.00/=) subject to 30% of the purchase price being paid upon execution of the Agreement for Sale. That upon following all necessary steps, the 1st Defendant purchased and was issued a title for the suit property herein.

131. On his part PW - 1 Mr. Manoj under cross examination testified on oath that, they never registered their interest with the Official Receiver. Their interest was also never registered against the title. Obviously to us because that they had not obtained the Consent of the Banks which had the titles due to Charges. They had no claim against the Banks even the bank's exercise of power of sale. They did not object to the sale by the Official Receiver too. This meant that at the time of the sale there was no hindrance forbidding him from undertaking the sale to the 1st Defendant. Don't they all then marvel at the claim for an interest in the suit property as dishonest? They ought.

132. Deducing from the foregoing, there is no gainsaying that the purchase of the suit property by the 1st Defendant was legal, procedural and without claims of right from third party as seen hereunder. The 1st Defendant's purchase could not be faulted as they paid valuable consideration in absence of further lawful encumbrances. Indeed, it was stated by DW - 1 that there was no vacant possession. This was acceptable in commercial world for the reason that the property had tenants who were remitting rent and the 1st Defendant never desired to lose such tenants. At the time the company assets were put into receivership all these tenants legally came under the Receiver's management yet none of them registered any interest or claim. This in itself was a testament that their claim never existed, was one they never believed in, was a mere afterthought or rather the thrusting in the grand scheme of fraud.

133. It was their submission that, any claims whether valid or not, which existed against a company which was then placed under receivership but such claims were not brought forward to the Receiver Manager was deemed to have been waived or extinguished. One cannot enforce it against purchasers of the property formerly belonging to that company or against its former Directors after the company has undergone Receivership.

134. Consequently, and in the premises, there was no debate as pertained to the legality of the title documents held by the 1st Defendant herein and in this regard, it suffices to point out that the 1st Defendant has been able to demonstrate his rights earned and in respect of the suit property. Before departing from the issue herein, it sufficed to underscore that the issuance of Certificate of title in favour of the registered owner, [which title was confirmed as authentic], vested in such an owner absolute and exclusive rights thereto. To underscore the scope and extent of the rights of a registered owner, it served to adopt and reiterate the succinct exposition alluded to in the case of "Mohansons (Kenya) Limited – Versus - Registrar of Titles & 2 others [2017] eKLR".

135. For coherence, the court stated and held as hereunder;(18) As held by the Court of Appeal for East Africa held in the case of:- "Moya Drift Farm Ltd. – Versus – Theuri (1973) EA 114" a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not have possession of the property. Spry, V-P at 116, considered the effect of the provision of Section 23 of the Registration of Titles Act, Cap. 281 and held: -

> "I cannot see how a person could possibly be described as 'the absolute and indefeasible owner' of land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession."

136. While Sir William Duffus, P.ibid at p.117 agreed with Spry, JA as follows:-

> "In any event I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land."

137. Similarly, in the case of:- "Park View Shopping Arcade – Versus - Kangethe & 2 Ors. (KLR) (E&L) 592", Ojwang, Ag. J. (as he then was) considered the rights of a registered proprietor under section 23 of the Registration of Titles Act and held that: -

> "*The Constitution* safeguards the sanctity of private property. It was not proper for the defendants to forcibly occupy the Plaintiff's land and then plead public interest in environmental conservation to keep out registered owner. The effect of their action was to deprive the owner of his land without full and fair compensation."

138. According to the Learned Counsel, in a nutshell, his answer to issue number one was to the effect that the 1st Defendant lawfully acquired the suit property and was therefore the legitimate proprietor thereof.

139. However, in a quick reaction to the Plaintiff's allegations that, the Defendants had sought to unlawfully dispose them and interfere with their peaceful enjoyment of the suit property. The 1st Defendant averred that one might never find a more daring illusion than where, a purported tenant who did not pay rent could seek to have peaceful possession against the lawful registered proprietor. The Plaintiffs did understand that the property herein had never belonged to them. That the property was transferred to the 1st Defendant by a person lawfully empowered so to do. This made the Plaintiffs Tenants-at-Will. They had no rights to enjoy any possession unless such rights are subject to the owner's permission. Their interest or claims were extinguished when they failed to register them with the Receiver.

140. It was incumbent upon the Plaintiffs to demonstrate the process leading to the acquisition of their interest in the suit property as lawful and procedural per the decisions in the cases of "Samuel Kamere – Versus - Land Registrar Kajiado (2015) eKLR", "Alice Chemutai Too – Versus - Nickson Kipkirui Korir & 2 Others (2015) eKLR" and "Elijah Makeri Nyamwara – Versus - Stephen Mungai Njuguna & Another Eldoret ELC No. 609B of 2012", respectively. But they failed. The interest they wished to be enforced were purportedly accorded to them by fraudsters aided by their Plaintiff's wilful refusal to undertake the relevant searches those relating to land and the Company search. They consequently had no enforceable rights/claims in law.

141. For a very long time now, the principle that one cannot pass a better title than he held had remained part of the Kenyan laws and applied to a fraudster who purported to pass an interest to the Plaintiff or to a Plaintiff who approached a fraudster and attempting to purchase an interest.

> " In (Luke 24:5) the good book tells us of an angel's question to those who went to Jesus' grave, "Why do you look for the living among the dead". asked the angel. Indeed, nothing can be legally attained from one without"

142. Mr. Geroge Dickson Atwetwe and Mr. Kailesh Johanputra could not give what they did not have. This position was emphasized by the principle of 'nemo dat non-quod habet', which was enunciated by the Court in the case of "Daniel Kiprugut Maiywa – Versus - Rebecca Chepkurgat Maim [2019] eKLR" as follows: -

> " The nemo dat principle means one cannot give what one does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else."

143. On the issue of whether the two leases signed between the Plaintiffs and the fraudulent third parties, without the Consent of either the Receiver or of the Bank are valid and enforceable against the 1st Defendant who purchased with the requisite Consents, the Learned Counsel futher argued that this ought to be the most best understanding expected from "men of good sense" that a man could not seek to enforce an agreement against a part other than against one who signed. In otherwise called privity of contract. While faced with the similar situation, the Court of Appeal had an opportunity and deliberated on the doctrine of privity at length in "Savings & Loan (K)Limited – Versus - Kanyenje Karangaita Gakombe & Another (2015) eKLR". The Court rendered itself as hereunder: -

> 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 Capital corporation 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, Hancax, 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. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter.

Thus,in Shanklin Pier V Detel Products Ltd (1951) 2 KB 854,for example, the plaintiff owned a pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for purpose, the plaintiff directed its contractor to use that paint. The contractor purchased the paint from the defendant, which proved unfit for purpose. Upon a suit by the plaintiff against the defendant, the court found for the plaintiff notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint was concerned.

144. According to the Learned Counsel to better understand the importance of this argument, they had be answering the sub – questions;

145. On whether the Plaintiff had a validly enforceable agreement against Triton Petroleum Company Limited and Triton Service Stations Limited that was conversely enforceable against the Receiver manager, the Learned Counsel submitted that for a contract to be valid there are a few basics that must be in place. Offer, Acceptance and Consideration. But most importantly with the right Parties. Any offer made with a fraudster even if it is accepted and consideration was paid thereto cannot be enforceable against a third party.

146. During the hearing, it became apparently clear from the testimony of DW – 1 who was the company and personal lawyer for Mr. Devani, the Director on CR - 12 according to Defendant Exhibit No. 1 and 2 that, Mr. Dickson Atwetwe and Mr. Kailesh Johanputra with whom the Plaintiff's received and signed the two Agreements were never Directors of Triton Petroleum Company Limited and Triton Service Stations Limited. They were fraudsters. It thus went without saying that that such an Agreement could not be enforceable against the 1st Defendant.

147. On whether the said contracts remain valid and enforceable against third party purchasers without it being recognized and registered by the Receiver Manager, the Learned Counsel submitted that they were of a considered view that, an invalid agreement against the company could not be presented to

the receiver manager to demand performance. This explained why the Plaintiffs never registered their claims when the receiver Manager was appointed and advertised. It further followed, that when under administration, all claims against the company had to be registered with the Receiver. Any Claims that remained unregistered are deemed to have been waived and is extinguished against purchasers of the property formerly belonging to the company which is subject of the receivership. The unregistered claimants cannot even sustain a claim against the former Directors

148. It was their observations that these agreements were clandestinely signed at the fraudulent behest of Mr. Devani as a device or contrivance designed or calculated to prevent or impede the Banks from exercising their rights. In a nutshell, even if the court would in the unlikely place have found that there was a valid contract involving the Plaintiff, it would still be incumbent upon it to find that such an agreement is unenforceable against 1st Defendants on the grounds that it was never registered with the Receiver Manager as required by law or with the Registrar of documents as it was a rule that no agreement shall be relied upon as evidence unless it is duly registered as a document.

149. The Learned Counsel contended that the Plaintiffs' claims could only be against the signatories; the fraudsters with which the agreements were signed. They called upon the Honourable Court to ponder and ask, why didn't the Plaintiffs present a copy of the search from the Ministry of Lands, was it indeed plausible that any person would invest colossal sums of money yet fail to carry out a Kshs. 500 search? How about a company search on similar amounts?

150. Their submission was that, the Plaintiff duly knew the status of the property as being encumbered. Worse still agreement were duplicitous plot involving the Plaintiffs intended to clog the Banks from recovering. The Plaintiff knew or had reasons to know that the property was legally encumbered and they could not rightly register any interest without permission from the protected banks. They opted to exercise willful blindness with a hope that this Honourable court would once blindly 'enforce their bidding'. The issue herein was thus concluded in the negative to wit, the two Leases signed between the Plaintiffs and the fraudulent third parties, without the Consent of either the Receiver or of the Bank were invalid and unenforceable against the 1st Defendant who purchased with the requisite Consents.

151. On whether having failed to undertake due diligence of either a land Search or a Company CR - 12 search and, consequently entering into agreements with fraudulent third parties, the Plaintiffs are entitled to compensation from the newly registered proprietor for the money paid to fraudsters without authority from the official receiver/the Bank, the Learned Counsel submitted that "it was a no mean task to have to resolve such questions but, times have changed and thus it has become necessary so to do. He was convinced that in a world where obliviousness became the cornerstone of Claims then sufficient clarity must be supplied to all issues in a bid to weed out from the Common man's midst all forms of witlessness" thus, the Learned Counsel commenced as follows;

152. During cross examination PW - 1 confirmed that, they didn't undertake due diligence when entering into the subject lease agreements. Thus, they had no reason to believe otherwise than to be satisfied that the Plaintiff failed to exercise due diligence expected of a prudent business man when it signed the two leases with persons who were not directors of the company leading to loss of money on their part.

153. In the instant matter, the liability and obligation of the Plaintiffs to be on guard against unscrupulous person was failed. It was an obligation arising from circumstances under which the common law imposed a duty of care on an individual. The Plaintiffs voluntarily assumed the risk and were responsible having failed to make reasonable inquiries despite having reasonable grounds of knowing fraud.

154. PW - 1's evidence that they never conducted a search at the company's registry or at the lands' registry shows that they deviated from the norm and abrogated their duty to themselves. There was sufficient

evidence that if the Plaintiffs had carried out due diligence on the directors of the company, they could have easily found out that the individuals signing the leases were not the actual directors. It could also have found out that the documents presented by the individuals were indeed fake. A background checks of the 'Lands registry' would also have alerted the respondent of whether the 'land was encumbered and subject to third party consents' that the purported directors (fraudsters had no powers to sign binding leases against the banks who had registered Charges.

155. The Plaintiffs no doubt failed to carry out customer due diligence which is an act of negligence on their part by omission. That negligence led to the fraudsters drafting and signing leases in the name of the company. In the case of "Samuel Odhiambo Oludhe & 2 others – Versus - Jubilee Jumbo Hardware Limited &another [2018] eKLR" the court had this to say regarding a title that had been fraudulently acquired:

> " Section 26 of the *Land Registration Act* has breathed a sigh of relief to innocent proprietors whose properties have been fraudulently transferred in unscrupulous individual's names. The court cannot allow such injustice to hold root. The proprietors are protected under the law. The court cannot turn a blind eye to sanitize irregularity and fraudulently acquired properties all in the name of indefeasibility of title."
>
> In the caseof "Arthi *Highway Developers Limited – Versus - West End Butchery Limited and Others Civil Appeal No. 246 of 2013*" the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled.

156. Similarly, in case of "Samuel Odhiambo Oludhe & 2 others –Versus - Jubilee Jumbo Hardware Limited &another [2018] eKLR" where the court had this to say regarding a title that had been fraudulently acquired:

> " Section 26 of the *Land Registration Act* has breathed a sigh of relief to innocent proprietors whose properties have been fraudulently transferred in unscrupulous individual's names. The court cannot allow such injustice to hold root. The proprietors are protected under the law. The court cannot turn a blind eye to sanitize irregularity and fraudulently acquired properties all in the name of indefeasibility of title.

157. The Learned Counsel submitted that the exerpts above is important because the Plaintiffs' allege to hold an interest in the premises. However, the said interests 'if any' were obtained in collusion with fraudsters. On its part, the 1st Defendant acquired its title legitimately begging the question, whose interest will this court uphold? Was it that which was acquired from fraudsters or that which followed due process?

158. The Learned Counsel submitted that in the case of "Lawrence Mukiri Mungai – Versus - Attorney General & 6 others [2019] eKLR", the Court was faced with a similar situation and it expressed itself as follows:-

> " I have already held that the 2nd Defendant acquired the Suit Property from the plaintiff fraudulently. The effect of that finding is that the 2nd Defendant did not hold a valid title to the Suit Property that he could pass to the 3rd to 6th Defendants or to any other person"...The foregoing notwithstanding, the 2th defendant having acquired the Suit Property fraudulently and illegally, his title was null and void. A null and void title cannot confer valid interest in land. The 2nd Defendant did not therefore have a valid title over the Suit Property that he could convey to the 3rd to 6th Defendants. The title that was transferred

by the 2nd Defendant to the 3rd to 6th Defendants was equally invalid, mull and void with the result that the 3rd to 6th Defendants acquired no interest in the Suit Property.....The Plaintiff held a legal title over the Suit Property. It follows therefore that even if the 3rd to 6th Defendants were innocent purchasers of the Suit Property for value without notice of the defect in the 2nd Defendant's title as alleged, the 3rd to 6th Defendant's right over the Suit Property cannot have priority over the Plaintiffs right to the same property which was first in time. In the premises, it is my finding that the 3rd to 6th Defendants did not acquire a valid title over the Suit Property from the 2nd Defendant. The 2nd Defendant had no valid title and as such had none that he could convey to the 3rd to 6th Defendants."

159. According to the Learned Counsel submitted that from the evidence produced by the 1st Defendant, it was apparent that Mr. Dickson Atwetwe and Mr. Kailesh Johanputra were not directors to sign off any interest in the land. The only persons with powers at the time to cede any interest in the suit property was those who held charges. Having signed Lease Agreements with fraudsters to acquire an interest in the property, did the Plaintiff in effect acquire the said interest? The answer was provided above and in the negative. A person without right or interest cannot pass it.

160. The Learned Counsel submitted that the 1st Defendants were the legitimate registered proprietors having acquired their ownership legitimately, it would fail logic that the Plaintiff would seek to be compensated or allowed to utilize an interest they did not acquire in the land. They submitted that to this end the Plaintiff fall within the category of trespassers having refused to regularize their stay on the suit premises with the registered owners upon Notice. The 1st Defendant was mandated to exercise his rights to have them evicted. They charged the Honourable Court to find that the Plaintiffs did not acquire acquire any interest in the suit property warranting the Court's protection and that its fair, just and equitable to have them removed from the suit premises.

161. On whether the money allegedly invested by the Plaintiff had been spent by today's date if indeed their agreements were valid, the Learned Counsel submitted that answering this question required them to critically analyse the two leases in a manner that was unothrodoxed to submissions, basic calculations have to be done. They were nonetheless equal to the task. On 25th February 2011 pursuant to the illegitimate leases, Jaguar petroleum company limited gave out a letter of offer whose terms among others were as follows;

> " Clause C; monthly rent was Kshs 150,000 Plus VAT payable quarterly in advance. The rent payable shall increase at the rate of 10% annually effective 1st March 2012." This information is derived from documents attached unto the Plaintiff's application dated 16th March 2023 on page 17.

No. Of Years	Principal	Interest Rate	Interest Amount	Total	VAT	VAT + Principal	X12 Month
2011	150,000	10%	15,000	165,000	26,400	191,400	2,296,800
2012	165,000	10%	16,500	181,500	29,040	210,540	2,526,480
2013	181,500	10%	18,150	199,650	31,944	231,594	2,779,128
2014	199,650	10%	19,965	219,615	35,138	254,753	3,057,036
2015	219,615	10%	21,961	241,576	38,652	280,228	3,362,737
2016	241576	10%	24,157	265,733	42,517	308,250	3,699,003
2017	265,733	10%	26,573	292,306	46,768	339,074	4,068,888
2018	292,306	10%	29,230	321,536	51,445	372,981	4,475,781
2019	321,536	10%	32,153	353,689	56,590	410,279	4,923,348
2020	353,689	10%	35,368	389,057	62,249	451306	5,415,673
2021	389,057	10%	38,905	427,962	68,473	496,435	5,957,220
2022	4,27,962	10%	42,796	470,758	75,321	546,079	6,552,951
2023	470,758	10%	47,075	517,833	82,853	600,686	7,208,236
							52,661,423

162. The Learned Counsel submitted that on 25th February 2011 pursuant to the illegitimate Leases, Jaguar petroleum company limited gave out a letter of offer whose terms among others were that;

> " Clause B; monthly rent was Kshs 100,000 Plus VAT payable quarterly in advance. The rent payable shall increase at the rate of 10% annually effective 1st March 2012."

163. According to the Learned Counsel submitted that the information was derived from documents attached unto the Plaintiff's application dated 16th March, 2023 on page 19.

No. Of Years	Principal	Interest Rate	Interest Amount	Total	VAT	VAT+ Principal	X12 Month	Grand Total
2011	100,000	10%	10,000	110,000	17,600	127,600	1,531,200	
2012	110,000	10%	17,600	127,600	20,416	148,016	1,776,192	
2013	127,600	10%	12,760	140,360	22,457	162,817	1,953,811	
2014	140,360	10%	14,036	154,396	24,703	179,099	2,149,188	
2015	154,396	10%	15,439	169,835	27,173	197,008	2,364,096	
2016	169,835	10%	16,983	186,818	29,890	216,708	2,600,496	
2017	186,818	10%	18,681	205,499	32,879	238,378	2,860,536	
2018	205,499	10%	20,549	226,048	36,167	262,215	3,146,580	
2019	226,048	10%	22,604	248,652	39,784	288,436	3,461,232	
2020	248,652	10%	24,865	273,517	43,762	317,279	3,807,348	
2021	273,517	10%	27,351	300,868	48,138	349,006	4,188,082	
2022	300,868	10%	30,086	330,954	52,952	383,906	4,606,879	
2023	330,954	10%	33,095	364,049	58,247	422,296	5,067,552	
							39,512,865	

Kshs 52,661,423

52,661,423 + 39,512,865 = 92,400,278 – Total spent in the last 13 years without 2024

164. According to the Learned Counsel, it was important to note that the Plaintiffs total investment claim was a sum of Kenya Shillings Fourty Million (Kshs 40,000,000/-) which was to be recovered through rent over the years. The question therefore was whether the same amount has been quenched. The basic calculations herein show that a sum of Kenya Shillings Ninety Two Million Four Hundred Thousand Two Seventy Eight Hundred (Kshs. 92,400,278/-). Has been spent in the last 13 years based on the formula provided therein. Consequently, there's nothing outstanding on the Plaintiffs investments 'if any' and the court herein was justified in making a finding that the Plaintiff owe the 1st Defendant rent of a sum of Kenya Shillings Fifty Million (Kshs. 52,000,000/-) on admission.

165. The Learned Counsel submitted consequently, they prayed that the Honourable Court make a finding in favour of the 1st Defendant dismissed the suit herein by declaring the following that the Plaintiffs were trespassers with no enforceable right acquired in the duo asserted Leases. Even by their own documentations if one was to blindly enforce them, their claim of investment has been extinguished

by the effluxion of time. They had no valid claim or interest on title or the banks. The Plaintiffs owed the 1st Defendants rent from the date of their Notice and the 1st Defendant was at liberty to execute.

C. The Written Submissions by the 2nd Defendant

166. The 2nd Defendant through the Law firm of Messrs. G. Mutua Molo & Company Advocates filed their written submissions dated 29th July, 2024. Mr. Mutua Advocate submitted that the Plaintiffs' claim against the Defendants was pleaded in terms of the Amended Plaint dated 31st March, 2023. The matter proceeded for full hearing before you on 7th and 25th June, 2024when the respective cases for the Plaintiffs, the 1st and 2nd Defendants were presented. On the issues that call for determination, they proposed to submit as follows on behalf of the 2nd Defendant.

167. The 2nd Defendant's case was predicated on the statement of defence dated 5th May, 2022 and filed on 11th May, 2022, its list and bundle of documents dated 17th May, 2024 admitted in evidence during the proceedings on 25th June, 2024 and the filed Witness Statement of its witness George W. Mathui dated 17th May, 2024. From pleadings on record, the oral and documentary evidence placed on record during trial, it is common ground that the 1st Defendant was registered as the proprietor of the Suit Properties. The evidence is also clear that the 1st Defendant acquired the Suit Properties for valuable consideration by way of purchase from financial institutions to whom the same had hitherto been charged as security for repayment of banking facilities. The same material on record also confirms that as the said registered proprietor, the 1st Defendant created and registered a legal charge over the Suit Properties in favour of the 2nd Defendant. Accordingly, it was common ground that the 2nd Defendant was the registered proprietor of a legal charge created in its favour over the Suit Properties.

168. By virtue of the provisions of Section 26 of the *Land Registration Act*, No. 3 of 2012 of the Laws of Kenya, they submitted that the documents of title placed on record are prima facie evidence that the 1st Defendant is the proprietor of the Suit Properties and was the absolute and indefeasible owner thereof. They further submitted that as the registered proprietor of the Suit Properties, the 1st Defendant was entitled to exercise the indicia of ownership as conferred upon it under the law in terms of the provisions of Sections 24 and 25 of the *Land Registration Act*, of the Laws of Kenya including the creation of the legal charge thereon in favour of the 2nd Defendant. In the premises, they humbly submitted and urged the Honourable Court to find that by virtue of the said registration as the sole proprietor of the Suit Properties, the 1st Defendant was conferred an indefeasible title thereon which enjoyed legal protection by dint of the provisions of Sections 24,25 and 26 of the *Land Registration Act*. They respectfully referred the Court to the decision in the case of: "Nkena Ole Keshu – Versus - Meteki Ole Tiima [2021] eKLR" which they urged the Honourable Court to adopt and apply thus;

> " Section 24 (a) of the *Land Registration Act* stipulates as follows:
>
> > 'subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....'
> >
> > In the case of Willy Kipsongok Morogo – Versus - Albert K. Morogo (2017)eKLR the Court held as follows: 'the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under Sections 24, 25 and 26 of the *Land Registration Act*.'

While in the case of Joseph N.K. Arap Ng'ok – Versus - Moijo Ole Keiwua & 4 Others [1997] eKLR, where the Court of Appeal held that:

Once one is registered as an owner of land, be bas absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation and such is the sanctity of the title bestowed upon the title of the holder."

Further, in Civil Appeal No. 246 of 2013 Arthi Highway Developers Limited – Versus - West End Butchery Limited and Others, the Court of Appeal expressly stated thus:

> "Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the *Land Registration Act* set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the other is proved to be a party. Such is the sanctity of title bestowed upon the title bolder under the Act. It is our law and late takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy."

169. According to the Learned Counsel under the provision of Section 26 of the *Land Registration Act*, the validity of a title issued to a registered proprietor of land can only be challenged under two circumstances, namely;

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. where the certificate of title bas been acquired illegally, unprocedurally or through a corrupt scheme

(See Elijah Makeri Nyangw'ara – Versus - Stephen Mungai Njuguna & Another [2013] eKLR)

170. The only ground upon which the Plaintiffs alleged vitiated the 1st Defendant's tide to the suit properties was fraud. However they invited the Honourable Court to note that there was no suggestion either in the Plaintiffs' primary pleading or evidence that the 1st Defendant was party to such alleged fraud. Even then, they humbly submitted and urged the Honourable Court to find that the allegation of fraud was not proved at all or to the required standard in law which the Court of Appeal in the case of:- "Kinyanjui Kamau – Versus - George Kamau (2015) eKLR", prescribed thus;

> " It is trite law that any allegation of fraud must be pleaded and strictly proved in case where fraud is alleged. It is not enough to infer from the facts."

171. The Learned Counsel submitted that in that regard, the evidence is clear that the transfer of the Suit Properties was effected in favour of the 1st Defendant by the entities on whose favour legal charges had previously been registered. Accordingly, nothing would turn on the allegation that it was fraudulent for the transfers to have been effected when there were legal charges in favour of KCB Bank and the Bank of India. Similarly, there was evidence at pages 50-53 of the 2nd Defendant's bundle of documents that the cautions that the Plaintiffs alleged were in place had been removed by the cautioner thereof. As such, they humbly submitted and urged the Honourable Court to find that nothing would had

turned on this allegation for purposes of impeaching the validity of the titles to the Suit Properties in favour of the 1st Defendant.

172. The Learned Counsel further submitted that without prejudice to the foregoing, the Honourable Court would specifically recall that while under cross – examination on behalf of the 2nd Defendant, the Plaintiffs' witness confirmed under oath that the Plaintiffs did not assert any proprietary interest in the suit properties. Given this position, the Learned Counsel humbly submitted and urged the Honourable Court to find that the Plaintiffs had absolutely no basis upon which they would have been entitled to challenge the validity of the 1st Defendant's title to the Suit Properties. As the witness confirmed in the course of the said cross-examination, the Plaintiffs' claim was solely limited to compensation for alleged improvements made on the Suit Properties. And in this regard, the witness expressly confirmed under oath that the Plaintiffs had no claim as against the 2nd Defendant and further that they had no reason to stop the 2nd Defendant from asserting its interest as a Chargee over the Suit Properties.

173. In the premises and with the foregoing express confirmation by the Plaintiffs' witness, they humbly submitted that the Plaintiffs' claim against the 2nd Defendant ought to fail. They humbly prayed that the same be dismissed with costs. In any event, the claim for compensation for alleged improvements was in the nature of special damages and in their humble submissions, the Plaintiffs failed completely to present any strict proof in support thereof during trial. The Learned Counsel humbly urged the Honourable Court to so find and hold. The Learned Counsel stated that the copies of the authorities cited were attached in the submissions for the Honourable Court's eace of reference.

VIII. Analysis and Determination

174. I have keenly assessed the filed pleadings by all the Plaintiff and Defendants herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

175. In order to reach an informed, equitable, reasonable and just decision in the subject matter, the Honourable Court has crafted the following three (3) issues for its determination. These are: -

a. Whether the Plaintiffs was a lawful tenant and had a binding leasehold rights to the suit property?

b. Whether the Plaintiff is entitled to the orders sought in the Plaint?

c. Who bears the costs of the suit?

ISSUE No. a). Whether the Plaintiffs was a lawful tenant and had a binding leasehold rights to the suit property;

176. Under this sub – title, the Honourable Court deciphers that the main substratum in this matter the rights of the Plaintiffs on the suit property. The issue of ownership has been vehemently challenged in this instant case with ownership and title of the suit properties which has been challenged and being a main issue of contention between the 1st and 2nd Plaintiffs and the 1st Defendant. The 1st and 2nd Plaintiffs have contended that the suit properties being Land Reference No. No MSA/BLOCK XXIII/ 206 and plot No. MSA/ BLOCK XXIII/210 were sub - leased to them by the 5th Defendant who in turn had a lease agreement with 4th Defendant herein. The 4th Defendant was a sister company to Triton Petroleum station Limited who gave them control of the suit premises in year 2008. The 1st Plaintiff/Applicant has emphatically averred that the transfer of title to the 1st Defendant was done illegally, irregularly and fraudulently. Indeed, they have provided an elaborate particular items

to support these allegations. As a rejoinder, the 1st Defendant has strongly refuted the allegation. Be that as it may, as the provision of Section 107 of the Evidence Cap. 80 dictates that it is he who alleges must prove.

177. The Plaintiffs have furnished a copy of the Lease Agreement duly executed between the 4th Defendant/ Respondent and the Triton Petroleum Station dated 12th August 2008; a Letter of Offer to sublease dated 25th February 2011 from the 5th Defendant to Brighton Limited; The Sub - Lease was for the Petrol station for the consideration of Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000 /-); there is another Sub – Lease; Letter of Offer from the 5th Defendant to the 1st and 2nd Plaintiffs dated 25th February 2011 for the restaurant and shop for the consideration of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) and statement of accounts attached thereto showing payment of rent for various months.

178. The question that arises here is whether the document produced by the Plaintiffs can pass the test of legality. The provision of Section 3(3) of the *Law of Contract Act* provides that:-

> " No suit shall be brought upon a contract for the disposition of an interest in land unless—
>
> (a) the contract upon which the suit is founded—
>
> (i) is in writing;
>
> (ii) is signed by all the parties thereto; and
>
> (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party..."

179. While the provision of Section 38 of the *Land Act*, No. 3 of 2012 provides as follows on disposition of an interest in land:

> 38.
>
> (1) No suit shall be brought upon a contract for the disposition of an interest in land unless —
>
> (a) the contract upon which the suit is founded—
>
> (i) is in writing;
>
> (ii) is signed by all the parties thereto; and
>
> (b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.
>
> (2) Subsection (1) shall not apply to a contract made in the course of a public auction nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive trust.

180. In section 2 of the same Act, disposition is defined as follows:

> " disposition" means any sale, charge, transfer, grant, partition, exchange, lease, assignment, surrender, or disclaimer and includes the disclaimer or the creation of an easement, a usufructuary right, or other servitude or any other interest in a land or a lease and any other

act by the owner of land or under a lease where the owner's rights over that land or lease are affected or an agreement to undertake any of the dispositions;

181. The basis of any suit in contract performance or non-performance is as per requirements in Subsection 3 of the Law of contract. Act (Cap 23 of the Laws of Kenya). The Plaintiffs is therefore expected to proof on a balance of probabilities the following essential elements to a lease agreement with the 3rd and 5th Defendant:

a. An offer.

b. An acceptance.

c. Any consideration.

d. Any intention to create legal relations

182. The essential components of a contract as was observed by "Harris JA in Garvey – Versus - Richards {2011} JMCA 16" ought to ordinarily reflect the following principles: -

> "It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence."

183. According to the Defendants, the lease agreements entered into by the Plaintiffs were illegal as the said company that was alleged to have entered into the lease agreement was under receivership and that further the Plaintiffs transacted with persons who were not directors of the said company they alleged to transact with.

184. The brief facts as per the Plaintiffs were that and/or about 20th September, 2002, all that parcel of land known as land Reference numbers Plot No. Msa/Block XXIII/206 and Plot No. Msa/Block XXIII /201 (Hereinafter referred to as "The Suit properties") were legally transferred from their respective previous proprietors to the new proprietor, trading in the names and style of "Triton Petroleum Company Limited" - the 3rd Defendant herein.

185. In the year 2004, the Triton Petroleum Limited in accordance with the terms and conditions stipulated under the Lease agreement, permitted its sister company, trading in the name and style of "Triton Service Stations Limited", the 4th Defendant herein to develop the suit properties by setting up such business establishments "inter alia" being a petrol station, a restaurant, a convenient store and a service bay thereon but put into under receivership.

186. Further according to the Plaintiffs the status of the premises necessitated renovations that caused the 1st and 2nd Plaintiffs herein to heavily invest a sum of Kenya shilling two million, one hundred and seventeen thousand, seven seventy - seven hundred and twenty cents only (Kshs. 2,117,777.20). Additionally, he stated that the 1st and 2nd Plaintiffs herein further invested a sum of Kenya Shillings eighteen million, one hundred and sixty - three thousand (Kshs. 18,163,000.00) in terms of the repair works undertaken onto the generators, pumps and the underground tanks. He deposed that 1st and 2nd Plaintiffs also spent a sum of Kenya Shillings ten million, five ninety - four thousand, eight sixty - five hundred and forty - eight cents (Kshs. 10,594,865.48/-) by way of the renovation of the restaurant to a

higher standard. By the material time of filing of this suit herein, undoubtedly, the 1st and 2nd Plaintiffs had in total already intensively undertaken elaborate development on the land. In the course that, they spend and invested a sum Kenya Shillings Forty - three million, one seventy thousand five sixty - two hundred and sixty - eight cents only (Kshs. 43,170,562.68) generally towards the various development fixtures made on the suit properties herein.

187. However, while all facts remained constant and operation proceeded smoothly all of a sudden the situation changed. In the month of February 2022, Mr. Manoj Shah, one of the Directors of the 1st and 2nd Plaintiffs received a telephone call from one Mr. Ben Kingori, a tenant of the business establishments on the suit properties, indicating that the suit property had been acquired by the 1st Defendant and there had been plans to have the 1st and 2nd Plaintiffs being evicted and/or vacate the business premises including the Petrol Station. Resultantly, and out of abundance of caution, on 10th February, 2022, the 1st and 2nd Plaintiffs caused an official search to be conducted onto the suit properties. According to the deponent herein, the searches revealed that indeed the suit properties had been fraudulently transferred to the 1st Defendant and charged to the 2nd Defendant on or about December, 2021.

188. The Plaintiffs emphatically stressed that the transfer of the suit properties was fraudulently, illegally and irregularly done without any basis. The Plaintiffs provided the following particulars of fraud meted by the 1st Defendant and others involved onto the suit properties. These were: -

a. That there was a registered Caution against the titles on or about 15th November, 2012, by the Triton Gas Stations Limited which Caution had since been removed fraudulently vide an application dated 16th November, 2021 executed by one Kumar Mashru Sanjan Kishor, a person not known to the 4th Defendant as one of the Directors.

b. That whilst the proprietor of the suit properties, the Triton Petroleum Company Limited went into receivership on or about 19th December, 2008, it had now emerged that there was a charge registered in favour of the KCB Bank on 10th February, 2009;

c. That whereas the suit properties had a registered charge against the Bank of India, there were no record on how the same was removed (Sic) and the property transferred free of any encumbrance.

d. That the process of purchase, acquisition and transfer of the suit properties was clouded in mystery and the records could not with certainty show how the transaction had since happened and titles of the suit properties vested on the 1st Defendant. The production of the records by the 1st Defendant would be required

189. As I have previously started in a ruling in this Court on the 9th December, 2022 there will be need to fully appreciate the Leasehold agreement duly executed between the Plaintiffs/Applicants and the 4th and 5th Defendants/Respondents. Leading to having this arrangement, it is claimed that the Plaintiffs proceeded to incur and spend a substantial amount in terms of causing elaborate renovation and improvement on the fixtures onto the suit properties. They have argued that these expenses if deducted would mitigate any rental sums being claimed by the 1st Defendant.

190. And the Supreme Court of United Kingdom in "RTS Flexible Systems Limited – Versus - Moikerei Alois Muller GMBH & Co K. G. {2010} UKSC 14":

> " The general principles are not in doubt, whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not

upon them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precaution to a concluded and legally binding agreement."

191. Based on the facts of the case as adduced by PW - 1 and which the Defendants' witnessess DW - 1 and 2 have not contradicted in any way there was an existed lease agreement on 25th February, 2011, with Brighton Limited (Currently Petrazo Limited) & Fusion Foods limited (hereinafter 'the Plaintiffs'), wherein the Plaintiffs took over the operations of the petrol station and all the other businesses located in the suit properties. Jaguar Petroleum Company Limited, the 5th Defendant and the Plaintiff mutually agreed that rent payable would be paid either directly or through settlement of expenses of Silver crest Enterprises Limited, Gormet Ventures Limited, Triton Convenient Stores Limited and Triton Gas Stations Limited, which companies were part of the larger Group of Companies under the Triton Petroleum Company Limited. These expenses included staff salary, maintenance of property and utility expenses as mutually agreed by both parties and which rent the Plaintiffs have at all material times settled in accordance with the terms of the agreement. I find the argument that this development be converted into the lease expenses payable to the 1st Defendant completely not only misplaced, erroneous but also mischievous.

192. The Defendants have contended that a letter of offer cannot be construed to be a written agreement but once the conditions to enter into a contract which I have mentioned above in this judgment are fulfilled then the said agreement becomes legally binding. The *Law of Contract Act* Cap 23 of the Laws of Kenya under section 3 (3) and Section 38 (1) & (2) of Land Law, No. 6 of 2012 provides what constitutes a contract for disposition of an interest in land that can found an action. The requirement that a contract effecting any disposition of an interest in land must be in writing and executed by the parties to the contract is further fortified by section 44 of the Land Registration, which provides as follows:-

44.

(1) Except as otherwise provided in this Act, every instrument effecting any disposition under this Act shall be executed by each of the parties consenting to it, in accordance with the provisions of this section.

(2) The execution of any instrument referred to in subsection (1), by a person shall consist of appending a person's signature on it or affixing the thumbprint or other mark as evidence of personal acceptance of that instrument.

193. The key question in this appeal revolves around the legal tenor of a letter of offer which is formally expressed to be subject to an anticipated formal contract that never crystallizes. This question was the focal question of consideration by the Court of Appeal [Gicheru JA, Kwach JA, and Muli JA] in the case of:- "East African Fine Spinners Limited (in receivership) & 3 others – Versus - Bedi Investments Limited [1994] eKLR". Expressing himself on this question, Gicheru JA adopted the following words of Lord Westbury LC in the case of:- "Chinnock – Versus - The Marchioness of Ely 4 DE G J&S 638 at 646":

"As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials, which this court requires, to make a legally

binding contract. But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

194. The Letters of offer dated 25th February, 2011 was a contract in writing within the meaning of Section (3) of the Law of Contract ready together with Section 38 of the *Land Act* as it incorporated all the terms that the parties had agreed to and further the same was executed by the Plaintiffs and the 3rd and 5th Defendant. Further the Defendants' witnesses have acknowledged that after the property was sold to the 1st Defendant the Plaintiffs were in possession of the same.

195. I also take note that the Defendants contested the legality of the signatures in the agreements saying that they had been forged. A mere aversion that the signatures could have been forged is not sufficient. The Court is meant to question if it sits as a forensic expert? There was no forensic evidence presented to this Honourable Court that the signatures in the lease agreements and the letters of offer did not match. Further, Section 37 of the *Companies Act* provided the following options for execution of documents by a company at the material time.

> " 37.
>
> (1) A document is executed by a company— (a) by the affixing of its common seal (if any) and witnessed by a director; or (b) in accordance with subsection (2). (2) A document is validly executed by a company if it is signed on behalf of the company — (a) by two authorized signatories; or (b) by a director of the company in the presence of a witness who attests the signature."

196. Additionally, the 1st Defendant and in particular their witness Mr. James Signh Gitau made a meal out of the fact that the Leases wre irregular and illegal in that it bore several anomalies. For instances he fleshed out the fact that they were executed by Mr. George Attewe and Mr. Kailesh Johan Putra were a former Court Clerk and Senior Marketing Manager of Triton Services Stations Limited and Jaguar Limited. I find this argument not well corroborated with any empirical documentary evidence. I left to conclude that these persons who not only seem to have had so much leverage, information but experience to the corporate entities must have been duly appointed agents. The Concise Dictionary of Law, 2nd Edition, page 17 defines an "agent" as:-

> " A person appointed by another (the principal) to act on his behalf, often to negotiate a contract between the principal and a third party."

In the Bowstead and Raynolds on Agency Seventeen Edition, Sweet and Maxwell, at page 1-001 defines an agent-principal relationship as

> " a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf to affect his relationship with third parties, and the other of whom similarly consents so to act or so acts."

197. In the case of "Garnac Grain Co. Inc. – Versus - H.M. Faure & Fair Dough Ltd and Bunge Corporation (1967] 2 All E.R. 353" Lord Pearson with the concurrence of the House used the words-

> " The relationship of the Principal - Agent can only be established by the consent of the Principal and Agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves and even

if they have professed to disclaim it... the consent must, however, have been given by each of them, either expressly or by implication from their words and conduct."

198. Further I make reference to the case of "Branwhite – Versus - Worcester Works Finance Ltd. [1969] 1 A.C. 552 at 587" where Lord Wilberforce stated thus; -

> " While an agency must ultimately derive from consent, the consent need not necessarily be to the relationship of principal and agent itself (indeed the existence of it may be denied) but it may be to a state of fact upon which the law imposes the consequences which result from the agency."

199. Even where the consent to create the Agent - Principal relationship is not express, parties to the contract will be held to have consented if what they have agreed upon amounts in law to such a relationship. Sometimes they may not recognize it themselves and may have even professed to disclaim it but the consent to create the agent-principal relationship may be found to exist by implication from their words and conduct. PW - 1 confirmed that the company that was under Receivership was Triton Petroleum Company Limited and not Triton Services Station Limited – there should not be that confusion. What he knew was that the two (2) gentlemen – Mr. George Attewe and Mr. Kailesh JohanPutra were directors of Triton Services Stations Ltd. and Jaguar Limited; being the agents of the said principal their consent was implied therefore they could have acted on behalf of the said company because their consent was implied.

200. In these premises then this Honourable Court finds that the Plaintiffs had legal binding relations with the 5th Defendant by virtue of its leasehold relationship with Triton Petroleum Company and therefore find them eligible for the prayers sought in the Plaint.

ISSUE No. B: Whether the Plaintiffs are entitled to the orders sought in the Plaint

201. Under this Sub - heading, the Plaintiffs have sought for various Reliefs as contained at the foot of the amended Plaint and paragraph 24 of the judgment herein. In law, this mischief cannot not be allowed to stand because as an equitable relief, the permanent injunction sought demanded of the plaintiff to come to court with clean hands and not seek to benefit from his own wrongdoing.

202. At page 193 of The Broom's Maxims of Law - A Selection of legal Maxims : Classified and Illustrated (1864) by Herbert Broom there is a chapter on "Fundamental Legal Principles" discussing this legal maxim: "Nullus commodum capere potest de injuria sua propria" No man shall take advantage of his own wrong.

> " It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong, and this maxim which is based on elementary principles, is full recognised in Courts of law and equity, and indeed, admits of illustration from every branch of legal procedure. The reasonableness and necessity of the rule being manifest, we shall proceed at once to show it practical application by reference to decided cases; and in the first place, we may observe, that a man shall not take advantage of how own wrong to gain the favourable interpretation of the law – frustra legis auxilium quaerit qui in legem committit"

203. Having concluded that the it is important to note that the title of the suit properties have been challenge and the form the basis of the prayers sought by the Plaintiffs. The Plaintiffs contended that on or about February, 2022 one of the directors of the Plaintiffs, Mr. Manoj Shah received a telephone call from one of Ben Kingori, a tenant, who indicated to him the suit properties had been acquired by the 1st Defendant and that there are plans to have the Plaintiffs vacate the business premises including the

petrol station. Out of abundance of caution, the Plaintiffs caused a search to be conducted on the suit properties on 10th February, 2022 only to notice that the suit properties had been fraudulently transferred to the 1st Defendant and charged to the 2nd Defendant on or about December, 2021. The Plaintiffs averred that the said transfer was fraudulently, without any basis in law and as such seeks the intervention of this Honourable Court.

204. The Plaintiffs relied on the following particulars of fraud:-

i. That for instance there was a registered caution as against the titles on or about 15th November, 2012 Triton Gas Stations Limited which Caution has since been removed fraudulently vide an Application dated 16th November, 2021 executed by one Kumar Mashru Sanjan Kishor, a person not known to the 4th Defendant as a director.

ii. That whereas the proprietor of the suit properties, Triton Petroleum Company Limited went into receivership on of about 19th December, 2008, it has now emerged that there was a charge registered in favour of the KCB Bank on 10th February, 2009;

iii. That whereas the suit properties had a registered charge as against the Bank of India, there is no record on how the same was removed and the property transferred free of any encumbrance;

iv. That the process of purchase, acquisition and transfer of the suit properties is clouded in mystery and the records cannot with certainty show how the transaction has since happened and titles of the suit properties vested on the 1st Defendant

205. Black's Law Dictionary, 9th Edition defines fraud as;

> " Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another".

206. In the case of "Arthi Highway Developers Limited – Versus - West End Butchery Limited & 6 others [Supra]", the Court held that;

> " It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:
>
> > "Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308).

207. Where a person's title is under attack, he must of necessity give an account on how he acquired the same; the Accuser must also show the court that the property as truly obtainted in a fradulent transaction.

In the case of "Munyu Maina – Versus - *Hiram Gathiha Maina, Civil Appeal No.239 of 2009*", where the Appeal Court held that: -

> " We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."

208. In this instance case, the 1st Defendant stated that it had lawfully and properly acquired Title No. Mombasa/Block XXIII/206 and Title No. Mombasa/Block XXIII/210 ("the Suit Properties") and was the only lawfully registered and beneficial owner of the Suit Properties and, hence, the only party entitled to the economic benefit and profits of the Suit Properties having bought it in 2022. DW 1 reiterated that the property was owned by Tritton Petroleum Company as Page 4 of the Certificate. It was Mr. Manoj who took him to see the property at Nyali and Petrol Station. They may have been other Advocates who handled the property. He was firm that Triton Petroleum Ltd was put under receivership. The other company's associated with it had their assets were put under Receivership. He had never acted for the Plaintiff; he only acted for the Defendant. There was a certificate of lease issued in favour of the 1st Defendant on 20th December, 2021 but the date of the term showed that the same was from the year 1998 for 99 years and one from 1st March, 1998 issued on 20th September, 2002 issued to Triton Petroleum Company.

209. It is therefore the finding of the Court that the 1st Defendant was a bone fide, absolute, legal and registered owner of the suit property with all indefeasible rights, title and rights evidence by the lease issued on 20th December, 2021. Be that as it may, the Honourable Court cannot dispute the fact that Triton Petroleum Limited owned the property before that and had leased it out to various people who subleased it and the Plaintiffs happened to be caught into that web.

210. I must appreciate that the Plaintiffs had heavily invested on the suit property and therefore contributed to the appreciation of its market value to the point that the 1st Defendant admired and subsequently bought it. Having said that much, I will not be a party to the deprevesion of the property to the Defendants and the compensation for the face lift of the property by the Plaintiffs therefore prayers 1 and 2 of the Amended Plaint fail in so far as the 1st Defendant are the legal proprietors of the suit property and in the same breath also owe the Plaintiffs for the renovations they did on the suit property as they are enjoing the fruits of the Plaintiffs.

211. In the foregoing, I find that the 1st and 2nd Plaintiffs have proved their case to the extent that they undertook elaborate and extensive modifications and development to the suit property which was not considered when the property was put under receivership and awards them prayers (c) and (d) above.

ISSUE No. c). Who bears the costs of the suit

212. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017]

eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

213. In the case of:- "Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR" quoted the case of "Levben Products – Versus - Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227" the Court held;

> "It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

214. In the present case, the Honourable Court elects and finds it reasonable in the given surrounding facts and inferences of the case to have the parties bear their own costs.

IX. Conclusion and Disposition

215. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the 1st and 2nd Plaintiffs have established their case against the Defendants partially. Thus, the Court proceeds to make the following specific orders:

a. That Judgment be and is hereby partially entered in favour of the Plaintiffs as against the 1st, 4th and 5th Defendants as per the Amended Plaint dated 31st March, 2023 purely on the expenses incurred on the extensive development undertaken on the suit property in form of the expansive structures during the tenancy period.

b. That the 1st Defendant found to be the legal and absolute registered proprietorship of the suit property with all the indefeasible rights, title and interest vested in them by law.

c. That the 2nd Defendant be and are hereby exonerated from any liabilities in the matter.

d. That the 1st, 4th, and 5th Defendants be jointly and severally held liable to compensate the Plaintiffs for all the extensive and elaborate investment undertaken on the suit property totaling to a sum of Kenya Shillings Forty-Two Million Only (Kshs. 42,000,000.00) with interest at the Court rates from the date of filing of this suit Within the Next (60) Days from the date of the delivery of this Judgement.

e. That each party shall bear their own costs of the suit.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 8TH DAY OF OCTOBER, 2024.

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HON. MR. JUSTICE L.L. NAIKUNI

ENVIRONMENT AND LAND COURT

AT MOMBASA

Judgement delivered in the presence of: -

a. M/s. Firdaus Mbula – the Court Assistant.

b. Mr. S. Ruwa Advocate for the Plaintiffs.

c. Mr. Clapton Advocate for the 1st Defendant

d. Mr. Mutua Advocate for the 2nd Defendant.

e. No appearance for the 3rd, 4th and 5th Defendants.