



**Patel & another v Oluoch & 6 others (Civil Suit 364 of 2013)  
[2024] KEELC 13627 (KLR) (3 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13627 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
CIVIL SUIT 364 OF 2013  
SO OKONG'O, J  
DECEMBER 3, 2024**

**BETWEEN**

**NARESH KUMAR RAMBHAI PATEL ..... 1<sup>ST</sup> PLAINTIFF  
DAXABEN NARESH KUMAR PATEL ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SAMUEL OKOTH OLUOCH ..... 1<sup>ST</sup> DEFENDANT  
DOROTHY LETTING ..... 2<sup>ND</sup> DEFENDANT  
FRED OKOTH NANDWA ..... 3<sup>RD</sup> DEFENDANT  
THE LAND REGISTRAR, KISUMU LAND REGISTRY ..... 4<sup>TH</sup> DEFENDANT  
THE CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT  
THE HONOURABLE ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT  
JOSEPH HANNINGTON OLUOCH ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs instituted this suit against the 1<sup>st</sup> to 6<sup>th</sup> Defendants on 27<sup>th</sup> December 2013 through a plaint dated 23<sup>rd</sup> December 2013. On his application, the 7<sup>th</sup> Defendant was added to the suit as an interested party on 22<sup>nd</sup> October 2014. The 7<sup>th</sup> Defendant was converted from an interested party to a defendant in the suit through leave granted on 22<sup>nd</sup> October 2018 and the plaint was amended accordingly to reflect his new status.
2. In their amended plaint filed on 4<sup>th</sup> January 2019, the Plaintiffs averred that at all material times to this suit, they were the joint registered proprietors of all that property known as Kisumu/ Konya/2836 measuring approximately 4.2 Ha. situated in Kisumu County within the Republic of



- Kenya (hereinafter referred to as "the suit property") after having lawfully and procedurally acquired the same for valuable consideration of Kshs. 10,500,000/- from its previous owner, the 1<sup>st</sup> Defendant.
3. The Plaintiffs averred that after the suit property was registered in their names, they took over possession of the same and constructed a perimeter wall around the same together with a semi-permanent structure thereon for a caretaker to look after the premises for and on their behalf. The Plaintiffs averred that while they were in the process of commencing major developments and investments on the suit property, they were confronted at the suit property by the 7<sup>th</sup> Defendant who claimed to be the registered owner of the property.
  4. The Plaintiffs averred that following this encounter, they reported the matter to the police who commenced investigations. The Plaintiffs averred that in the course of the said investigations, they visited the lands office at Kisumu where the 4<sup>th</sup> Defendant gave them a letter dated 30<sup>th</sup> September 2013 indicating that the transaction between the Plaintiffs and the 1<sup>st</sup> Defendant through which the Plaintiffs acquired the suit property was fraudulent and that the Plaintiffs were required to return the title for the suit property that was lawfully issued to them for immediate cancellation. The Plaintiffs averred that it was dishonest, irresponsible, ludicrous and callous on the part of the 4<sup>th</sup> Defendant to allege that the suit property was acquired fraudulently when all the searches conducted at the lands office showed that indeed the property was registered in the name of the 1<sup>st</sup> Defendant and had no subsisting encumbrances and as such was available for purchase.
  6. The Plaintiffs averred that they were diligent in their engagement with the Defendants before and after the transaction in question. The Plaintiffs averred that all the searches and inquiries made at the lands office confirmed that the suit property was available for acquisition. The Plaintiffs averred that based on the said information, the Plaintiffs completed the transaction and obtained a valid title as purchaser for value without notice of any defect in title whatsoever.
  7. The Plaintiffs averred that they complied with all the statutory and administrative procedures conditional upon the acquisition of the aforesaid property and remitted the computed stamp duty payable for the property and other incidental expenses to the government as required of them. The Plaintiffs averred that the 4<sup>th</sup> Defendant had no statutory power to cancel a title deed that was lawfully issued. The Plaintiffs averred that the intended cancellation of the Plaintiffs' title to the suit property by the 4<sup>th</sup> Defendant was unlawful, untenable, ultra vires the relevant law and the constitution and therefore null and void ab initio. The Plaintiffs averred that prior to entering into the aforesaid transaction regarding the suit property until completion, the Plaintiffs trusted the officers at the lands office and the information given by them more particularly the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants who assured the Plaintiffs that the suit property was clean and available for purchase.
  8. The Plaintiffs averred that they trusted the 1<sup>st</sup> Defendant who had actual possession of the suit property and a title deed thereto, a fact that was confirmed and verified by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. The Plaintiffs averred that if the suit property belonged to the 7<sup>th</sup> defendant, which they denied, the actions of the 1<sup>st</sup> to 4<sup>th</sup> Defendants amounted to a breach of contract, trust and statutory duty the particulars of which they pleaded in detail. The Plaintiffs averred that the 7<sup>th</sup> Defendant actively participated, connived and acted in conspiracy with the 1<sup>st</sup> to 5<sup>th</sup> Defendants to defraud the Plaintiffs.
  9. The Plaintiffs averred that due to the Defendants' fraudulent actions, they stood to suffer immense loss and damage should their said title to the suit property be cancelled. The Plaintiffs prayed for judgment against the Defendants jointly or severally for;
    - a. A declaration that the Plaintiffs were the lawful registered proprietors of the suit property as beneficial purchasers for value without notice of any defect in the title and are thus entitled



to the physical possession, occupation and enjoyment of all proprietary rights appurtenant thereto.

- b. A declaration that the 4<sup>th</sup> and 5<sup>th</sup> Defendants and/ or their designated officials did not have the statutory powers to purport to cancel the Plaintiffs' lawfully issued title deed in respect of the suit property.
  - c. In the alternative and without prejudice to (a) above, an order compelling the Defendants jointly and severally to refund and compensate the Plaintiffs for the sum of Kshs. 10,500,000/- and other incidental expenses incurred during the entire transaction by dint of statutory indemnity.
  - d. General damages for breach of contract, trust, and statutory duty.
  - e. Exemplary and aggravated damages.
  - f. Cost of the suit.
10. The 1<sup>st</sup> Defendant did not enter appearance. The 2<sup>nd</sup> Defendant entered an appearance and filed a statement of defence on 24<sup>th</sup> October 2014 to the original plaint. The 2<sup>nd</sup> Defendant averred that she was wrongly joined as a party to the suit in her personal capacity. The 2<sup>nd</sup> Defendant denied all the allegations made against her in the plaint. The 2<sup>nd</sup> Defendant averred that while executing the documents the subject of the suit, she acted in her official capacity and within the law in the execution of her duties. The 2<sup>nd</sup> Defendant averred that she discharged her duties diligently as provided for by the law. The 2<sup>nd</sup> Defendant contended that the suit was scandalous, vexatious and an abuse of the court process. The 2<sup>nd</sup> Defendant averred that the suit disclosed no or any reasonable cause of action against the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant prayed that the suit be dismissed with costs.
11. The 3<sup>rd</sup> Defendant filed a statement of defence on 11<sup>th</sup> April 2014 which was amended on 8<sup>th</sup> March 2019. The 3<sup>rd</sup> Defendant denied the allegations made against him in the plaint. The 3<sup>rd</sup> Defendant averred that if he executed the certificate of official search dated 31<sup>st</sup> May 2013, he did so in the execution of his official duties and reliance on the official records. The 3<sup>rd</sup> Defendant denied that he was guilty of breach of trust and statutory duty owed to the Plaintiffs and that he connived and conspired with the other Defendants to defraud the Plaintiffs.
12. The Attorney General entered an appearance and filed a statement of defence on behalf of the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants on 16<sup>th</sup> November 2015 in which the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants denied the allegations made against them in the plaint. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants averred that the 7<sup>th</sup> Defendant had always been the registered owner of the suit property.
13. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants averred that the 4<sup>th</sup> Defendant has statutory power to call for and cancel any title to property that it has established to have been acquired fraudulently. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants averred that if the Plaintiffs conducted any form of due diligence prior to the transaction in question, the Plaintiffs would not have been defrauded by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants averred that the Plaintiffs could not be deemed as purchasers for value without notice of defect in the title that was held by the 1<sup>st</sup> Defendant as the 1<sup>st</sup> Defendant had no title to the suit property capable of being transferred to the Plaintiffs. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants prayed that the Plaintiffs' suit be dismissed with costs.
14. The 7<sup>th</sup> Defendant filed a statement of defence on 25<sup>th</sup> February 2019. The 7<sup>th</sup> Defendant denied that the Plaintiffs were at all material times the registered proprietors of the suit property. The 7<sup>th</sup> Defendant averred that he was the registered owner of the suit property which he purchased on 28<sup>th</sup>



April 1979 and that a certificate of title was issued to him in respect thereof on 15<sup>th</sup> April 1991. The 7<sup>th</sup> Defendant averred that he had never advertised the suit property for sale. The 7<sup>th</sup> Defendant averred that the certificate of official search which showed that the 1<sup>st</sup> Defendant was the owner of the suit property was null and void ab initio as the 1<sup>st</sup> Defendant had never owned the suit property and had no title in the same to pass to the Plaintiffs. The 7<sup>th</sup> Defendant averred that criminal proceedings were instituted against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and other parties in Criminal Case No. 364 of 2013 in which the 7<sup>th</sup> Defendant was called as a witness and gave testimony on behalf of the complainant. The 7<sup>th</sup> Defendant averred that in the said criminal case, the 1<sup>st</sup> Defendant was found guilty of receiving payment of Kshs. 10,500,000/- through false pretense from the Plaintiffs as he neither had a property to sell nor proper title to transfer. The 7<sup>th</sup> Defendant averred that the whole transaction in which the Plaintiffs acquired the suit property was fraudulent and that the Plaintiffs actively participated in the fraud. The 7<sup>th</sup> Defendant averred that the 4<sup>th</sup> Defendant had statutory power to cancel a title obtained fraudulently. The 7<sup>th</sup> Defendant averred that the Plaintiffs acted negligently in the transaction in dispute in that they failed to conduct sufficient due diligence and to carry out a valuation of the suit property to determine its market price. The 7<sup>th</sup> Defendant averred that the Plaintiffs could not be innocent purchasers of the suit property for value when the transaction in which they acquired the property was fraudulent. The 7<sup>th</sup> Defendant averred that the Plaintiffs were not entitled to the reliefs sought in the counter-claim. The 7<sup>th</sup> Defendant prayed that the suit be dismissed with costs.

15. At the trial, the 1<sup>st</sup> Plaintiff (PW1) gave evidence on his own behalf and on behalf of the 2<sup>nd</sup> Plaintiff who was his wife. PW1 adopted his witness statement filed together with the plaint on 27<sup>th</sup> December 2013 as his evidence in chief and produced the bundle of documents also filed together with the plaint on the same date as P.EXH.1. PW1 stated that he could no longer access the suit property. He stated that after purchasing the suit property from the 1<sup>st</sup> Defendant and paying for it, the 7<sup>th</sup> Defendant came to him after about 2 months claiming that he was the owner of the suit property. He stated that the 7<sup>th</sup> Defendant did not come to the scene until he purchased and paid for the property. He stated that the 2<sup>nd</sup> Plaintiff gave him permission to represent her in the suit and he had a letter of authority dated 23<sup>rd</sup> December 2013 from her which he produced as P.EXH.2. He stated that the 7<sup>th</sup> Defendant's silence allowed the fraudsters to take his money.
16. On cross-examination by the advocate for the 3<sup>rd</sup> Defendant, PW1 stated that he conducted a search and the 3<sup>rd</sup> Defendant who was then working at the land registry issued him with a certificate of official search which showed that the 1<sup>st</sup> Defendant was the owner of the suit property. He stated that it was this search which was linking the 3<sup>rd</sup> Defendant to the fraud. PW1 stated that he was faulting the 3<sup>rd</sup> Defendant because he should have known what was happening at the land registry. He stated that the 3<sup>rd</sup> Defendant supplied him with information from a forged land register. PW1 stated that he did not know who was responsible for the forgery.
17. On cross-examination by the advocate for the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants, PW1 stated that he was introduced to the 1<sup>st</sup> Defendant who sold him the suit property by Mr. Dacho who was working at the Municipal Council of Kisumu. He stated that the 1<sup>st</sup> Defendant was staying on the suit property together with his brother, Benson Ochieng Oluoch. He stated that the 1<sup>st</sup> Defendant told him that the suit property belonged to him and that he inherited the same from his deceased father, Nicholas Bongu. He stated that the area chief confirmed that the suit property belonged to the 1<sup>st</sup> Defendant and his said brother. He stated that he was aware of the criminal case in which the 1<sup>st</sup> and 3<sup>rd</sup> Defendants were found guilty and were sentenced.



18. On cross-examination by the advocate for the 7<sup>th</sup> Defendant, PW1 stated that he was aware of criminal case No. 2 of 2014 in which they complained against among others the 1<sup>st</sup> Defendant and in which the accused persons were found guilty. He stated that the court found that the 1<sup>st</sup> Defendant had received Kshs. 10,500,000/- from them fraudulently. He stated that the court found that the 1<sup>st</sup> Defendant had no authority to sell the suit property to him. PW1 stated further that he only fenced a portion of the suit property.
19. On re-examination, PW1 stated that the judgement in the criminal case was delivered on 9<sup>th</sup> December 2016 while this suit was pending. He stated that it was after that that he amended the plaint to join the 7<sup>th</sup> Defendant in the suit. On examination by the Court, PW1 stated that he did not know if the Defendants were related. He stated that when he went to the suit property, the 1<sup>st</sup> Defendant had a house on the suit property. He reiterated that the 7<sup>th</sup> Defendant came forward after he had completed the transaction and paid the money. PW1 stated that all the people who were charged in the criminal case were employed at the land's office. He stated that he sued the 2<sup>nd</sup> Defendant because she was the one who issued a title deed in his favour for the suit property.
20. The Plaintiffs' next witness was Msabi Chacha (PW2) who was an employee of the Judiciary working at the High Court Criminal Registry. He came to court to produce High Court Criminal Appeal files for Criminal Appeals, No. 1 of 2017, No. 2 of 2017 and No. 3 of 2017. The files had the entire records of the appeals and the records of the lower court proceedings. In the files, there were judgments delivered in Criminal Appeal Nos. 3 and 4 of 2017(consolidated), and Criminal Appeal No. 1 of 2017. The files also had the record of appeal in Criminal Appeal No. 1 of 2017, and original record and supplementary record of appeal in Criminal Appeal No. 3 of 2017. He produced certified copies of the two (2) judgments as P.EXH 2 and P.EXH 3 respectively. PW2 stated that from the record, Criminal Appeal No. 2 of 2017 was abandoned. The appellants in the appeal were James Nyangweso, Charles Were Opiyo and Heson Amino Atundo. The appeal was marked as abandoned on 30<sup>th</sup> January 2018 through an order by Hon. D. Majanja J.
21. On cross-examination by the advocate for the 3<sup>rd</sup> Defendant, PW2 stated that the 2<sup>nd</sup> Defendant, Dorothy Letting was a witness in the criminal case and not an accused person. On cross-examination by the advocate for the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants, PW2 stated that the appellant in Criminal Appeal No. 1 of 2017 was the 1<sup>st</sup> Defendant and the appeal was allowed. PW2 stated that the appellants in Criminal Appeal No. 3 and 4 of 2017 were John Gachichi and John Nyambogo Ndege and the conviction of the 2<sup>nd</sup> appellant was set aside while the 1<sup>st</sup> appellant was acquitted in respect of only one count.
22. After the close of the Plaintiffs' case, the 7<sup>th</sup> Defendant gave evidence as DW1. DW1 adopted his two witness statements filed on 31<sup>st</sup> October 2017 when he was added to the suit as an interested party and on 25<sup>th</sup> February 2019 after being made a defendant as his evidence in chief. He was initially an Interested Party in the suit and filed a witness statement as an interested party. He also produced two bundles of documents; the one attached to the Interested Party's list of documents filed on 31<sup>st</sup> October 2017 and the other to the supplementary list of documents attached to the 7<sup>th</sup> Defendant's defence filed on 25<sup>th</sup> February 2019 as D.EXH. 1 and D.EXH. 2 respectively. He stated that he was not related to the 1<sup>st</sup> Defendant, Samuel Okoth Oluoch and did not even know him.
23. On cross-examination by the Plaintiffs' advocate, DW1 stated that he was the proprietor of the suit property. He stated that he entered into a sale agreement in respect of the suit property in 1979 as the chairman of Chambedo Ltd. and got a title in 1991 in his name. He stated that the agreement of sale was dated 28<sup>th</sup> April 1979. He stated that he bought the property from Nicholas Bongu Ngonga. He stated that he entered into two (2) agreements for sale. He stated that the other agreement was with



Silvanus Bonyo Ngonga. He stated that Nicholas Bongu Ngonga and Silvanus Bonyo Ngonga were brothers owning one parcel of land. He stated that the second agreement was not produced through an error. He stated that the purchaser of the suit property was Chambedo Ltd. and that he signed the agreement as the Chairman of the Company and Mr. Oganda was a witness. He stated that he did not know the 1<sup>st</sup> Defendant. He stated that he did not develop the land but planted trees along the boundary of the property which were destroyed by cattle and others during the road expansion in the area. He stated that the late Mathew Oganda was looking after the property for him. He stated that Mathew Oganda died about 10 years ago. He stated that he would give him something from time to time. DW1 stated that he lived in Nairobi and Ugunja and visited the suit property from time to time on his way to Nairobi. He stated that Chambedo Ltd. was a family company and that the company transferred the suit property to him. He stated that when he purchased the suit property, it had not been adjudicated and as such it had no parcel number.

24. He stated that Nicholas Bongu sued him in 2001 in Kisumu HCCC No. 3 of 2001. He stated that he was not familiar with the case and did not know its outcome. He stated that he was not aware that he filed a counterclaim in the case. He stated that the property was not abandoned and it was Mr. Oganda who reported to him that Nicholas Bongu had put his children on the land. He stated that he reported the matter to the police and they were arrested. DW1 stated that if the Plaintiffs had done due diligence they would have known that there were people who had been arrested concerning the parcel of land.
25. DW1 stated that the theft of the land started in 1999 and by 2013 when the Plaintiffs purported to purchase the suit property, there was already a case in court over the suit property. He stated that he learnt that the Plaintiffs were claiming the land in 2013 and he reported the matter to the police. He stated that there was nothing more he could do to protect the land.
26. On cross-examination by the advocate for the 3<sup>rd</sup> Defendant, DW1 stated that he was blaming the 2<sup>nd</sup> Defendant for the fraud because she claimed that the suit property belonged to somebody else.
27. On cross-examination by the advocate for the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants, DW1 stated that he was the first registered owner of the suit property. He stated that he discovered that there was interference with the suit property in November 2000. He stated that there was a criminal case in which Nicholas Bongu and his son were the accused persons. He stated that he had produced the proceedings and judgment entered in that case. He stated that the land registrar did not err in cancelling the fraudulent entries in the register. On re-examination, DW1 confirmed that Chambedo Ltd. was a family company and the directors were his children.
28. The next to give evidence was the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants' witness, Boaz Oketch Juma (DW2). He stated that he was working as a land registrar in Kisumu. He adopted his witness statement dated 27<sup>th</sup> September 2023 as his evidence in chief. DW2 produced the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants' documents filed on 1<sup>st</sup> November 2017 as DEXH.3. DW2 stated that the suit property was adjudicated in favour of the 7<sup>th</sup> Defendant and was registered in the name of the 7<sup>th</sup> Defendant on 14<sup>th</sup> March 1991. He stated that the 7<sup>th</sup> Defendant was issued with a title deed on 15<sup>th</sup> April 1991. DW2 stated that the 7<sup>th</sup> Defendant was issued with a copy of the register for the suit property on 2<sup>nd</sup> February 2000 before the fraudulent entries shown in a copy of the register at page 6 of DEXH. 3 were made. He stated that the said entries were cancelled for being fraudulent. DW3 stated that a copy of the register at page 8 of D.EXH.3 which showed Nicholas Bongu Oluoch as the first registered owner of the suit property, the 1<sup>st</sup> Defendant as the second registered owner and the Plaintiffs as the third registered owners was a forgery. He stated that there cannot be two parallel registers in respect of the same parcel of land. He stated that when the forgery was discovered, the land registrar wrote to the beneficiaries of the forgery and also to the Directorate of Criminal Investigations. He stated that following the letter, the title



- issued to the Plaintiffs was cancelled and several people were charged. He stated that according to the records held at the land registry, the owner of the suit property was the 7<sup>th</sup> Defendant.
29. On cross-examination by the advocate for the Plaintiff, DW3 stated that he was not in Kisumu when the transactions in question took place. He stated that all the documents which he produced in evidence were in their custody as part of their records of land. He stated that the documents were a true reflection of the ownership of the suit property. He stated that the extract of the register at page 8 of D.EXH.3 was a forgery and did not show ownership. He stated that there was no need to cancel something which was forgery. He stated that in the extract of the register at page 6 of D.EXH.3 false entries were cancelled and the genuine entries restored. He stated that in the extract of the register at page 8 of D.EXH.3, the whole document was a forgery. He stated that in declaring the said register a forgery, they relied on the genuine register. He stated that he did not know when and how this forged register came to be in their records.
30. DW2 stated further that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were land registrars and that any information coming from the land registry is official information. He stated that he was not aware that the officers who issued a search showing that the suit property was owned by the 1<sup>st</sup> Defendant were charged and convicted. He stated that apart from conducting a search, a potential purchaser of land should do more like conducting a survey and doing a ground search. He stated that the purchaser must also talk to the people in the neighbourhood and also look at the adjudication documents. He stated that these are best practices.
31. On cross-examination by the advocate for the 3<sup>rd</sup> Defendant, DW2 stated as follows: The documents for a parcel of land are kept in the binders, safe custody and parcel file. The documents that he had produced were kept in the parcel file. He had produced two sets of the registers which had elements of forgery. When a document is in safe custody it must be noted in the safe custody register. He had not brought the safe custody register in court. It was from that register that they could tell that some documents relating to this property were kept in safe custody. For a search, the applicant would fill a form and leave it at the registry for their clerks to work on it. The clerks would go to the binder and check if the register for the particular parcel is in the binder. They are supposed to fill the search form and take it together with the binder containing the register to the land registrar.
32. The land registrar is to ascertain that the entry in the search form is in agreement with the register in the binder. He will then sign the search and hand it over to the applicant. The entries in the extract of the register at page 8 of D.EXH3 are the same as those in the register at page 109 of P.EXH.1 save for the words “forgery”. He stated that he could not blame the 2<sup>nd</sup> Defendant since she must have acted in good faith. He stated that the search at page 37 of P.EXH.1 was signed by the 3<sup>rd</sup> Defendant and the entries are in accordance with the entries in the register at page 109 of P.EXH.1. He stated that the 3<sup>rd</sup> Defendant must have acted in good faith based on the documents that were placed before him.
33. On cross-examination by the advocate for the 7<sup>th</sup> Defendant, DW2 stated that there was no adjudication record to support the forged register. He stated that if the Plaintiffs had extended the search to adjudication records, they would have realised the fraud. On re-examination by Ms. Jumma, DW2 stated that the Plaintiffs were notified in writing about the fraud and that the fraudulent records had been expunged. He stated that the forgery was discovered when the 7<sup>th</sup> Defendant came with his original title deed and it was found that the original register was available. He stated that investigations revealed the fraud and it was discovered that the forged register was planted at the land registry.
34. The last witness was the 2<sup>nd</sup> Defendant who gave evidence as DW3. DW3 stated as follows in her evidence in chief. She was the County Land Registrar, Machakos County. Before that, she was a land registrar at Kisumu. She came to Kisumu in 2013 and served for 6 months. She then left in the same



year and came back in May 2019. She served until May 2023 when she left for Machakos. She was posted to Kisumu in May 2013 and reported in June 2013. She signed the search certificate at page 63 of P.EXH.1. The entries in the certificate of search were made by Mr. Ombaya. An application for a search is made and paid for. The application is then allocated to a clerical officer who looks for the records, fills the certificate of search and presents it to the land registrar for signature. When filling out the certificate of official search, the clerical officer uses the register from the binder. This particular clerk brought to her the certificate of official search duly filled and the binder which had the register inside. A register is presented to the land registrar so that he can confirm that the certificate of search complies with the register. The register at page 8 of D.EXH.3 is written on the face of it forgery. The entries in the search dated 9<sup>th</sup> July 2013 (page 63 P.EXH.1) were in accordance with the information in this register.

35. She testified further that a search normally picks only the last entries and that she was the one who registered the transfer between the 1<sup>st</sup> Defendant and the Plaintiffs and that was why her signature was in the register with a mark “forgery”. At the time she dealt with this transaction, the words “forgery” were not written on the face of this register. The register was marked as a forgery when the 7<sup>th</sup> Defendant came up to claim the land and after investigations, fraudsters and land officers were arrested and charged. She was a witness in the criminal case. She was not charged. If at the time she dealt with the transaction there was a note that the register was a forgery, she would not have processed the transfer. She was not charged because she came to Kisumu when the transaction had commenced. By the time the matter came to her table, a lot had been done by other land registrars. The transaction was at an advanced stage when she got involved. The person who made entries in the search is the same one who made entries in the register. He was a senior clerical officer and was seconded to the Land Control Board.
36. DW3 stated that she signed the title deed at page 59 of P.EXH.1 on 4<sup>th</sup> July 2013. She stated that the entries in the title deed were in accordance with the register that she had referred to. She stated that she relied on the register that was in the binder when she was signing the documents that she had referred to. She signed the documents in the course of her duty as a land registrar. She did not get any financial gain in the transaction. The register was marked as a forgery after the 7<sup>th</sup> Defendant complained and investigations were conducted. The lawful owner of the suit property was the 7<sup>th</sup> Defendant. When she signed the register she had referred to, she had no information that the property belonged to the 7<sup>th</sup> Defendant. She relied on the documents which were brought before her. The transaction was done when she was barely 3 weeks in the Kisumu office. When investigations were carried out, she was not found culpable. The fraudsters were found and charged. She wanted the case against her dismissed. She worked with the 3<sup>rd</sup> Defendant for 6 months and she was familiar with his signature. The official search at page 37 of P.EXH.1 dated 31<sup>st</sup> May 2019 was signed by the 3<sup>rd</sup> Defendant. The search showed that the suit property was owned by the 7<sup>th</sup> Defendant. The 3<sup>rd</sup> Defendant signed the documents as a land registrar.
37. On cross-examination by the advocate for the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants, DW3 stated that she did not know the 1<sup>st</sup> Defendant at a personal level. She stated further that she did not know that the original documents for the suit property were in the strong room. She stated that the documents in the strong room were normally listed in a book. She stated that the book was not available when she was signing the documents as she was new at the station. She stated that there was a failure on the part of the head land registrar. She stated that it was his duty to disclose all the documents which had been kept in safe custody.
38. On cross-examination by the advocate for the 7<sup>th</sup> Defendant, DW3 confirmed that the 7<sup>th</sup> Defendant was the lawful owner of the suit property. In re-examination, DW3 stated that the book on which the



documents kept in the safe are recorded is called the Safe Custody Register. She stated that the book is kept with the Registrar in charge. She stated that at the material time, the Registrar in charge was George Gachihi. He stated that the book was found in his custody and she did not know who brought it to court. She stated that if the book was in her custody, she would not have acted on the documents which were presented to her.

39. The 3<sup>rd</sup> Defendant's witness statement filed on 28<sup>th</sup> June 2016 was admitted as his evidence. He did not give oral testimony. After the close of evidence, the parties were directed to make closing submissions in writing.

### **The Plaintiffs' submissions**

40. The Plaintiffs filed submissions dated 10<sup>th</sup> April 2024. The Plaintiffs submitted that the scheme that led to the Plaintiffs losing their money was well choreographed. The Plaintiffs submitted that the 7<sup>th</sup> Defendant was absent throughout the transaction until the last payment. The Plaintiffs submitted that all the players from the local chief to the land registrars gave a green light to the plaintiff to enter into the impugned transaction and part with the entire purchase price. The Plaintiffs submitted that the question as to whether it is the government employees at the lands office or the government who should compensate the Plaintiffs for their loss would depend on whether the said officers were conducting their duties or were on a frolic of their own. The Plaintiffs submitted that the burden of proving that the said officers were discharging their duties was on them while the burden of proving that they were on a frolic of their own rested with the Plaintiffs. The Plaintiffs submitted that they had demonstrated that they had conducted all necessary due diligence. The Plaintiffs submitted that by failing to disclose that the suit property had two sets of registers and that one was genuine and another one fake, the land registrar made the plaintiffs to believe that all was well. The Plaintiffs submitted that the land registrar abdicated his responsibility and could not be said to have been discharging his duty. The Plaintiffs submitted that the land registrars in this case were of a frolic of their own. The Plaintiffs submitted that the actions of these land registrars could not be said to be actions of the government. The Plaintiffs submitted that the land registrars concerned should be held personally liable for the Plaintiffs' loss. In support of this submission, the Plaintiffs cited Dr. Olango Onudi the acting County Secretary v. Samuel Okuro & Others, CA NO. 79 OF 2018, where the Court of Appeal stated as follows:

“The law is that public officers do not enjoy immunity from litigation in respect to acts, which though done in the name of the office, are overtly outside the remit of their offices. If there is need for support of this now well settled proposition, is the decision of this Court in Ethics and Anti-Corruption Commission –vs- Judith Marilyn Okungu & another (2017) eKLR where the Court held as follows; “... There is ample authority to the effect that a person against whom fraud or illegality is alleged cannot escape personal liability (should the fraud or illegality be proved) on the basis that he was acting as an agent or servant of another. Indeed, government functionaries of whatever seniority are not immune from personal liability for unlawful acts such as deceit, fraud or contempt of court. See STANDARD CHARTERED vs. PNSC (supra) and M. Vs. HOMES OFFICE & ANOR (supra).

The latter case 12 locates this personal liability at the heart of the rule and quotes Prof. Dicey in the following terms; “When we speak of the rule of law as a characteristic of our country, [we mean] not only that no man is above the law. But (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. In England the idea of legal equality, or the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from Prime



Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person. (See Introduction to the Study of the Law of the Constitution (10th edn, 1965) pp193-194.)”

41. The Plaintiffs also relied on Sections 7, 9, 80, and 81 of the Land Registration Act, 2012 on the duty of the land registrars to maintain the land registers and furnish the public with the information therein. The Plaintiffs submitted that the land registrars could not have been performing their statutory duties when they furnished the Plaintiffs with fake records. The Plaintiffs submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants bore the greatest responsibility for the Plaintiffs’ loss and should be condemned to compensate the Plaintiffs. The Plaintiffs submitted that in any event they were entitled to indemnity from the government under Section 81 of the Land Registration Act, 2012. The Plaintiffs submitted that due to his conduct, the 7<sup>th</sup> Defendant was not entitled to an order for the rectification of the register.

#### **The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants’ submissions**

42. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed submissions dated 1<sup>st</sup> July 2024. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants framed two issues for determination namely; whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants breached trust and statutory duty owed to the Plaintiffs, and who should bear the costs of this suit. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that they performed their duties as servants of the Government as defined under Section 2 of the Government Proceedings Act. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that they were absolved and protected from prosecution for any tortious act committed in the performance of their duties as land registrars. In support of this submission, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants relied on Section 4 (3) of the Government Proceedings Act and Section 14 of the Land Registration Act.
43. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that the Plaintiffs did not provide any evidence showing that they willfully and knowingly lied to them. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that there was no proof that they acted in a manner that was aimed at defrauding the Plaintiffs. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that they had proved that in signing the contested documents, they relied on the register that they were provided with. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that they had demonstrated that although they were land registrars, George Gachihi was the officer in charge of the Kisumu lands office at the time. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that he was the person with access to the safe custody register and would have been the only one aware of any issues concerning the register of the suit property. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that they were brought a register which did not indicate any fraudulent activity. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that the issue of fraud only arose when they received a complaint from the 7<sup>th</sup> Defendant.
44. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that no evidence was adduced showing that they had benefited from the transaction between the 1<sup>st</sup> Defendant and the Plaintiffs over the suit property. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that there was no proof that they acted contrary to their statutory duties and breached the trust owed to the Plaintiffs. In support of this submission, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants cited John Hayo Owuor v. Attorney General & 2 Others [1991] eKLR and Bishop v. Attorney General of Uganda & Another, EALR 1967. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that



liability for the Plaintiffs' loss should be borne by the government. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants cited Section 12 of the Government Proceedings Act and submitted that the claim brought against them should have been brought against the Attorney General. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that they were wrongly joined in the suit. On the issue of costs, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that the costs should follow the event. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants urged the court to grant them the costs of the suit.

#### **The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendant's submissions**

45. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants filed submissions dated 5<sup>th</sup> April 2024. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants (hereinafter referred to only as "the A.G") framed several issues for determination. The first issue framed by the A.G was, whether the Plaintiffs were the lawful registered owners of the suit property as purchasers for value without notice. The A.G submitted that there was already a finding by the court in Criminal Case No. 2 of 2014 that the 7<sup>th</sup> Defendant was the owner of the suit property. The A.G submitted that the evidence placed before the court showed that the root of the Plaintiffs' title was questionable. The A.G submitted that the evidence showed that the 1<sup>st</sup> Defendant had no title in the suit property that it could pass to the Plaintiff. The A.G submitted that the 7<sup>th</sup> Defendant's title was grounded on the adjudication records. The second issue was whether the 4<sup>th</sup> and 5<sup>th</sup> Defendants had statutory powers to cancel the Plaintiffs' title. On this issue, the A.G submitted that it was common ground that the register that bore the 1<sup>st</sup> Defendant's name as the registered owner of the suit property was a forgery the same as the title deed that was held by the 1<sup>st</sup> Defendant. The A.G submitted that the court in Criminal Case No. 2 of 2014 found that the fake register was planted in the binder of registers by corrupt land registry clerks. The A.G submitted that the fake register was accordingly expunged from the land registry records. The A.G submitted that when the fraud was discovered, the Plaintiff was duly notified of the same and requested to surrender his title deed for cancellation. The A.G submitted that the Plaintiffs' title was lawfully cancelled under Section 79(2) of the Land Registration Act, 2012. The A.G submitted that the title that was obtained through fraud or corrupt scheme was liable to cancellation by the land registrar after a notice was served upon the Plaintiffs and the fake register was expunged from the land registry records.
46. The third issue was whether the Plaintiffs were entitled to indemnity, general damages for breach of contract, trust, and statutory duty. The A.G submitted that the Plaintiffs purchased the suit property from the 1<sup>st</sup> Defendant who was a fraudster. The A.G submitted that the 1<sup>st</sup> Defendant working together with corrupt land registry clerks planted a fake register in the land registry records. The A.G submitted that the Plaintiffs were not entitled to an indemnity from the government for their loss. The A.G submitted that the Plaintiffs could only look to the 1<sup>st</sup> Defendant for the recovery of the purchase price that they paid to him. The A.G submitted that the Plaintiffs were informed by the 1<sup>st</sup> Defendant that he had acquired the suit property from his deceased father. The A.G submitted that the Plaintiffs never bothered to inquire whether there was succession in respect of the estate of the 1<sup>st</sup> Defendant's purported father. The A.G submitted that the Plaintiffs could not get protection as innocent purchasers of the suit property. The A.G submitted that the Plaintiffs did not undertake adequate due diligence. The A.G submitted that several land registry staff were charged and found guilty in relation to the transaction in which the Plaintiffs acquired the suit property. The A.G submitted that only the 2<sup>nd</sup> Defendant was found to have acted in good faith and became a state witness. The A.G submitted that the government cannot be held liable for criminal acts of its officials. The A.G submitted that the said officials should be held personally liable for the Plaintiffs' loss. The A.G urged the court to dismiss the case against the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants and to enter judgment against the 1<sup>st</sup> Defendant.



### **The 7<sup>th</sup> Defendant's submissions**

47. The 7<sup>th</sup> Defendant filed submissions dated 16<sup>th</sup> October 2024. The 7<sup>th</sup> Defendant framed three issues for determination namely; who was the registered proprietor of the suit property? whether the Plaintiffs were entitled to the declaration that they were the owners of the suit property, and who was liable for the costs of the suit? The 7<sup>th</sup> Defendant submitted that one cannot give what he does not have. The 7<sup>th</sup> Defendant submitted that the criminal court in Criminal Case No. 2 of 2014 made a finding that the title for the suit property that was held by the 1<sup>st</sup> Defendant was fake and that the 1<sup>st</sup> Defendant obtained Kshs. 10,500,000/- from the Plaintiffs by false pretenses. The 7<sup>th</sup> Defendant submitted that the 1<sup>st</sup> Defendant could not transfer to the Plaintiffs the suit property as he did not legally own it. The 7<sup>th</sup> Defendant submitted that he had established that he was the owner of the suit property.
48. On whether the Plaintiffs were entitled to a declaration that they were the lawful owners of the suit property, the 7<sup>th</sup> Defendant submitted that the Plaintiffs obtained a fake title from the 1<sup>st</sup> Defendant that could not make them legal owners of the suit property. The 7<sup>th</sup> Defendant submitted that the Plaintiffs could not benefit from the doctrine of innocent purchaser for value without notice since the doctrine is only available to a person who has acquired a valid and legal title. In support of this submission, the 7<sup>th</sup> Defendant cited *Dina Management Limited v. County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023). The 7<sup>th</sup> Defendant submitted that the Plaintiffs were not entitled to an order that they were bona fide purchasers of the suit property for value without notice. On the issue of costs, the 7<sup>th</sup> Defendant submitted that costs follow the event. The 7<sup>th</sup> Defendant submitted that the Plaintiffs were aware of the criminal case in which the 1<sup>st</sup> Defendant was convicted. The 7<sup>th</sup> Defendant submitted that he was entitled to the costs of the suit which should be on a higher scale. The 7<sup>th</sup> Defendant prayed that the Plaintiffs' suit be dismissed and a declaration be made that the suit property belonged to the 7<sup>th</sup> Defendant.

### **Analysis and Determination**

49. I have considered the pleadings, the evidence tendered and the submissions filed by the parties. I am of the view that the issues arising for determination in this suit are the following;
- a. Whether the Plaintiffs are the lawful owners of the suit property.
  - b. Whether the 4<sup>th</sup> and 5<sup>th</sup> Defendants had power to cancel the Plaintiffs' title to the suit property.
  - c. Whether the Plaintiffs are entitled to the reliefs sought in the amended plaint.
  - d. Who is liable for the costs of the suit?

### **Whether the Plaintiffs are the lawful owners of the suit property**

50. Sections 24, 25, 26 and 80 of the Land Registration Act, 2012 provide as follows:

24. Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights



and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
  - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - (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 has been acquired illegally, unprocedurally or through a corrupt scheme.

80.

- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

51. It is common ground that the Plaintiffs derive their claim to the suit property from the 1<sup>st</sup> Defendant. It has been established by evidence and it was not disputed at the trial that the title that was held by the 1<sup>st</sup> Defendant in respect of the suit property was fraudulent and as such null and void. The 1<sup>st</sup> Defendant was charged in Kisumu Chief Magistrate's Court Anti-Corruption Case No. 2 of 2014 with the offence of obtaining registration of the suit property in his name by false pretense and obtaining KShs. 10,500,000/- from the Plaintiffs by false presence that he was in a position to sell to them the



suit property which he knew he did not own. The 1<sup>st</sup> Defendant was convicted of the offences and sentenced to pay a fine of Kshs. 100,000/- in default of which he was to serve 6 months imprisonment. He was also ordered to refund the said sum of Kshs. 10,500,000/- in default of which he was to serve a further 5 years imprisonment. On appeal, the High Court set aside the sentence of 5 years that was imposed upon the 1<sup>st</sup> Defendant but not his conviction for obtaining registration and money by false pretense. The High Court did not also set aside the fine of Kshs. 100,000/-. It was therefore established in the Criminal Case No. 2 of 2014 that the registration of the 1<sup>st</sup> Defendant as the owner of the suit property was fraudulent. The 1<sup>st</sup> Defendant did not defend this suit. The allegations made against him in these proceedings that he held a fraudulent title to the suit property was therefore not rebutted. The evidence that was produced before this court established beyond doubt that the register of the suit property which was the root of the 1<sup>st</sup> Defendant's purported title was fake. It was also established that the genuine register bore the name of the 7<sup>th</sup> Defendant as the first registered owner of the suit property. The said register also showed that the 7<sup>th</sup> Defendant had never transferred the suit property to anyone.

52. The Plaintiffs contended that they were innocent purchasers of the suit property for value without notice of any defect in the title that was held by the 1<sup>st</sup> Defendant. In *Mwangi James Njehia v. Janetta Wanjiku Mwangi & another* [2021] eKLR, the court stated as follows:

“ 37. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that: -

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

For a purchaser to successfully rely on the bona fide doctrine as was held in the case of *Hannington Njuki v William Nyanzi* High Court civil suit number 434 of 1996, he must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

38. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have



been duped to believe that such documents are genuine and on that basis they have “purchased’ properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi.

39. The elephant in the room is whether genuine, legitimate owners of property should be dispossessed of their hard earned property, because a party has “purchased” the property on the basis of an “apparent title” at the land registry which had been transplanted in place of the genuine title, only for the genuine one to reemerge after the transaction? In our view, no legitimate owner of property should be divested of their property unlawfully, under the guise that the “purchaser” was duped to buy land which he/she could have believed to be genuinely owned by the person holding himself out as the vendor.”

53. The scenario that the Court of Appeal described in the foregoing case is exactly what happened in the case before me. The 7<sup>th</sup> Defendant who is the legitimate owner of the suit property cannot be divested of the property on account of an illegal title that the Plaintiffs obtained from a fraudster however innocent the Plaintiffs were while undertaking the transaction and irrespective of whether they had notice of the fraud or not. In *Alberta Mae Gacie v. Attorney General & 4 Others* [2006] eKLR the court stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come...”

54. The title that was held by the 1<sup>st</sup> Defendant was fraudulent, illegal, null and void. The 1<sup>st</sup> Defendant had no legal interest in the suit property that he could pass to the Plaintiffs. The title that the Plaintiffs obtained from the 1<sup>st</sup> Defendant was a nullity. In *Wambui v. Mwangi & 3 others*, (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) the Court of Appeal stated as follows:

“70. Sixth, the title was also tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was subsequently declared null and void ab initio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title allegedly vested in the 3<sup>rd</sup> respondent and subsequently passed on to the appellant having stemmed from court proceedings that were subsequently declared null and void also stood vitiated by the same nullity and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.

71. Seventh, section 80 of the Act is explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. The title purportedly acquired by the 3<sup>rd</sup> respondent and subsequently passed on to the appellant



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

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

55. It is my finding from the foregoing that the Plaintiffs are not the lawful owners of the suit property. The lawful and legitimate registered owner of the suit property is the 7<sup>th</sup> Defendant.

**Whether the 4<sup>th</sup> and 5<sup>th</sup> Defendants had power to cancel the Plaintiffs' title to the suit property.**

56. In *Adan Abdirahani Hassan & 2 others v. Registrar of Titles & 2 others* [2013] eKLR, the court stated as follows:

"25. Any alienation of land reserved for public purpose and issuance of a title for the same, whether under the Registration of Titles Act, cap 281 or the Registered Land Act, cap 300 is null and void ab initio. Such a title does not exist in the first place because the land belonged to the Public and was not available for alienation. The cancellation of such a "title," which is not a title as known in law because it should not have been issued in the first place, would be an administrative exercise by the Commissioner of Lands or the Registrar of Titles to rectify the mistake or misrepresentation that was made by the same office."

57. As I have mentioned earlier, the title deed that was held by the Plaintiffs was a product of a fake register that was planted in the land registry by fraudsters. A title deed which is an end product of a fake register is not a title if I may adopt the words used by the court in *Adan Abdirahani Hassan & 2 others v. Registrar of Titles & 2 others* (supra). The genuine register for the suit property was available in the land registry and the genuine title deed had been issued and was being held by the 7<sup>th</sup> Defendant. There was actually no entry in the genuine register or a genuine title deed to cancel. As correctly submitted by the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants, what they were supposed to do and which they did was to expunge from the land registry records the fraudulent and fake land register for the suit property. After expunging of the said fake register, the title held by the Plaintiffs which was based on the same became otiose and no further action was required on the part of the 4<sup>th</sup> and 5<sup>th</sup> Defendants. The notice that was given by the 4<sup>th</sup> Defendant to the Plaintiffs on 30<sup>th</sup> September 2013 was in my view sufficient for the action that they took. I am of the view that Sections 79 and 80 of the Land Registration Act, 2012 applies only when dealing with entries in a genuine land register. An entry in a fake land register is not capable of being rectified or cancelled either by the land registrar or by the court. The issue of whether or not the 4<sup>th</sup> and 5<sup>th</sup> Defendants had power to cancel the Plaintiffs' illegal and void title deed does not therefore arise. Section 9 of the Land Registration Act gives the 4<sup>th</sup> and 5<sup>th</sup> Defendants general power to keep and maintain records. The 4<sup>th</sup> and 5<sup>th</sup> Defendants have no power to keep and maintain fake documents or records in the land registry. It is therefore my finding that the 4<sup>th</sup> and 5<sup>th</sup> Defendants acted lawfully within the powers conferred upon them under Section 9 of the Land Registration Act when they expunged the fake register for the suit property from the land registry records.



### **Whether the Plaintiffs are entitled to the reliefs sought in the amended plead.**

58. From the findings that I have made above, I am not satisfied that the Plaintiffs have made out a case for the grant of prayers (a) and (b) of the amended plead. As concerns, the alternative prayer for a refund or compensation for the purchase price for Kshs. 10,500,000/- that was paid to the 1<sup>st</sup> Defendant, I am of the view that the 1<sup>st</sup> Defendant who was found liable for obtaining the said sum of Kshs. 10,500,000/- from the Plaintiffs and the 3<sup>rd</sup> Defendant who was found in Criminal Case No. 2 of 2014 to have been involved in the fraudulent planting of the fake land register for the suit property in the binder of land registers are liable to the Plaintiffs for the said sum of Kshs. 10,500,000/-. I agree with the Attorney General that this is not a suitable case for indemnity by the government under Section 81 of the Land Registration Act, 2012. Indemnity is only payable under Section 81 of the Land Registration Act in respect of damage suffered as a result of; “rectification of the register, or an error in a copy of or extract from the register or in a copy or extract from any document or plan certified under the Act.” The case before me has nothing to do with the rectification of the register of the suit property or any error in a copy of or an extract of the register for the suit property. This is a case of a fake register planted in the land registry records by fraudsters from outside and inside the land registry. The fraudsters were arrested, charged and convicted. I can see no reason why the government should pay for their crime. The Plaintiffs had also claimed general and exemplary damages. No basis was laid at the trial and in the submissions for these claims. I will not make any award for damages.

### **Who is liable for the costs of the suit?**

59. Under Section 27 of the Civil Procedure Act, the costs of and incidental to a suit is at the discretion of the court and as a general rule, costs follow the event. The Plaintiffs have succeeded in their alternative claim against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. The Plaintiffs shall have the costs of the suit to be paid by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants shall also pay the costs for the 7<sup>th</sup> Defendant. The 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants shall bear their own costs.

### **Conclusion**

60. In conclusion, I hereby make the following orders in the matter;

1. The Plaintiffs’ claim against the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants is dismissed.
2. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants shall pay the costs of the suit to the 7<sup>th</sup> Defendant.
3. The 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants shall bear their own costs of the suit.
4. Judgment is entered for the Plaintiffs against the 1<sup>st</sup> and 3<sup>rd</sup> Defendants jointly and severally in the sum of Kshs. 10,500,000/- together with interest at court rates from the date hereof until payment in full.
5. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants shall pay the Plaintiffs’ costs of the suit.

**DELIVERED AND DATED AT KISUMU ON THIS 3<sup>RD</sup> DAY OF DECEMBER 2024**

**S. OKONG’O**

**JUDGE**

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

Mr. Olunya for the 7<sup>th</sup> Defendant

Ms. Raburu h/b for Mr. Omondi for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants



Ms. J. Omondi-Court Assistant

