



**Passaris & another v Maina & 3 others (Environment & Land Case 1256 of 2014 & 1171 of 2013 (Consolidated)) [2023] KEELC 20786 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20786 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT & LAND CASE 1256 OF 2014 & 1171 OF 2013 (CONSOLIDATED)**  
**LC KOMINGOI, J**  
**OCTOBER 12, 2023**

**BETWEEN**

**ESTHER MUTHONI PASSARIS ..... PLAINTIFF**

**AND**

**CHARLES KANYUGA MAINA ..... 1<sup>ST</sup> DEFENDANT**

**GRACE WANJIKU KANYUGA ..... 2<sup>ND</sup> DEFENDANT**

**ALKA ROSHANLAL HANSPAL (AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE KULTAR SINGH HANSPAL) ..... 3<sup>RD</sup> DEFENDANT**

**ESTHER MUTHONI PASSARIS ..... 4<sup>TH</sup> DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT & LAND CASE 1171 OF 2013**

**BETWEEN**

**ALKA ROSHANLAL HANSPAL (AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE KULTAR SINGH HANSPAL) ..... PLAINTIFF**

**AND**

**ESTHER MUTHONI PASSARIS ..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 25<sup>th</sup> September 2014, the Plaintiff seeks the following reliefs:



- i. A declaration that the 3<sup>rd</sup> Defendant was prohibited by Section 52 of the Transfer of Property Act from transferring the property known as LR No. 7741/75 to any person pending the hearing and determination of ELC No. 1171 of 2013.
  - ii. A declaration that the 3<sup>rd</sup> Defendant obtained the Provisional Title to LR No. 7741/75 through fraud and misrepresentation.
  - iii. A declaration that the purported sale and transfer of LR no. 7741/75 by the 3<sup>rd</sup> Defendant to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is therefore null and void with no effect.
  - iv. An order revoking the transfer of LR No. 7741/75 Kitusuru from the late Kultar Singh Hanspal to Alka Roshanlal Hanspal the 3<sup>rd</sup> Defendant herein.
  - v. An order revoking the registration of LR No. 7741/75 Kitusuru in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and cancellation of all entries on the title LR No. 7741/75 effecting registration of the transfer.
  - vi. A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from selling, transferring, charging, mortgaging, leasing, pledging or in any way dealing with or alienating the property known as LR No. 7741/75 Kitusuru.
  - vii. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from evicting, distressing for rent, trespassing onto, invading, cutting trees, demolishing structures, erecting walls, wasting, alienating, or in any way dealing with or interfering with the Plaintiff's quiet possession of the property known as LR No. 7741/75 Kitusuru.
  - viii. Any other orders or relief as the court may deem fit in exercise of its overriding objective to meet the ends of justice.
  - ix. Costs of this suit.
2. It is the Plaintiffs case that the property LR No. 7741/75 Kitusuru (herein after referred to as the suit property) which she occupies and pays rent on belonged to the late Kultar Singh Hanspal Husband to Alka Roshanlal Hanspal (3<sup>rd</sup> Defendant); that having been assured that the 3<sup>rd</sup> Defendant had obtained court orders in Miscellaneous Civil Application No. 1390 of 2002 allowing her to deal with her husband's estate including selling it, she entered into a one year lease agreement on the 1<sup>st</sup> September 2006 with the 3<sup>rd</sup> Defendant on behalf of her late husband; that Clause 4 of the said agreement had an option to purchase the suit property before the expiry of the tenancy term or after the extended term; that at the time of signing the agreement, the 3<sup>rd</sup> Defendant informed her that the suit property's title was in the custody of Oriental Commercial Bank as security but that this issue would be resolved during the period of the lease to enable her purchase the suit property; that the late Kultar Singh Hanspal was duly aware and had consented to the 3<sup>rd</sup> Defendants actions as evinced by the fact that during the term of the lease agreement he claimed for rent from her.
  3. According to the Plaintiff, during this agreement's term, she lent the 3<sup>rd</sup> Defendant Kshs. 250,000; purchased from her crystal chandeliers and other house items amounting to Kshs. 442,000 and carried out extensive repairs and improvements on the house amounting to Kshs. 8,200,000; that upon expiry of the lease period, the late Kultar Singh Hanspal agreed to extend the tenancy period for another two years from 1<sup>st</sup> October 2007 and on 2<sup>nd</sup> March 2009, she issued the late Kultar Singh Hanspal a 3 months' notice stating her intention to invoke the option to purchase according Clause 4 of the lease agreement; that the option to purchase the suit property was to be exercised by giving three months' notice where upon its expiry, the Plaintiff would purchase the suit property at Kshs. 35,000,000/=



without any encumbrances; that it was a further term that the sale would be completed within 90 days of expiry of the Plaintiff's notice and the lease was to continue in force until the purchase price was paid. In addition, the 3<sup>rd</sup> Defendant would not terminate the lease and would if requested by the Plaintiff renew it to enable her recover the full amount.

4. The Plaintiff contends that the late Kultar Singh Hanspal frustrated the option to purchase and issued her with a 7 days eviction notice on 16<sup>th</sup> March 2009 and further filed High Court Civil Case No. 280 of 2009 (now ELC 1171 of 2013 consolidated herein) on 16<sup>th</sup> April 2009 seeking orders of injunction, vacant possession and eviction against the Plaintiff from the suit property.
5. The Plaintiff filed a Defence and Counterclaim in the said ELC No. 1171 of 2013 (formerly High Court Civil Case No. 280 of 2009) seeking;
  - a. A declaration that the Defendant (herein Plaintiff) has the right to exercise the option to purchase the parcel of land known as LR No. 7741/75 from the Plaintiff (herein the late Kultar through the 3<sup>rd</sup> Defendant) on payment of the sum of Kshs. 35,000,000.
  - b. An order of specific performance of the option to purchase under the Agreement for Lease between the Plaintiff and the Defendant to purchase the parcel of land known as LR No. 7741/75 from the Plaintiff on payment of the sum of Kshs. 35,000,000.
  - c. An order do issue compelling the Plaintiff to execute transfer of the suit property, the parcel of land known as LR No. 7741/75 in favour of the Defendant upon payment of the purchase price in default whereof the Registrar of the High Court be allowed to execute the Transfer and all other documents, deeds or instruments to effect the transfer the parcel of land known as LR No. 7741/75 to the Defendant free of encumbrances.
  - d. Damages in lieu of or in addition to specific performance
  - e. Alternatively to prayer (b) & (d) the sum of Kshs. 65,000,000 as particularised in paragraph 29 herein above.
  - f. Interest on all sums found due to the Defendant pursuant to and incidental to the exercise of the option to purchase under the agreement of lease herein.
  - g. The Costs of the suit be awarded to the Defendant (herein Plaintiff)
  - h. Such further or other relief that the court may deem just.
6. The Plaintiff states that she was granted injunctive orders (which was served on Kultar Singh Hanspal personally on 20<sup>th</sup> May 2011) restraining the 3<sup>rd</sup> Defendant from interfering with her quiet possession of the suit property until the suit was heard and determined; that as such the 3<sup>rd</sup> Defendant was prohibited and barred by doctrine of lis pendens from transferring or alienating the suit property adding that she had rights under Section 52 of the Transfer of Property Act which was saved by Section 107 (1) of *Land Registration Act* and Section 162(1) of the *Land Act*; that the above notwithstanding, on the 19<sup>th</sup> and 20<sup>th</sup> September 2014, a group of unknown assailants, on the instructions of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who had apparently purchased the suit property from the 3<sup>rd</sup> Defendant went to the suit property armed with crude weapons and destroyed the Plaintiff's perimeter wall; that the aforesaid sale was illegal, null and void and an attempt to defeat the Plaintiff's claim as:
  - a. ELC 1171 of 2013 (formerly High Court Civil Case No. 280 of 2009) instituted by the 3<sup>rd</sup> Defendant never stated the property had been transferred to her as a gift by her husband Kultar; that on 2<sup>nd</sup> November 2009, the 3<sup>rd</sup> Defendant filed an application in HCCC No. 66 of 2005



to compel Oriental commercial Bank to release the original Title; On 4<sup>th</sup> September 2012 the suit property was allegedly transferred to her by the late Kultar Hanspal; and on 22<sup>nd</sup> January 2013 the 3<sup>rd</sup> Defendant applied to be issued with a Provisional Certificate of Title on grounds that she had been gifted the suit property by her husband and could not trace the original Title while all along she was aware that it was in the custody of Oriental Bank.

- b. Through a letter dated 27<sup>th</sup> November 2009, Kultar requested the Plaintiff to forward to him rent payments for the period February to December 2009.
- c. On 3<sup>rd</sup> September 2010, the 3<sup>rd</sup> Defendant and the late Kultar recorded a Consent order in HCCC No. 77 of 2010 to sell the suit property. This suit filed on 22<sup>nd</sup> July 2010 by the 3<sup>rd</sup> Defendant sought to have the suit property which was registered in Kultar's name be declared a family asset with each of them holding equal shares and for its sale with proceeds being divided equally among them.
- d. On 28<sup>th</sup> December 2010 the Plaintiff received a letter from Ken Petro Enterprises issuing them a 15 days' notice to vacate the suit property on allegation that they had purchased it from the late Kultar. How then was it possible to have sold the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants if the same had already been sold to Ken Petro Enterprises and during the pendency of ELC 1171 of 2013?

#### **The 1st and 2nd Defendants' case**

7. In their Defence and Counterclaim dated 15<sup>th</sup> December 2014, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant while denying the Plaintiff's claim, acknowledged that they were aware that the Plaintiff was a tenant at the suit property vide an agreement for lease and not through an unregistered lease as alleged; that even if such a lease had been executed, it was void since it was undated and un-signed and had been executed at a time when the 3<sup>rd</sup> Defendant was not an authorised agent of the late Kultar; that they are the duly registered and indefeasible owners of the suit property having acquired it in July 2014 and the Plaintiff was thus in occupation illegally; that they did not hire goons to destroy the perimeter wall as, as rightful owners they had obtained the necessary approvals from Nairobi County Government to construct a perimeter wall in order to preserve its value. They thus sought for:
  - a. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the lawful owners of L.R No. 7741/75 Kitusuru.
  - b. A permanent injunction restraining the Plaintiff from trespassing, interfering, encroaching or in any way possession L.R No. 7741/75 Kitusuru.
  - c. An order of eviction against the Plaintiff, her servants and or agents from L.R No. 7741/75 Kitusuru and everybody claiming through her or under her be bound by the said order.
  - d. In the alternative to prayer (c) above, an order of delivery of vacant possession to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant of L.R No. 7741/75 Kitusuru or the portion occupied by the Plaintiff by herself and or her servants and or agents and everybody claiming through her or under her be bound by the said order.
  - e. Mesne profits at a rate of Ksh.700,000 per month from July 2014 to the date of eviction and or granting of vacant possession.
  - f. Costs of this suit,
  - g. Interest on (f) above at court rates,



- h. Any other or further relief as this honourable court may deem fit and just to grant.

### **The 3rd Defendant's case**

8. The 3<sup>rd</sup> Defendant in her Defence and Counterclaim dated 27<sup>th</sup> July 2015 acknowledged that the Plaintiff was in possession of the suit property as a rent paying tenant but not as a purchaser. She denied existence of a binding agreement between her and the Plaintiff effective 1<sup>st</sup> September 2006 stating that the unregistered, unattested and an unexecuted agreement which she signed was signed under duress as the Plaintiff took advantage of her husband's ailing condition stating that she would not pay rent if the agreement was not signed; that upon asking her advocates to attest the said agreement, she was advised that the agreement was invalid because her next friend status vide Misc. Civil Application No.1390 of 2002 did not give her authority to sign such documents on behalf of her husband but only represent him in suits and this position was made clear to the Plaintiff by the advocates; that her advocates disagreed with contents of the said agreement and in particular clause 4 which was expunged from the new lease entered into between the Plaintiff and the Late Kultar effective 1<sup>st</sup> October 2007 and terminating on 1<sup>st</sup> October 2009; that in March 2009 before expiry of the term, the late Kultar sought to evict the Plaintiff which was unsuccessful; that nonetheless, noting that the contractual period lapsed in October 2009, the Plaintiff has since then been a month to month tenant.
9. She went on to state that she never lied about the whereabouts of the Title of the suit property highlighting that HCCC No. 77 of 2010 was filed having visited Oriental Bank severally in search for the Title but not getting any conclusive response; that the need to secure the said Title was amplified by the fact that the late Kultar having suffered a brain stroke made it hard for him to remember where the Original Title to the suit property was.
10. She rehashed the above claims in the Counterclaim and sought for:
- a. A permanent mandatory injunction directing the Respondent whether by herself, her agents, and or servants to deliver immediate vacant possession of the suit property.
  - b. Permanent injunction restraining the Respondent either by herself, agents, servants and or otherwise from dealing in any manner whatsoever with the suit property to any part thereof.
  - c. That this counterclaim be granted as prayed and that Respondents suit be dismissed with costs to the Defendants.
  - d. That the differences of the rent paid by the Respondent and rent calculable at market rates from 2009 to the date of the issuance of this order.
  - e. Any other relief that this honourable court deems fits and just to grant.
11. In reply to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant Defence and Counterclaim, the Plaintiff prayed for their dismissal with costs and judgment entered as prayed reiterating that the lease agreement was valid and enforceable and she had a valid claim to rightfully exercise her option to purchase the property which she was ready and willing to do. Re-stating that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant were neither entitled to mesne profits nor vacant possession of the suit property since they did not have valid title over it.

### **Evidence of the Plaintiff**

12. PW1 Esther Muthoni Passaris, the plaintiff adopted her witness statement as part her evidence in chief and produced her bundle of documents as exhibits. The witness statement buttressed the claim in the documents and in the plaint which has already been summarised herein above.



13. On Cross examination she stated as of 2006 the legal owner of the suit property was the Late Kultar Singh Hanspal. However, the Provisional Title which was issued in 2014 after the demise of Kultar and after the caveat against the property was lifted showed that the owners were the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. She pointed out that due to pending court cases, any transaction against the suit property was prohibited and a court order had neither been issued allowing the 3<sup>rd</sup> Defendant to sell the suit property nor was she the Administrator of the Estate of the late Kultar Singh Hanspal at the time of the sale.
14. According to PW1, she took possession of the suit property on 1<sup>st</sup> September 2006 after executing a lease agreement with the 3<sup>rd</sup> Defendant whom she has been paying rent to since then. She indicated that original agreement which had a clause giving her an option to purchase the suit property was forwarded to the 3<sup>rd</sup> Defendant's advocates but that clause was omitted in the consequent lease agreement although she did not file a claim against the removal of that clause. She went on to state that she was willing to purchase the suit property from whoever the court ordered as the lawful owner adding that the 3<sup>rd</sup> Defendant had been issued with Letters of Administration to administer the estate of the late Kultar Singh Hanspal.
15. She further stated that even though the lease was not registered, she still had an enforceable contract against the 3<sup>rd</sup> Defendant, she also stated that whereas she entered the property as a tenant and neither had a sale agreement with the late Kultar nor with the 3<sup>rd</sup> Defendant, the late Kultar had informed her that he was willing to sell the suit property and went ahead and executed a lease agreement that had the option to purchase with representation from his advocate. While acknowledging that she was aware of the court order issued in 2002 which declared the late Kultar incapable of handling his own matters, she stated that when he signed the lease agreement with her he was of sound mind and that the eviction notice issued to her on 16<sup>th</sup> March 2009 was unlawful because she had the right to exercise her option to purchase.
16. On Re-examination she stated that when she met Kultar he was of sound mind noting that even though they did not have a sale agreement, the lease agreement had an option to purchase. And that she invoked the said option when she issued a three months' notice to the late Kultar.
17. Fred Athuok an advocate of the High Court practicing at Ibrahim Isaak & Company Advocates from the year 1997 testifying as PW2 stated that the Plaintiff and the 3<sup>rd</sup> Defendant were well known to him and he was also well versed with the suit property. He adopted his witness statement as part of his evidence in chief.
18. On cross examination he stated that he acted for late Kultar on several occasions but not for the 3<sup>rd</sup> Defendant. He testified that he was aware that the suit property was registered in the late Kultar's name and that he was also aware of the lease agreement between the late Kultar and the Plaintiff although he did not witness it. He noted that he was aware that the Plaintiff was in possession of the suit property and that the late Kultar wanted to collect the rent himself instead of his wife, the 3<sup>rd</sup> Defendant. He went on to state that as much as he had not seen the lease agreement between the Plaintiff and the 3<sup>rd</sup> Defendant, he was aware that the rent from the suit property as of 2006 was being paid to her.
19. PW2 confirmed that the lease agreement entered into in 2007 between the Plaintiff and Kultar neither referred to the 2006 lease agreement nor was it an extension of the 2006 lease; that nonetheless, it was the intention of the parties to buy/sell the property upon termination of the lease. He also stated that Kultar had informed him that the Title to the suit property was with Oriental Bank although he could not recall when this information was relayed to him. He further added that at one point Kultar wanted to institute divorce proceedings against his wife, the 3<sup>rd</sup> Defendant because "... he was not happy with



her conduct.” He also stated that he was aware that at the time of Kultar’s demise, the 3<sup>rd</sup> Defendant was not his wife although he did not have a divorce decree to support his allegation adding that he was also aware that the 3<sup>rd</sup> Defendant was previously married to someone else. This statement was also unsupported. He also pointed out that the 3<sup>rd</sup> Defendant was not the Administrator of the Estate of the late Kultar Singh Hanspal.

20. He further stated that he was the one who prepared the second lease agreement which was an extension of the first lease adding that the late Kultar neither executed a sale agreement nor a transfer in favour to the Plaintiff.
21. On re-examination PW2 stated that he was not in breach of his client’s confidentiality but was only informing the Court on the aspects of the document he prepared for his client and that the 3<sup>rd</sup> Defendant had not objected to his testimony. In this regard, he stated the late Kultar was aware of the lease agreement between the Plaintiff and the 3<sup>rd</sup> Defendant entered into in 2006.

### **Evidence of The Defendants**

22. DW1 Alka Roshanlal Hanspal the 3<sup>rd</sup> defendant, adopted her witness statement as part of her evidence in chief and adduced her bundle of documents as her exhibits. She acknowledged having signed the lease agreement dated 1<sup>st</sup> September 2006 in her personal capacity without being her husband’s agent nor having a power of attorney. However, her husband entered into a new lease agreement with the Plaintiff effective 1<sup>st</sup> October 2007.
23. She stated that when the Plaintiff approached her to lease the property, there was someone else who was interested in it; that however, the Plaintiff offered a higher price and DW1 thus leased it to her; that the Plaintiff’s lawyers prepared the said lease agreement; that the Plaintiff had asked her if she was selling the property but she stated that she could not respond since her husband was ill having suffered a stroke; that despite her response aforesaid, the Plaintiff insisted to be given the option to purchase the suit property which clause was included in the draft agreement that was shared with DW1; that not being in agreement with that clause, the agreement remained un-executed and consequently the clause on the option to purchase was deleted from the agreement; that the Plaintiff also approached the late Kultar to sell the suit property but he also neither agreed to sell it nor did he have capacity to; that prior to the lapse of the tenancy period she notified Kultar of her option to purchase but Kultar being in contention issued the Plaintiff an eviction notice which she objected to.
24. On cross examination she insisted that she did not execute the lease that had an option to purchase and confirmed that she sold the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants through a sale agreement dated 12<sup>th</sup> May 2014 for Kshs. 100,000,000/= having been issued with a Provisional Title vide an un-objected Gazette notice. She stated that suit property was given to her by her husband as a Deed of Gift sometime in January 2009 (it is worth noting that after DW1 was stood down and recalled at a later date, she stated that she suit property was gifted to her in 2003) and registered it in July 2012 (once again after being stood down she indicated that the Deed of Gift was received by the Lands office on 4<sup>th</sup> September 2012). She noted that the Deed of Gift was registered after the demise of Kultar. Kultar passed away on 5<sup>th</sup> March 2012.
25. She further testified that upon Kultar’s demise she filed for letters of administration in 2012 and received a confirmation on 6<sup>th</sup> October 2015; that she applied for a Provisional Title in 2013 because the Title to the suit property was lost; that this was after several follow up with Oriental Bank for the said Title; that at the time of applying for the Provisional Title, she had neither been confirmed as an Administrator for the Estate of the deceased nor did she include the sworn Affidavit where she stated that the Title to the suit property was with Oriental Bank for safe keeping. She also pointed out there



- was a suit against her by Oriental Bank (being ELC 52 of 2020) which affirmed that the Title had not been charged to Oriental Bank but was given to them for safe keeping. She also confirmed that HCCC 77 of 2010 was filed to secure Title to the suit property because her husband had suffered a stroke. She acknowledged that in the Consent Order dated 20<sup>th</sup> August 2010 the issue of the suit property being gifted to her by her husband was not mentioned stating that she kept that information to secure her interests. She went on to confirm that she neither disclosed existence of this consent order to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants nor in the probate proceedings.
26. DW1 confirmed existence of a sale agreement between the late Kultar and Ken Petro Enterprises dated 17<sup>th</sup> December 2010 stating that by this time she had the Deed of Gift although it was unregistered. She also admitted that at the signing of the sale agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, she did not disclose that the suit property was listed among the late Kultar's properties in the Probate suit. Adding that although she gave the 1<sup>st</sup> and 2<sup>nd</sup> Defendants pleadings for this current suit, she never disclosed that a decree had been issued preventing any dealings on the suit property. She however denied receiving any deposit for the sale of the suit property from the Plaintiff.
  27. On re-examination she confirmed that the unregistered lease agreement entered between the Plaintiff and her late husband did not have an option to purchase. She added that 1<sup>st</sup> and 2<sup>nd</sup> Defendants were aware of the proceedings in court regarding the suit property and had also inspected the suit property and being satisfied purchased the same property. She also indicated that HCCC 280 of 2009 was instituted by her husband adding that the Plaintiff was paying a monthly rent of Kshs. 165,000 which was below the market value of Kshs. 300,000.
  28. DW3 Charles Kanyuga Maina, a businessman dealing in real estate adopted his witness statement as part of his evidence in chief. He stated that they wanted to purchase a family house and had looked at different properties when they were informed of the suit property; that they met the owner (the 3<sup>rd</sup> Defendant) and settled on Kshs. 100,000,000/= as the purchase price. He testified that the suit property was transferred to them before the payment was effected since the bank was to transfer the money directly to the 3<sup>rd</sup> Defendant. He went on to confirm that he had been receiving the suit property's rent of Kshs. 165,000 paid to the 3<sup>rd</sup> Defendant by the Plaintiff. However, he stated that the current market value of the suit property was Kshs. 700,000,000/= and that was the mesne profits he was entitled to.
  29. On cross examination he stated that he learnt about the suit property three months before its purchase; that it was purchased on 12<sup>th</sup> May 2014, the transfer effected on 16<sup>th</sup> May 2014 and a search was conducted on 19<sup>th</sup> May 2014; that he indicated that the sale agreement stipulated terms payment but the bank varied the said terms by undertaking to pay the 3<sup>rd</sup> Defendant the purchase price although there was no evidence of the said variation; that the sale was based on the provisional Title in the 3<sup>rd</sup> Defendant's name.
  30. He went on to state that he was aware that the suit property was occupied but he was under the impression that the occupant would be his tenant although the agreement did not stipulate that; that he was not aware that the Plaintiff was seeking the option to purchase the suit property; that it was not until they tried to undertake refurbishments of the perimeter wall that they were met with contention from the Plaintiff; that prior to the construction they applied for approvals and the same was granted but he did not produce the application or the said approvals by the County Government.
  31. DW2 also confirmed that he was aware of ELC 52 of 2020 and had seen the pleadings. He stated that had he been shown the deed of gift dated 5<sup>th</sup> January 2009 which was registered on 4<sup>th</sup> September 2012, he would have been hesitant to purchase.



32. On re-examination he stated that they took possession of the suit property in July 2014 although no repairs had been undertaken and that the entire purchase price was paid within three (3) months of execution of the sale agreement.
33. At the close of the oral testimonies parties tendered final written submissions.

### **The plaintiff's submissions**

34. Counsel for the Plaintiff in their submissions dated 20<sup>th</sup> September 2022 and 10<sup>th</sup> February 2023 summarised the pleadings and evidence and highlighted the following as issues for determination: Whether the option to purchase in the lease agreement signed by the Plaintiff is valid and enforceable? Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were innocent purchasers for value? Whether the property is still available for the reliefs sought? Whether the parties are entitled to the reliefs sought?
35. On whether the option to purchase is valid and enforceable Counsel submitted that the lease agreement dated 1<sup>st</sup> September 2006 adhered to Section 3(3) of the Contract Act because it was duly signed by the Plaintiff and the 3<sup>rd</sup> Defendant and witnessed by their advocates adding that the 3<sup>rd</sup> Defendant also admitted in her testimony that she signed the lease agreements. Counsel also submitted that the prohibitory order registered against the title over the suit property only barred the late Kultar from undertaking any transaction in respect of the suit property but did not bar the 3<sup>rd</sup> Defendant from signing documents relating to the suit property. Counsel also submitted that although the lease agreement was unregistered it was still enforceable as a contract between the parties for purposes of enforcing the option of purchase citing Court of Appeal in *Mega Garment Ltd vs Mistry Jadva Parbat & Co. (EPZ) Ltd* [2016] eKLR and *Chon Jeuk Suk Kim and Kim Jong Kyu v E.J Austin and Others* [2013]eKLR and High Court in *Simona Rizzoti v Kenya Way Limited* [2021]eKLR.
36. Counsel went on to submit that clause 4 of the lease agreement entered on 1<sup>st</sup> September 2006 which was later extended made it mandatory for the landlord to sell the suit property to the Plaintiff once she exercised the option of purchase which extended to the Estate of the deceased. Reference was made to *Anne Murambi vs John Munyao Nyamu & Another* [2018] eKLR which held that the death of the vendor did not terminate the contract which the defendants had executed on his behalf.
37. On whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were bona fide purchasers for value, Counsel while making reference to the Court of Appeal's case of *Samuel Kamere v Lands Registrar, Kajiado* [2015] eKLR and High Court in *Bernadette Wangari Muriu vs National Social Security Fund Board of Trustees & 2 others* [2012] eKLR submitted that the suit property was sold and transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in 2014 while it was pending several suits in court including HCCC No. 280 of 2009 (now ELC No. 1171 of 2013) which was against the doctrine of *lis pendens* as was set out in Section 52 of the repealed Indian Transfer of property Act, 1882 and continued by Section 107(1) of the [Land Registration Act](#). Counsel while making reference to the Court of Appeal's case in *Naftali Ruth Kinyua vs Patrick Thuita Gachure & Another* [2015] eKLR which set the test for consideration of a bona fide purchaser submitted that the 1<sup>st</sup> Defendant in his testimony confirmed that he was aware of the current suit but did not want to get involved, that the search was conducted after the sale agreement had been executed, that the property was subject to a Succession case, as well as the agreement indicated that the property was to be sold with vacant possession which was not the case, but still went ahead and purchased it. How then could the 1<sup>st</sup> Defendant claim to have done due diligence, Counsel posed? While citing *Arthi Highway Developers Ltd vs West End Butchery Ltd & 6 others* [2015] eKLR and *Antony Ted Andrew Hoareau v Mary Muthoni Wanjohi* [2018] eKLR counsel stated that from the foregoing, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were not bona fide purchasers and neither did they acquire valid title over the suit property.



38. Counsel also submitted that at the time of the sale of the suit property in 2014, the 3<sup>rd</sup> Defendant had not been confirmed the Administrator of the said Estate and as such the sale was an act of intermeddling in the Estate of the late Kultar citing the cases of *In the Matter of the Estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR and *Anne Murambi v John Munyao Nyamu & Another* (supra) which held that upon the demise of the vendor, the Defendants did not have locus standi to create another valid contract on his behalf or of his estate. Counsel also highlighted the discrepancy in the 3<sup>rd</sup> Defendants testimony on when the deed of gift was given, date of signing, persons attesting it as well as why it was included in the late Kultar's Estate for administration if it had been gifted to her.
39. On whether the property was available for reliefs sought, Counsel submitted that a certificate of Title illegally and fraudulently obtained could not be protected by law as per Article 40(6) of *the Constitution* and Section 26(1) of the *Land Registration Act* and neither could it be passed to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Reliance was placed on the cases of *Isaac Gathungu Wanjohi & Another v Attorney General & 6 Others* [2012] eKLR, *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR, *Maguga Green Apartments Ltd vs Attorney General, SBM Bank (Kenya) Ltd & Richardson Properties Ltd* [2020] eKLR and *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others* [2017] eKLR; that subsequently, pursuant to Section 80 of the *Land Registration Act*, the court should order for a rectification of the register.
40. Counsel submitted that the Plaintiff had established her case and was entitled to the reliefs sought; that she was entitled to the prayer of specific performance was ready and willing to pay Kshs 35,000,000/=; that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were not entitled to any orders.

#### **The 1st and 2nd Defendant's Submissions**

41. They are dated 24<sup>th</sup> October, 2022, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired legal title over the suit property from the 3<sup>rd</sup> Defendant and the Plaintiff's unregistered lease could not interfere with it as it was of no legal consequence. Reliance in this respect was placed on Section 4 of the *Registration of Documents Act* and the cases of *W J Blakeman Ltd v Associated Hotel Management Services Ltd* (1986) KLR 156 and *Souza and Figueiredo and Co. Ltd v Moderings Hotel Co. Ltd* [1960] EA 926 and *Bachelor's Bakery Ltd vs Westlands Securities Ltd* [1982] KLR 366. Counsel added that a lease and a lease agreement were distinct contracts as was held in *Rogan- Kamper v Gos Venor* [1977] KLR 123; (1989) KLR 367.
42. On whether they lawfully purchased the suit property, Counsel submitted that having seen the 3<sup>rd</sup> Defendant's Provisional Title registered on 18<sup>th</sup> April 2013 and undertaken diligence through carrying out a search, they executed the sale agreement dated 12<sup>th</sup> May 2014, paid Kshs. 100,000 and the suit property was transferred to them on 16<sup>th</sup> May 2014; that as such they are bona fide purchasers of the suit property without notice of defect making reference to *Eunice Grace Njambi Kamau & Another v Attorney General & 5 others* [2013] eKLR, *Lawrence Mukiri v Attorney General & 4 others* [2013] eKLR and *Samuel Kamere* (supra) and that no revocation of Title should be effected against them as per Section 14(7) of the *National Land Commission Act*; that they are entitled to vacant possession and eviction of the Plaintiff
43. On the issue of mesne profits, Counsel submitted that in 2006 the Plaintiff was paying rent of Kshs. 100,000 to the 3<sup>rd</sup> Defendant which she has been paying to date during the pendency of the suit; that however, the said amount is below the prevailing market value which should be Kshs. 700,000 and should be paid effective July 2014. Reference was made to *Swordhealth Properties v Tabet & Other* (1979) 1 ALL Er 240, *Attorney General v Halal Meat Products Limited* (2016) eKLR and *Rajan Shah*



T/A Rajan S. Shah & Patterns v Bipin P. Shah [2016] Eklr; that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are entitled to the reliefs sought with costs of the suit being borne by the Plaintiff.

### **The 3rd Defendant's Submissions**

44. The 3<sup>rd</sup> Defendant, through Counsel vide the submissions dated 19<sup>th</sup> December 2022, stated that the lease agreement relied on by the Plaintiff is undated and un-executed; that as such she was a month to month tenant on the suit property. Counsel also stated that there was also no sale agreement as per the provisions of Section 3(3) of the Law of Contract Act and Section 38 of the Land Registration Act adding that the option of purchase was neither consented to nor was there a sale agreement for the same. Reference was made to Patrick Tarzan Matu & Another v Nassim Shariff Abdulla & 2 others [2009] eKLR, Daudi Ledama Morintat vs Mary Christine Karie & 2 others [2017] eKLR, Silverbird Kenya Ltd vs Junction Ltd & 3 others [2013] eKLR, Leo Investment Ltd vs Estuarine Estate Ltd [2017] eKLR and Kukal Properties Development Ltd v Tafazzal H Maloo & 3 others [1993] eKLR.
45. It was submitted that the Plaintiff's suit is unsustainable and should be dismissed with costs and the enforcement order sought under Section 80 of the Land Registration Act should be declined since it did not adhere to the aforementioned Section 3(3) of the Law of Contract Act. Counsel cited the case of John Michael Wanjao vs Walubala Abonayo Andambi [2011] eKLR; that the Plaintiff has not proved the alleged fraud against the Defendants in the parameters set out in Vijay Morjaria vs Madhusingh Darbar & another [2000] eKLR and Kuria Kiarie & 2 others vs Sammy Magera [2018] eKLR.
46. On whether the 3<sup>rd</sup> Defendant's counterclaim should be allowed, Counsel submitted that the Plaintiff did not demonstrate that she possessed a valid interest over the suit property stating that Section 4 of the Registration of Documents Act required registration of documents conferring title or interest in immovable property citing Chon Jeuk Suk Kim (Supra), Bachelors Bakery Ltd vs Westlands Securities Ltd [1982] eKLR, Garibi Ltd vs Ogilvi East Africa Ltd [2014] eKLR; that as such, there were no grounds for the court to compel the 3<sup>rd</sup> Defendant to sell the suit property to the Plaintiff nor issue an injunction restraining her from dealing with the suit property as she pleases. Adding that the Plaintiff had been paying a monthly rent of Kshs. 150,000 for a property that was worth over Kshs. 250,000. Hence she was entitled to the counterclaim and costs of the suit.

### **Analysis and Determination**

47. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are;
- i. Was there a valid agreement between the 3<sup>rd</sup> Defendant and the Plaintiff with an option for the Plaintiff to purchase the suit property LR No. 7741/75.
  - ii. Was the sale and transfer of the suit property LR No. 7741/75 from the 3<sup>rd</sup> Defendant to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants valid?
  - iii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are bonafide purchasers for value? And if so, are they entitled to the reliefs sought in the counter claim?
  - iv. Is the plaintiff entitled to the reliefs sought?
  - v. Who should bear costs of this suit?

SUBDIVISION - i. Was there a valid agreement between the 3<sup>rd</sup> Defendant and the Plaintiff with an option for the Plaintiff to purchase the suit property LR No. 7741/75.?



48. The first issue for determination and the gist of this case is the validity of the lease agreement dated 1<sup>st</sup> September 2006 entered between the Plaintiff and the 3<sup>rd</sup> Defendant. The said agreement had a clause (referred to as Clause 4) that granted the Plaintiff the option to purchase the suit property. The said clause reads:

4. Option To Purchase

- 4.1 If the tenant wishes to purchase the property, and at any time before the expiry of the said term (or the extended term, if any) gives to the Landlord not less than Three (3) months' notice of that wish ("the Tenant's Notice"), then the Landlord must, on the expiration of the Tenant's notice, sell the Property to the Tenant at the agreed purchase price of Kenya Shillings Thirty Five Million (KShs. 35,000,000.00) subject to the matters stated in the Memorandum endorsed hereon but otherwise free from all encumbrances. Until the sums payable in accordance with this clause are paid to the Landlord, the Lease is to continue in full force and effect. The parties hereby agree that if the Landlord wishes to sell the Property before the Tenant has exercised her option pursuant to this clause, the Landlord shall in any event first offer the Property to the Tenant at the aforesaid purchase price and the Tenant shall have Thirty (30) days from the date of receipt of the Landlord's written offer to confirm her willingness to purchase the Property.
- 4.2 The sale of the Property is to be completed within 90 days from the date of the expiry of the Tenant's notice or the acceptance of the Landlord's offer (as the case may be).
- 4.3 3 The sale and purchase of the Property is to be subject to the Law Society Conditions of Sale, 1989 Edition, as may be amended.
- 4.4 4 At the Landlord's request the Tenant shall advance to the Landlord such amount as the Landlord shall require subject to a maximum sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs 250,000.00) (hereinafter referred to as the Loan") which shall be deducted from the purchase price referred to in clause 4.1 above. If for any reason whatsoever, the sale and purchase of the property is not concluded, the Tenant shall be entitled to recover the then outstanding balance of the Loan by deducting the same from the rent that shall be payable by the Tenant to the Landlord and It Is Hereby Agreed That the Landlord shall not terminate the Lease and shall (if requested by the Tenant) renew the Lease for such periods as will enable the Tenant to recover the Loan in full.
- 4.5 5 The Landlord hereby acknowledges that, upon execution of this Lease by both parties, the Tenant shall be at entitled to register a caveat against the title to the Property.



49. The said lease adduced in court has signatures of both the Plaintiff and the 3<sup>rd</sup> Defendant and attested by the advocate for the Plaintiff.
50. In her testimony, the 3<sup>rd</sup> Defendant contested ever agreeing to the said option to purchase. She stated that she got into an agreement with the Plaintiff as a tenant and although the Plaintiff raised the issue of purchasing the suit property she never agreed to it. She added that she signed the said agreement hurriedly under duress and on the belief that it captured what they had orally agreed. It was upon realization that it has a clause on option of purchase that had not been agreed upon, that the same was raised with the Plaintiff for amendment and that clause was deleted in the next agreement.
51. To confirm the status of the suit property, the court looked at entries of the Certificate of Title on record and notes that the suit property was transferred to Kultar Singh Hanspal in 1985; charged to Standard Chartered Bank Kenya Ltd in 1991 for Kshs. 4,000,000; a further charge registered in 1995 with the same bank for Kshs. 16,000,000; a discharge registered on 21<sup>st</sup> September 1999 and a prohibitory order entered in 2003 against the suit property.
52. From evidence adduced and on record, the prohibitory order emanated from HCCC No. 63 of 2003 where Alka as the Applicant sought to have Kultar barred from disposing of or alienating the suit property on grounds that he had suffered a stroke which made him incapacitated. As such, he was not capable of dealing with the suit property although his family wanted to have him dispose of the suit property. On 27<sup>th</sup> May 2003 an order was thus issued restraining Kultar from dealing/ disposing of the suit property and the prohibitory order was thus registered against the suit property.
53. The plaintiff entered into a lease agreement with the late Kultar Singh Hanspal over the suit property for one (1) year effective 1<sup>st</sup> September 2006 through the 3<sup>rd</sup> Defendant as his lawful agent. The evidence on record confirms that the lease agreement was duly signed by the plaintiff and the 3<sup>rd</sup> Defendant and their signatures witnessed by Advocates, Andrew Mugambi and Onalo Ogesa respectively.
54. I agree with the plaintiff's submissions that the 3<sup>rd</sup> Defendant admitted that she was an agent of the late Kultar Singh Haspal, for purposes of executing agreements on his behalf. Examples are the lease agreements with Lintonpark PLC and Innscore Kenya Limited, where the 3<sup>rd</sup> Defendant's signature on the two leases is the same one, on the lease with the plaintiff. The 3<sup>rd</sup> defendant admitted that she signed the lease agreements.
55. I also agree with the plaintiff's submission that the prohibitory order only related to the late Kultar Singh, and not the 3<sup>rd</sup> Defendant as she had procured the order, in order to secure her interests on the suit property. It did not bar her from signing documents relating to the suit property.
56. It is not in dispute that the lease agreement between the plaintiff and the 3<sup>rd</sup> defendant was not registered. However, the same is enforceable as a contract between the parties for purposes of enforcement of an option to purchase the suit property. The Court of Appeal in *Mega Garment Limited v Mistry Jadva Parbat & Co. (EPZ) limited* [2016] eKLR stated as follows;

“The time-honoured decision of this court in *Bachelors Bakery Ltd v Westlands Securities Ltd* [1982] KLR 366 which has been followed in a long line of subsequent decisions elucidates the status of an unregistered lease. It reiterates and confirms the firmly settled law, first that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute, does not require to be registered to be enforceable, that such an agreement is valid inter-parties even in the absence of registration, but gives no



protection against the rights of third parties. That exposition of the law hold true in this case....”

57. In the case of *Simona Rizzoti v Kenya Way Limited* [2021] eKLR the court stated as follows;

“In the instant suit, it is not in doubt that it was intended by the parties that the agreement of 7<sup>th</sup> June 2013 serve as a lease agreement. However, it was a term of the agreement that the lease term be five years and one month. As such, it was a requirement of the law that such lease be registered in order to be recognized as such. It was not. Nonetheless, as espoused in the authorities I have adverted to, I find that while the agreement of 7<sup>th</sup> June 2013 does not muster as a valid lease agreement owing to its non-registration, it is still enforceable as contract between the parties and is thus a proper benchmark to determine the terms contractual relations between the parties.”

58. It is the plaintiff’s contention that the lease agreement dated 1<sup>st</sup> October 2007 between the plaintiff and the late Kuttar Singh Hanspal, was an extension of the lease dated 1<sup>st</sup> September 2006. That the same entitled her to an option to purchase the suit property. On the 2<sup>nd</sup> of March, 2009 counsel for the plaintiff addressed the late Kuttar Singh Hanspal giving him “three months’ notice to purchase the suit for Kshs.35,000,000 and that upon expiry of the notice any money paid will be towards the purchase and not rent.....”

59. On the 6<sup>th</sup> March 2009, counsel for Kuttar wrote to the plaintiff’s counsel opposing the plaintiff’s choice to exercise her option to purchase. He also filed civil suit 280 of 2009 – Kullar Singh Hanspal v Esther Muthoni Passaris (now ELC 1171 of 2013).

The plaintiff herein filed a statement of defence and counter claim in that suit and successfully obtained injunctive orders against the late Kuttar Singh Hanspal.

60. It is clear that the lease agreement made it mandatory for the landlord to sell the suit property to the plaintiff once she exercised her option to purchase. In the case of *Anne Murambi v John Munyao Nyamu & Another* [2018] eKLR , the court stated as follows;

“37. At law, the demise of the vendor only terminated the powers which the defendants had hitherto exercised as attorneys of the deceased vendor. The death of the vendor did not terminate the contract which the defendants had executed on behalf of the deceased vendor. The contract remained binding on the estate of the vendor, and the personal representatives of the vendor were, by law required to initiate succession proceedings and discharge the vendor’s obligation under the contract.”

61. I agree with the plaintiffs’ submission that following the demise of the late Kuttar Singh Hanspal, the lease agreement is still enforceable against the estate of the deceased. The option to purchase was therefore enforceable against the 3<sup>rd</sup> defendant.

I find that the option to purchase is valid and enforceable.

62. It is not in contention that the suit property was disposed of to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant during the pendency of this suit against the doctrine of *lis pendens*. Further, there was a prohibitory order against dealing with the suit property lodged in 2003 as well as an injunction in ELC 1171 of 2013 (formerly HCCC 280 of 2009) and the current suit against dealing with the suit property pending the hearing



and determination of those suits. The Court of Appeal in *Anne Jepkemboi Ngeny v Joseph Tireito & another* [2021]eKLR addressed itself as follows on the doctrine of lis pendens:

“... In Civil Appeal Number 44 of 2014, *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* [2015] eKLR, the Court address the issue of lis pendens as follows;

“Black’s Law Dictionary 9th edition, defines lis pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending...

The actions of the appellant and the 2<sup>nd</sup> respondent of proceeding to alienate the property and having it registered in their names during the pendency of the litigation process, ran afoul of the doctrine of lis pendens and was also tantamount to contempt of court... Under the circumstances, the learned Judge cannot be faulted for cancelling the Title deeds and ordering the retransfer of the properties to the 1<sup>st</sup> respondent...”

63. The legal effect of the lis pendens principle was extensively discussed by the Court of Appeal in *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* [2015] eKLR , where the court stated;

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

64. Similarly in the *In Re Estate of Solomon Muchiri Macharia* [2016] eKLR Mativo J (as he then was ) stated thus;

“The doctrine of his lis pendens was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court in which a dispute on rights or interest in immovable property is pending by private dealings which may remove the subject matter of litigation from the ambit of the courts power to decide a pending issue or frustrate its decree”.

The learned Judge also quoted Mulla’s transfer of property Act, 6<sup>th</sup> Edition where the Authors stated at page 241 that;

“The effect of the maxim is not to annul the conveyance but only to render it sub servient to the rights of the parties subject to litigation”.

65. I find that at the time of the sale and transfer the suit property by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the suit property was subject to ELC 1173 OF 2013 among other proceedings pending before this court where the plaintiff had a counter claim to enforce the option to purchase. This means the 1<sup>st</sup> and 2<sup>nd</sup> defendants could not have legally acquired title to the suit property. The same ought to be cancelled and or revoked.
66. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants claimed that they purchased the suit property on the strength of the Provisional Title registered in the 3<sup>rd</sup> Defendant’s name.
67. How and when did the 3<sup>rd</sup> Defendant acquire a Provisional Title for the suit property in her name? It is on record that vide an the undated Affidavit titled Loss of Title Affidavit signed in 2013 by the 3<sup>rd</sup> Defendant (Alka) she claimed that she was unable to trace the title to LR No. 7741/75’s adding that



the Title had not been used as security or lien. She indicated that the property was gifted to her by her husband on 12<sup>th</sup> July 2009. Her husband who passed away on 5<sup>th</sup> March 2012.

68. It is also on record that vide a Notice of Motion dated 2<sup>nd</sup> November 2009 filed in the counterclaim in HCCC No. 66 of 2005, Alka swore an affidavit where she deponed that having been granted Power of Attorney by Kultar as of 25<sup>th</sup> January 2009 she had capacity to follow up on the issue of Title over the suit property which was in possession of Oriental Bank. The said HCCC No. 66 of 2005 was filed by Oriental Bank against Kultar (and two others). Kultar filed a counterclaim where he sought an order for the release of Title for IR 9874 LR No. 7741/63 held by Oriental Bank on the grounds that Oriental Bank had not taken any action to prosecute the said suit in over three years which was an abuse of the Court process.
69. The 1<sup>st</sup> Defendant in his testimony while claiming to be a bona fide purchaser of the suit property acknowledged that he was aware that there was a court case regarding the suit property but did not want to get involved. Whereas it is noted from DW1 (the 3<sup>rd</sup> Defendant) testimony that there is information she kept away from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants regarding the status of the suit property, the little information given to them including court proceedings was enough to aid them in ascertaining the factual state of the suit property.
70. It is indeed baffling how one can purchase a property worth such copious amounts of money without getting involved in knowing the history of the suit property which includes going to the ground to view the property and finding out how the suit property is being sold while someone is in possession. He claimed that he was under the impression that the occupant would be his tenant. Due diligence involves more than an assumption and a face value impression noting that Equity does not aid the indolent!! It is also not clear how the suit property was purchased because there was no evidence of the transaction. That notwithstanding, had the 1<sup>st</sup> and 2<sup>nd</sup> Defendant undertaken due diligence they would have interrogated any questionable entries on the Certificate of Title including how the Prohibitory order against that suit property was lifted, or the process in which the 3<sup>rd</sup> Defendant ended up being issued a Provisional Title. The court is thus not convinced that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant have any valid ground to wave the Title on court's face and claim indefeasibility of Title as per Section 26 of the [Land Registration Act](#).
71. Having already established and determined that the Provisional Title registered in the 3<sup>rd</sup> Defendant's name was irregularly acquired, means that there was no valid interest that could pass to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. As such the alleged transfer of title to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant was irregularly done. It thus follows that the titles ought to be cancelled as guided by Section 80 of the [Land Registration Act](#):
- (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, 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.



72. This was also the holding by the Court of Appeal in *Wambui v Mwangi & 3 others* (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) (Judgment)

“... no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurality or otherwise a product of a corrupt scheme... 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 3rd respondent and subsequently passed on to the appellant having been demonstrably shown to have been tainted with fraud, deceit and nullity fits the description of title that has been acquired not only irregularly and unprocedurally but also through a corrupt scheme...”

73. I find that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are not bonafide purchasers for value without notice. I rely on the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015]eKLR.

74. In this regard, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ Counterclaim dated 15<sup>th</sup> December 2014 fails in totality with costs to the Plaintiff.

75. The 3<sup>rd</sup> defendants counter claim ELC 1256 of 2014 is also dismissed.

76. From the foregoing I find that the plaintiff is entitled to the reliefs sought in the plaint. She is entitled an order of Specific Performance having exercised her option to purchase. In the case of *Lucy Njeri Njoroge v Kanyaje Njoroge* [2015] eKLR ; it was held thus;

“on the bases of these principles we wish to reiterate our earlier stand that since the Business Premises Tribunal Orders were based on non-existent tenancy, they were, and still are incapable of enforcement. Finally, on whether the parties were bound by the contract of sale, we have already said that the contract of sale remained in existence until determined by either of the parties, and that for this reason the sale contract remains valid and enforceable. This being the case the parties remain bound to perform their obligations thereunder. The appellant has stated that she paid an amount of Kshs.60,000 to the respondent through her advocate and that a further amount of Kshs.80,000 was paid into court as a condition for the grant of a stay of execution.

The agreement provided that upon payment of the balance, the appellant would be entitled to the transfer of the half portion of the suit property into her name, or in the even of non-payment, the amount was to be recovered as a civil debt. Had the courts below considered the terms of the agreement, they would have either ordered specific performance of the contract as prayed by the appellant, or would have directed that either party was at liberty to terminate the contract, so that the appellant would be obliged to recover the sums paid as a civil debt”

77. Accordingly judgement is entered for the plaintiff against the defendant as follows;

- a. That a declaration is hereby issued that the plaintiff has the right to exercise the option to purchase the parcel of land known as LR. NO.7741/75 from (the estate of the Late Kuttar Singh Hanspal(through the 3rd defendant) upon payment of Kshs.35,000,000/=.
- b. That an order of specific performance of the option to purchase under the agreement for lease between the 3rd defendant to purchase the parcel of land Known as LR. NO. 7741/75 from the 3rd Defendant upon payment of Kshs.35,000,000 within ninety (90) days from the date of this judgement.



- c. That an order is hereby issued compelling the 3rd defendant to execute transfer of LR. NO.7741/75 in favour of the plaintiff upon payment of Kshs.35,000,000 in Default the Deputy Registry of this Honourable court do execute the necessary documents to effect the transfer free from any encumbrances.
- d. That a declaration is hereby issued that the sale and transfer of LR NO. 774/75 by the 3rd defendant to the 1st and 2nd defendants is null and void.
- e. That the Chief Land Registrar, is hereby directed to revoke and or cancel the registration of LR. NO. 7741/75 Kitisuru in favour of the 1st and 2nd defendants and cancellation of all entries on the title LR NO. 7741/75 effecting registration of the transfer within Ninety (90) days from the date of this judgement.
- f. That a permanent injunction is hereby issued restraining the 1st and 2nd defendants from selling, transferring, charging, mortgaging, leasing, pledging or in any way dealing with or alienating the property known as LR. NO. 7741/75 Kitisuru.
- g. That a permanent injunction is hereby issued restraining the 1st, 2nd , 3rd defendants from evicting, distressing for rent, trespassing or to invading, cutting trees, demolishing structures, erecting walls, wasting, alienating or in any way dealing with or interfering with the plaintiff's quiet possession of the property known as LR. NO. 7741/45 Kitisuru.
- h. That the plaintiff shall have costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 12TH DAY OF OCTOBER, 2023.**

**L. KOMINGOI**

**JUDGE.**

**IN THE PRESENCE OF:**

**Mr.Issa Mansur with Mrs. Ahomo for the plaintiff.**

**Ms. Kyumu for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.**

**Mr. H. Kinyanjui for the 3<sup>rd</sup> Defendant.**

**Court Assistant – Mutisya.**

