



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 385 OF 2012**

**NISHITH YOGENDRA PATEL**

**(Suing as a Legal Representative of Yogendra Purshottam Patel).....1<sup>ST</sup> PLAINTIFF**

**NILESH PRAHLADBHAI PATEL.....2<sup>ND</sup> PLAINTIFF**

**=VERSUS=**

**NAIBUROME EAST AFRICA LIMITED.....1<sup>ST</sup> DEFENDANT**

**CLAUDE LYONS (E.A) COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

**DANIEL KINYUA MUGO.....3<sup>RD</sup> DEFENDANT**

**REGINA NYOKABI KURIA.....4<sup>TH</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS.....5<sup>TH</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Background:**

At all material times, all that parcel of land known as L.R No. 12442 (Grant No. I.R 33904) (hereinafter referred to as “the suit property”) was registered in the names of Yogendra Purshottam Patel (deceased), Prahladbhai Purshottam Patel (deceased) and Rajnikant Purshottam Patel (deceased) as tenants in common. The suit property was leasehold from the Government of Kenya for a term of 99 years with effect from 1<sup>st</sup> April, 1976. The 1<sup>st</sup> plaintiff is the legal representative of the estate of Yogendra Purshottam Patel (hereinafter referred to as “Y. P. Patel”) while the 2<sup>nd</sup> plaintiff is the legal representative of Prahladbhai Purshottam Patel (hereinafter referred to as “P. P. Patel”). Y. P. Patel died on 12<sup>th</sup> February, 2006. P. P Patel died on 21<sup>st</sup> April, 1991 while Rajnikant Purshottam Patel (hereinafter referred to as “R. P. Patel”) died on 10<sup>th</sup> August, 1983. The estate of R. P. Patel is being administered by Pascale Mireille Baksh (nee Patel) (hereinafter referred to as “Pascale”).

On 11<sup>th</sup> November, 1993, Pascale lodged a caveat against the title of the suit property claiming beneficial

interest. In 1995, Y. P. Patel filed a suit in the High Court at Nairobi namely, H.C.C.C No. 617 of 1995 against among others the said administrators of the estates of P. P. Patel and R. P. Patel seeking among others, a declaration that he was the sole proprietor of the suit property and that P. P. Patel and R. P. Patel held the suit property in trust for him. In a judgment delivered by the High Court on 13<sup>th</sup> March, 2006 in HCCC No. 617 of 1995, the court dismissed Y. P. Patel's claim. The court ordered further that the estate of R. P. Patel was at liberty to sell its undivided share in the suit property subject to first priority being given to the co-owners of the property to purchase the same.

On 10<sup>th</sup> January, 1994, the caveat that was registered against the title of the suit property by Pascale was withdrawn and the property transferred thereafter to the 1<sup>st</sup> defendant herein on 18<sup>th</sup> January, 1994. On 23<sup>rd</sup> May, 2006 the suit property was transferred by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant.

#### The plaintiffs' claim:

The plaintiffs filed this suit against the defendants on 3<sup>rd</sup> July, 2012. The plaintiffs averred that following the deaths of Y. P. Patel, P. P. Patel and R. P. Patel, the plaintiffs and Pascale became the bona fide owners of the suit property. The plaintiffs averred that on or about 11<sup>th</sup> June, 2012 people unknown to them invaded the suit property and started surveying the same. The plaintiffs averred that the said survey works continued on 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> June, 2012. The plaintiffs averred that the said survey works were undertaken without their permission and that the same were carried out under the instructions of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. The plaintiffs averred that they did not allow the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants to survey the suit property. The plaintiffs averred that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants were trespassers on the suit property and that their acts of trespass had caused the plaintiffs loss and damage.

The plaintiffs averred that on 12<sup>th</sup> June, 2012 they learnt that the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants had a copy of a title for the suit property which showed that upon removal of the caveat in favour of Pascale on 10<sup>th</sup> January, 1994, the suit property was transferred to the 1<sup>st</sup> defendant on 18<sup>th</sup> January, 1994 at a consideration of Kshs. 60,000,000/= and that the 1<sup>st</sup> defendant transferred the suit property to the 2<sup>nd</sup> defendant on 23<sup>rd</sup> May, 2006 at a consideration of Kshs. 120,000,000/=. The plaintiffs averred that they were not aware of these transactions. The plaintiffs averred that Pascale did not withdraw the Caveat that she registered against the title of the suit property on 11<sup>th</sup> November, 1993. The plaintiffs averred that the said Caveat was removed from the title of the suit property fraudulently by the defendants. The plaintiffs averred that none of them transferred the suit property to the 1<sup>st</sup> and/or the 2<sup>nd</sup> defendant. The plaintiffs averred that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were registered as proprietors of the suit property fraudulently, unprocedurally and unlawfully. The plaintiffs averred that as a result of the unlawful and fraudulently acts of the defendants aforesaid, the plaintiffs risked being disposed of the suit property. The plaintiffs sought judgment against the defendants jointly and severally for;

1. A declaration that the plaintiffs and Pascale were the bona fide proprietors of the suit property.
2. A declaration that the fraudulent entries on the title of the suit property were illegal, null and void.
3. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants from trespassing, transferring, offering for sale, leasing, subletting, charging or alienating the suit property and/or interfering and/or otherwise dealing in any manner howsoever with the suit property.
4. A mandatory injunction compelling the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants to forthwith remove the structures they have erected or caused to be erected on the suit property or any part thereof.
5. An order compelling the 5<sup>th</sup> and 6<sup>th</sup> defendants to cancel the fraudulent entries particularly the fraudulent transfer of the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

6. Damages for trespass.

7. Interest and costs of the suit.

#### The defence:

The 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants neither entered appearance nor filed a defence. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed a joint statement of defence on 10<sup>th</sup> October, 2012. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants averred that the 2<sup>nd</sup> defendant was the registered proprietor of the suit property. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants admitted that those who entered the suit property to carry out survey were the 2<sup>nd</sup> defendant's agents and that they were acting under its instructions. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants averred that in carrying out the activities that it was engaged in on the suit property, the 2<sup>nd</sup> defendant was exercising its right as the proprietor of the suit property. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants averred that the 2<sup>nd</sup> defendant did not receive the permission or consent of the plaintiffs to enter the suit property.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants denied that they interfered with the plaintiff's occupation of the suit property. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants contended that it was the plaintiffs who interfered with the suit property. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants admitted that the 2<sup>nd</sup> defendant purchased the suit property from the 1<sup>st</sup> defendant. They denied however that the transaction was fraudulent. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants averred that the 2<sup>nd</sup> defendant purchased the suit property from the 1<sup>st</sup> defendant for valuable consideration. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants averred that they were strangers to the allegations of fraud and illegality pleaded against them by the plaintiffs. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants averred that the plaintiffs' suit was time barred. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants averred further that the plaintiffs had no registrable interest in the suit property and as such they were busy bodies. The 3<sup>rd</sup> and 4<sup>th</sup> defendants averred that the plaintiffs' suit was frivolous and vexatious as against them. The 3<sup>rd</sup> and 4<sup>th</sup> defendants averred that they were improperly joined in the suit since they were only shareholders and directors of the 2<sup>nd</sup> defendant. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants urged the court to dismiss the plaintiffs' suit with costs.

#### The evidence:

At the trial, the plaintiffs called three witnesses. The plaintiffs' witnesses were Nishith Yogendra Patel (PW1), Moses Wachira Muricho (PW2) and Jacob Oduor (PW3). PW1 adopted his affidavit sworn on 3<sup>rd</sup> July, 2012 together with the annexures, further affidavit sworn on 5<sup>th</sup> October, 2012 together with the annexures and further affidavit sworn on 2<sup>nd</sup> October, 2013 together with the annexures as his evidence in chief. PW1 produced the said affidavits and annexures as plaintiffs' exhibits 1, 2 and 3 respectively. PW1 also produced the documents attached to the plaintiffs' supplementary list of documents dated 27<sup>th</sup> September, 2016 and further supplementary list of documents filed on 11<sup>th</sup> October, 2017 as plaintiffs' exhibits 4 and 5 respectively. PW1 told the court that the suit property was at all material times owned by Y. P. Patel, P. P. Patel and R. P. Patel (hereinafter together referred to as "the Patels"). PW1 stated that the Patels were brothers and that they were all deceased. He stated that in June, 2012 he was informed by his workers that some people had entered the suit property and were surveying the same. He stated that he made a report of the trespass at Muthaiga Police Station and that the 4<sup>th</sup> defendant was arrested and subsequently charged. PW1 stated that he later learnt at the lands office that the suit property had been transferred to the 1<sup>st</sup> defendant. He stated that Y. P. Patel who was the only one alive as at the time the suit property was allegedly transferred to the 1<sup>st</sup> defendant did not effect such transfer because there was an ongoing dispute between Y. P. Patel and the administrators of the estates of his two brothers over the ownership of among others the suit property.

PW1 stated that the dispute was subsequently taken to court by Y.P. Patel in 1995 where it was registered as Nairobi HCCC No. 617 of 1995. PW1 stated that Y. P. Patel would not have filed a suit in 1995 against his brothers who were the co-proprietors of the suit property seeking a declaration that he was the sole owner of the property if he had sold the property to the 1<sup>st</sup> defendant in 1994. PW1 stated that the owners

of the suit property did not sell the same to the 1<sup>st</sup> defendant. He stated that the plaintiffs had been in possession of the suit property since 1963. PW1 stated that the plaintiffs were not in possession of the original title for the suit property. He stated that Y. P. Patel wanted to subdivide the suit property and for that reason he surrendered the original title for the suit property to the lands office. PW1 stated that by a letter dated 20<sup>th</sup> July, 2012, the Principal Registrar of Documents confirmed that the suit property was registered in the names of the Patels and that the purported transfers of the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> defendants were fraudulent and that the same had been cancelled. PW1 stated that the 2<sup>nd</sup> defendant challenged the cancellation of its title in this court by way of judicial review application in ELC Misc. Application No. 306 of 2015 which application was dismissed.

PW1 stated that the 2<sup>nd</sup> defendant was not the owner of the suit property and that it did not purchase the property from the 1<sup>st</sup> defendant at Kshs. 120,000,000/= as alleged. PW1 averred that the 4<sup>th</sup> defendant was charged with conspiracy to defraud in relation to the purported acquisition of the suit property by the 2<sup>nd</sup> defendant. A copy of the judgment delivered on 10<sup>th</sup> September, 2019 in the Chief Magistrates Court Criminal Case No. 1603 of 2012 in which the 4<sup>th</sup> defendant was the accused was produced in evidence by consent as plaintiffs' exhibit 6. In the said judgment, the court found the 4<sup>th</sup> defendant guilty of obtaining registration of the suit property by false pretense that she had purchased the same from Y. P. Patel in the name of the 2<sup>nd</sup> defendant. PW1 stated that the plaintiffs thought all along that the title for the suit property was in the lands office. He stated that they were not aware that the title was in the hands of third parties. PW1 stated that they had no reason to report the loss of the title because it was not lost. He stated that when they went to the lands office, they were given a letter confirming that the property was owned by the Patels but they were not given the title. PW1 stated that all the fraudulent entries in the title were cancelled after he lodged a complaint with the Ministry of Lands. PW1 denied that the suit property was sold by the Patels to the 1<sup>st</sup> defendant. PW1 stated that the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants did not defend the suit.

PW2 was the Patels' neighbor and friend. He told the court that Y. P. Patel never told him that he was selling the suit property and that he was not aware of the purported sale of the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. He told the court that he had expressed interest in the suit property and that Y.P. Patel would not have sold the suit property without telling him.

PW3 was a documents examiner. His evidence was to the effect that the Land Registrar, Fredrick Indoko Lubulellah who was alleged to have registered the transfer of the suit property in favour of the 2<sup>nd</sup> defendant did not do so since the signature said to be his in entry No. 10 in the title of the suit property was not his.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants also called three witnesses namely, Regina Nyokabi Kuria(DW1), Emmanuel Karisa Kenga(DW2) and Daniel Kinyua Mugo (DW3). DW1 is the 4<sup>th</sup> defendant. DW1 told the court that she was a director and a shareholder of the 2<sup>nd</sup> defendant. DW1 stated that the 2<sup>nd</sup> defendant purchased the suit property from the 1<sup>st</sup> defendant in 2006 at Kshs. 120,000,000/=. She admitted that she was the accused in Chief Magistrate's Court Criminal Case No. 1603 of 2012. She told the court that the 2<sup>nd</sup> defendant had 5 directors and that the 2<sup>nd</sup> defendant followed due process when acquiring the suit property. DW1 stated that the suit property was vacant when they purchased the same save for one residence that was at a corner on the suit property that was occupied by one, Hon. Githinji. DW1 maintained that the 2<sup>nd</sup> defendant had a valid title to the suit property. DW1 denied that the 2<sup>nd</sup> defendant's title was cancelled. She stated that the 2<sup>nd</sup> defendant's surveyors were chased away from the suit property. She stated that the 2<sup>nd</sup> defendant obtained its title from the 1<sup>st</sup> defendant. DW1 produced as defendants' exhibit 1 the documents attached to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants' list of documents dated 9<sup>th</sup> October, 2012. She also produced the documents attached to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants' supplementary list of documents filed in court on 18<sup>th</sup> January, 2018 as defendants' exhibit 2.

On cross-examination, DW1 told the court that the 2<sup>nd</sup> defendant was incorporated on 17<sup>th</sup> December,

2005. She stated that the 2<sup>nd</sup> defendant had several shareholders and that it raised the purchase price over a period of time. DW1 stated that the sale transaction with the 1<sup>st</sup> defendant was handled on their behalf by Momanyi Masese & Co. Advocates. She stated that the agreement for sale was signed by two of the directors of the 2<sup>nd</sup> defendant namely, Pius Abuki Bwongereri and the 3<sup>rd</sup> defendant, Daniel Kinyua Mugo. She stated that the purchase of the suit property was completed in 2006. She stated that Thomas Momanyi Masese Advocate was known to her. When shown a letter dated 20<sup>th</sup> April, 2017 from the Law Society of Kenya (PEXh. 5) to the effect that Masese Thomas Momanyi Advocate died on 22<sup>nd</sup> July, 2000, DW1 stated that his firm was in existence even after his death. DW1 admitted however that there was no way the deceased advocate could have witnessed the agreement for sale between the 1<sup>st</sup> and 2<sup>nd</sup> defendants. DW1 stated that the 2<sup>nd</sup> defendant had quiet possession of the suit property between 2006 and 2012 when a dispute with the plaintiffs erupted. She told the court that during that period, they just used to visit the property. She reiterated that the 2<sup>nd</sup> defendant did not acquire the suit property fraudulently.

DW2 was a forensic document examiner. The gist of his evidence was that Fredrick Indoko Lubullelah a land registrar who was said to have registered the transfer of the suit property in favour of the 2<sup>nd</sup> defendant indeed registered the said transfer. He stated that the signature in entry No. 10 on the title of the suit property was that of Fredrick Indoko Lubullelah.

DW3 is the 3<sup>rd</sup> defendant. He told the court that he was one of the directors and shareholders of the 2<sup>nd</sup> defendant. He adopted his witness statement dated 13<sup>th</sup> February, 2015 as part of his evidence in chief. DW3 corroborated the evidence of DW1 that the suit property was acquired lawfully by the 2<sup>nd</sup> defendant from the 1<sup>st</sup> defendant at a consideration of Kshs. 120,000,000/=. He stated that the 2<sup>nd</sup> defendant paid the purchase price in full and was issued with a title for the property. He stated that after taking possession of the suit property they surveyed the same. He stated that a dispute over the ownership of the suit property arose 4 years after the 2<sup>nd</sup> defendant had acquired the property.

On cross-examination, DW3 stated that the 2<sup>nd</sup> defendant acquired the suit property in 2005. DW3 stated further that the other directors of the 2<sup>nd</sup> defendant did not know the directors of the 1<sup>st</sup> defendant. He stated that only one of the directors of the 2<sup>nd</sup> defendant, Pius Abuki knew the directors of the 1<sup>st</sup> defendant. He stated that even when he accompanied the said directors to the suit property, he did not get their names. He stated that he did not find out how the 1<sup>st</sup> defendant acquired the suit property. He admitted that the agreement for sale of the suit property was signed by him and Pius Abuki on behalf of the 2<sup>nd</sup> defendant. He stated that their signatures were witnessed by Tom Masese Advocate in 2005. He stated that the 2<sup>nd</sup> defendant purchased the suit property at Kshs. 120,000,000/= and that they paid a deposit of Kshs. 12,000,000/-. Asked how this deposit was paid, he stated that the same was paid in cash through Tom Masese Advocate. He stated that Kshs. 12,000,000/= in cash weighed about 12kg and that Tom Masese issued a receipt upon receipt of the said cash payment. He did not however produce the receipt in evidence. DW3 stated that the purchase price was contributed by the members of the 2<sup>nd</sup> defendant and that Pius Abuki and he used to keep the members' contributions in their houses. He stated that he was present when the deposit of Kshs. 12,000,000/= was paid to Tom Masese Advocate. On how the 2<sup>nd</sup> defendant paid the balance of the purchase price in the sum of Kshs. 108,000,000/-, DW3 stated that even that payment was made through Tom Masese Advocate in cash. He stated that he was also present when the payment was being received by Tom Masese Advocate. When shown a letter from the Law Society of Kenya dated 20<sup>th</sup> April, 2017 to the effect that Tom Masese Advocate died on 22<sup>nd</sup> July, 2000. DW3 stated that Tom Masese's firm was still running even after his death. He stated that he did not know Tom Masese personally and that he was not aware that he was deceased when he went to his office. On being pressed on how a deceased advocate could have witnessed the agreement for sale, DW3 stated that the agreement was witnessed by the office of the advocate. DW3 denied that the title held by the 2<sup>nd</sup> defendant was a forgery.

He stated that the 2<sup>nd</sup> defendant could not have been issued with a title for the suit property if it had not completed the payment of the purchase price.

### The submissions:

After the close of evidence, the parties were directed to make closing submissions in writing. The plaintiffs filed their submissions on 24<sup>th</sup> July, 2020 while the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed their submissions on 20<sup>th</sup> February, 2021. The plaintiffs framed three issues which they submitted on namely, whether the alleged transfer of the suit property to the 1<sup>st</sup> defendant and subsequently to the 2<sup>nd</sup> defendant was procured through forgery and fraud, whether the certificate of title in the name of the 2<sup>nd</sup> defendant is null and void and whether the reliefs sought in the plaint should be granted. The plaintiffs submitted that since the caveat that was registered against the title of suit property was removed irregularly, the subsequent entries after the purported withdrawal of the caveat were similarly irregular, null and void.

The plaintiffs submitted further that the transfer of the suit property in favour of the 1<sup>st</sup> defendant and the subsequent transfer of the property to the 2<sup>nd</sup> defendant were fraudulent. The plaintiffs submitted that the searches conducted on the title of the suit property on 23<sup>rd</sup> April, 2001 and 10<sup>th</sup> September, 2004 (pages 135 to 138 and 140 to 142 of P Exh. 1) showed that the last entry in the title of the suit property was the caveat that was registered in favour of Pascale on 11<sup>th</sup> November, 1993. The plaintiffs submitted that if the transfer in favour of the 1<sup>st</sup> defendant registered on 18<sup>th</sup> January, 1994 was genuine, the same would have been shown in the said searches. The plaintiffs submitted further that if the caveat by Pascale was also withdrawn on 10<sup>th</sup> January, 1994 as claimed, the withdrawal would also have been shown in the said searches. The plaintiffs submitted that the absence of the alleged withdrawal of caveat purportedly registered on 10<sup>th</sup> January, 1994 and the transfer in favour of the 1<sup>st</sup> defendant registered on 18<sup>th</sup> January, 1994 in the said two searches shows that the same were forgeries. The plaintiffs submitted that as at the time of the purported transfer of the suit property to the 1<sup>st</sup> defendant two of the registered proprietors of the suit property were deceased. The plaintiffs submitted that there was no evidence that the administrators of the estates of the deceased co-proprietors of the suit property were involved in the transfer of the suit property to the 1<sup>st</sup> defendant leave alone the 1<sup>st</sup> plaintiff. The plaintiffs submitted that that rendered the purported transfer of the suit property to the 1<sup>st</sup> defendant fraudulent, null and void. The plaintiffs submitted further that in the Judicial Review application that the 2<sup>nd</sup> defendant had filed to challenge the cancellation of its purported title to the suit property (JR.Misc. Application No. 306 of 2015) one, Sarah Chelimo Maina a Principal Land Registration Officer swore an affidavit in opposition to the application. The plaintiffs submitted that in the said affidavit, Sarah Chelimo Maina stated that the entries in the register of the suit property relating to the transfer of the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> defendants were not supported by any documentation held at the land registry. The plaintiffs submitted that the said affidavit supported the plaintiff's contention that the purported transfers were fraudulent. The plaintiffs submitted that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had a duty to establish the root and validity of their titles to the suit property. In support of this submission, the plaintiffs relied on Willis Gitau Njoroge v Monica Wanjira Gachie & Another [2019] eKLR and Samuel Kamere v Land Registrar, Kajiado [2015] eKLR. The plaintiffs submitted that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had a duty to place before the court documents in support of their registration as proprietors of the suit property which they failed to do.

The plaintiffs submitted further that the 4<sup>th</sup> defendant who was a director of the 2<sup>nd</sup> defendant was charged and found guilty of obtaining registration of the suit property by false pretence. The plaintiffs submitted that there was no evidence whatsoever placed before the court in proof of how the suit property became registered in the name of the 1<sup>st</sup> defendant. The plaintiffs submitted that failure by the 1<sup>st</sup> defendant to defend the suit was a further indication and admission that the transfer in its favour was fraudulent.

The plaintiffs submitted that the 2<sup>nd</sup> defendant claimed that it purchased the suit property from the 1<sup>st</sup> defendant at Kshs. 120,000,000/= through an agreement for sale that was prepared by Tom Masese Advocate. The plaintiffs submitted that the 2<sup>nd</sup> defendant had claimed that it also paid the said sum of of Kshs. 120,000,000/- in cash through the said advocate. The plaintiffs submitted that it was not possible for the 3<sup>rd</sup> defendant and his co-director in the 2<sup>nd</sup> defendant to carry Kshs. 120,000,000/= in cash to the

office of Tom Masese Advocate. The plaintiffs submitted further that as at the time Tom Masese advocate is alleged to have witnessed the said agreement for sale between the 1<sup>st</sup> and 2<sup>nd</sup> defendants and received Kshs. 120,000,000/-, he was long dead according to a letter from the Law Society of Kenya that was produced in evidence. The plaintiffs submitted that the 4<sup>th</sup> defendant was untruthful witness whose evidence should be disregarded by the court. The plaintiffs submitted that there was no evidence that Tom Masese received the alleged sum of Kshs. 120,000,000/= from the 2<sup>nd</sup> defendant.

The plaintiffs submitted that the purported instrument of transfer that was produced by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants in evidence was also a forgery as it was allegedly registered by Fredrick Lubulellah who denied registering the document. The plaintiffs submitted that the document was never presented for registration at the land registry and that is why the land registry had no record of the same. The plaintiffs submitted that there was no evidence of how the suit property was transferred from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant.

On expert evidence, the plaintiffs submitted that the same should be considered together with other evidence on record. The plaintiffs submitted that the evidence of Jacob Oduor (PW3) was supported by the evidence of Fredrick Lubulellah who denied that he registered the transfer in favour of the 2<sup>nd</sup> defendant.

The plaintiffs submitted that there was no evidence that the suit property was lawfully transferred to the 1<sup>st</sup> defendant and subsequently to the 2<sup>nd</sup> defendant. The plaintiffs submitted that they had proved their case against the defendants to the required standard. The plaintiffs urged the court to find that the plaintiffs cannot be dispossessed of their land by fraudsters.

In their submissions in reply, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants (hereinafter referred to only as “the defendants”) framed a total of four issues for determination by the court namely; whether the plaintiffs are vested with the *locus standi* to bring this suit, whether the 2<sup>nd</sup> defendant was a bona fide purchaser of the suit property for value without notice of any defect in its title, whether the Land Registrar acted ultra vires in cancelling the 2<sup>nd</sup> defendant’s title, and whether their plaintiffs have proved their case on a balance of probabilities. On the issue of *locus standi*, the defendants submitted that the plaintiffs were strangers to the subject matter of the suit. The defendants submitted that the plaintiffs were neither the registered proprietors of the suit property nor the legal representatives of the previous registered owners. The defendants submitted that the plaintiffs had not produced any evidence showing that they were the legal representatives of the estates of the Patels who were the previous registered owners of the suit property. The defendants submitted that since the plaintiffs were not the legal representatives of the estates of the Patels, they had no *locus standi* to bring this suit. In support of this submission, the defendants cited among others Otieno v Ougo [1986- 1989] E.A.L.R 486.

On whether the 2<sup>nd</sup> defendant was an innocent purchaser of the suit property, the defendants cited Lawrence Mukiri v Attorney General & 4 others [2013] eKLR and submitted that they had established the elements of an innocent purchaser. The defendants cited section 23 of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) and submitted that having purchased the suit property for value without notice and not having been a party to any fraud or misrepresentation in relation to the transfer of the suit property to the 2<sup>nd</sup> defendant, the 2<sup>nd</sup> defendant was entitled to enjoy all the rights appurtenant to its registration as the proprietor of the property. The defendants submitted that since the 2<sup>nd</sup> defendant was the bona fide proprietor of the suit property, the Land Registrar had no right to cancel its title. The defendants submitted that the Land Registrar acted in excess of its powers and against the rules of national justice and fair administrative action in cancelling the 2<sup>nd</sup> defendant’s title. The defendants urged the court to declare the cancellation of the 2<sup>nd</sup> defendant’s title null and void.

On whether the plaintiffs had proved their case on a balance of probabilities, the defendants submitted that the plaintiffs had failed to establish that the 2<sup>nd</sup> defendant had acquired the suit property from the 1<sup>st</sup> defendant fraudulently. The defendants submitted further that the plaintiffs had failed to establish the acts

of fraud pleaded against the defendants and as such there was no basis for challenging the 2<sup>nd</sup> defendant's title. The defendants submitted that the plaintiffs did not place before the court a death certificate in proof of the alleged death of Tom Masese advocate. They submitted that a letter from the Law Society of Kenya on the alleged death was not sufficient to prove death. The defendants submitted further that there was no evidence that the firm of Thomas Masese Advocate was not in existence at the material time. The defendants submitted that the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendants was valid and binding.

The defendants submitted further that the 1<sup>st</sup> plaintiff was unreliable witness whose evidence should be disregarded. The defendants submitted that the 1<sup>st</sup> plaintiff's evidence as regards the whereabouts of the original title of the suit property was fabricated. The defendants termed the 1<sup>st</sup> plaintiff a person of questionable moral character. The defendants claimed that the 1<sup>st</sup> plaintiff instigated a criminal case against the 4<sup>th</sup> defendant and also concealed material facts to the court. On expert evidence, the defendants submitted that the evidence of their expert witness, Emmanuel Kenga Karisa (DW2) should be given due weight because of the length of his experience. As concerns the affidavit of Sarah Chelimo Maina, the defendant submitted that the same should be disregarded since Sarah Chelimo Maina did not appear at the trial for cross-examination.

In conclusion, the defendants submitted that the plaintiffs' case was not proved. The defendants urged the court to dismiss the plaintiff's suit and to make an order of quashing the decision of the Land Registrar to cancel the 2<sup>nd</sup> defendant's title to the suit property.

I have considered the pleadings, the evidence and the submissions by the parties. The following in my view are the issues arising for determination in this suit;

1. Whether the 1<sup>st</sup> defendant acquired the suit property lawfully.
2. Whether the subsequent transfer of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was lawful.
3. Whether the plaintiff is entitled to the reliefs sought in the plaint.
4. Whether the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are entitled to any relief.
5. Who is liable for the costs of the suit?

#### Whether the 1<sup>st</sup> defendant acquired the suit property lawfully.

The suit property is said to have been transferred to the 1<sup>st</sup> defendant on 18<sup>th</sup> January, 1994. It is not disputed that prior to the said transfer, the property was owned by the Patels. It is not disputed that of the three Patels, Y. P. Patel died on 12<sup>th</sup> February, 2006, P. P. Patel died on 21<sup>st</sup> April, 1991 while R. P. Patel died on 10<sup>th</sup> August, 1983. What this means is that as at 18<sup>th</sup> January, 1994 only one of the registered proprietors of the suit property; Y. P. Patel was alive. Y. P. Patel alone could not transfer the suit property to the 1<sup>st</sup> defendant. The plaintiffs denied that Y. P. Patel sold the suit property to the 1<sup>st</sup> defendant. The plaintiffs placed evidence before the court showing that there was a dispute between the Patels over the suit property and that in 1995, Y. P. Patel filed a suit against the estates of P. P. Patel and R. P. Patel over the ownership of the suit property, namely, Nairobi HCCC No. 617 of 1995 in which Y. P. Patel sought a declaration that he was the sole owner of the suit property. I am in agreement with the plaintiffs that there was no way Y. P. Patel could have filed a suit in 1995 against the estates of his brothers who were the co-owners of the suit property if he alone or together with the estates of his said brothers had sold the suit property to the 1<sup>st</sup> defendant in 1994. The plaintiffs placed in evidence official searches on the title of the suit property conducted on 23<sup>rd</sup> April, 2001 and 10<sup>th</sup> September, 2004. These searches did not reflect the existence of the transfer in favour of the 1<sup>st</sup> defendant that was allegedly registered on 18<sup>th</sup> January, 1994.

I have also noted from the affidavit of Sarah Chelimo Maina that was filed in JR. No. 306 of 2015 in which the 2<sup>nd</sup> defendant had challenged the cancellation of its title to the suit property that the Land Registry disowned the transfer of the suit property to the 1<sup>st</sup> defendant. Sarah Chelimo Maina stated that the transfer was not supported by any document lodged at the Land Registry. The defendants had urged the court to disregard the affidavit since Sarah Chelimo Maina did not attend court for cross-examination. There is no valid reason put forward by the defendants that would justify exclusion of the said affidavit from consideration by the court. The same was produced in evidence by the plaintiffs as part of PExh. 4. The defendants did not object to its production. They did not also seek to cross-examine Sarah Chelimo Maina on the contents thereof. The objection to the affidavit is coming late in the day in my view and the same is overruled. I have also noted that prior to the registration of the said transfer of the suit property in favour of the 1<sup>st</sup> defendant, a caveat that had been registered against the title of the suit property by Pascale prohibiting any dealing with the suit property was withdrawn. This withdrawal according to the affidavit aforesaid by Sarah Maina was also not supported by documents at the Land Registry. No document of whatsoever nature was placed before the court in proof of how the 1<sup>st</sup> defendant acquired the suit property. The 1<sup>st</sup> defendant did not defend the suit. That means that all the allegations of fraud and illegality that were pleaded against it by the plaintiffs were not rebutted. This applies also to the evidence that was adduced against its purported title.

It is my finding from the foregoing that the 1<sup>st</sup> defendant acquired the suit property fraudulently and illegally.

Whether the subsequent transfer of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was lawful.

In Macfoy v United Africa Co. Ltd. (1961)3 All ER 1169, Lord Denning stated as follows at page 1172:

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

The 1<sup>st</sup> defendant having acquired the suit property fraudulently and illegally, its title was null and void. A null and void title cannot confer a valid interest in land. The 1<sup>st</sup> defendant did not therefore have a valid title over the suit property that it could convey to the 2<sup>nd</sup> defendant. The title that was transferred by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was invalid, null and void with the result that the 2<sup>nd</sup> defendant acquired no interest in the suit property. I am supported in this finding by the decision in West End Butchery Ltd. v Arthi Highway Developers Ltd. & 6 others [2012] eKLR that was confirmed by the Court of Appeal in Arthi Highway Developers Ltd. v West End Butchery Ltd. & 6 others [2015] eKLR where the court (Nyamweya J.) stated as follows:

**“It is in my view unjust and inequitable that an innocent proprietor can be dispossessed of his or her legal title to land through the acts of a fraudster, and this cannot have been the intention of section 23 of the Registration of Titles Act. I am persuaded by the statements made in Alberta Mae Gacie V Attorney General & 4 Others (2006) eKLR where this court (Hon. Justice Onyancha) 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....”**

Likewise, in the case of Iqbal Singh Rai vs Mark Lecchini and the Registrar of Titles, Civil Case No 1054 of 2001, this court (Hon. Justice Muchelule) held as follows:

“At the time when the 1<sup>st</sup> Defendant sought to buy the land in dispute the registered proprietor was the Plaintiff. There is no dispute that he never dealt with the Plaintiff in the transaction that followed. The person with whom he dealt was not the registered proprietor of the land in dispute. The person was a fraud who had no claim whatsoever to the land. The consequence is that the 1<sup>st</sup> Defendant was a purchaser who did not deal with the registered proprietor of the land. Section 23(1) protects ‘title issued to a purchaser upon the transfer or transmission by the proprietor thereof’. The 1<sup>st</sup> Defendant did not obtain a transfer from the Plaintiff who was the registered proprietor. He obtained a transfer from a fraudulent person who had no claim to the land. He cannot I find invoke the provisions of section 23(1) to say he obtained an indefeasible title.”

It is thus my finding that similarly, in this case the 1<sup>st</sup> Defendant did not obtain a transfer from the registered proprietor, but from fraudulent persons namely the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who had no claim to the suit property. The 1<sup>st</sup> Defendant cannot therefore invoke indefeasibility of title and the transfer to him by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was null and void”.

The 2<sup>nd</sup> defendant submitted at length that it was an innocent purchaser for value without notice of any defect in the 1<sup>st</sup> defendant’s title. I am not satisfied from the evidence on record that the 2<sup>nd</sup> defendant was an innocent purchaser of the suit property for value. In Mwangi James Njehia v Janetta Wanjiku Mwangi & another [2021] eKLR, the Court of Appeal stated as follows:

“37. In Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaaura 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.”

In Samuel Kamere v Land Registrar Kajiado, Nairobi Court of Appeal, Civil Appeal No. 28 of 2005, the court addressing the issue of competing titles stated that:

**“It is evident that there are two competing claims over the suit property, and we have said that the plaintiff’s proprietary interest is already established. Since the appellant’s title is under challenge, in order to be considered a bona fide purchaser for value, he must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.”**

In Munyu Maina v Hiram Gathiha Maina [2013] eKLR, the Court of Appeal stated that:

**“...when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership.... the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal.....”**

The same reasoning was adopted in the case of Daudi Kiptugen v Commissioner of Lands & 4 Others [2015] eKLR where the court stated that:

**“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”**

The burden was upon the 2<sup>nd</sup> defendant to prove that it acquired the suit property lawfully and that it had no notice of any defect in the title of the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant placed before the court a copy of the title for the suit property that was disowned by the Land Registry. The 2<sup>nd</sup> defendant also placed before the court a copy of a sale agreement between it and the 1<sup>st</sup> defendant dated 21<sup>st</sup> December, 2005 that was witnessed by an advocate who died on 22<sup>nd</sup> July, 2000. On how it paid the purchase price, the 2<sup>nd</sup> defendant made an outrageous claim that it paid a whole Kshs. 120,000,000/- to the 1<sup>st</sup> defendant in cash through the said deceased advocate. No evidence of such payment was produced in court. There was also no evidence of the source of the said amount. The 2<sup>nd</sup> defendant claimed that it collected the said

purchase price from its members. There was no evidence placed before the court showing that the 2<sup>nd</sup> defendant had other members apart from its five directors and shareholders. There was also no evidence of contribution of the said Kshs. 120,000,000/- by the alleged members. The 2<sup>nd</sup> defendant according to the evidence on record had a nominal share capital of Kshs. 100,000/- that was divided into 1000 shares of Kshs. 100/- each of which the 2<sup>nd</sup> defendant's five directors had subscribed to only 60 shares. I wonder how the 2<sup>nd</sup> defendant managed to raise Kshs. 120,000,000/-. The elephant in the room however is why the 2<sup>nd</sup> defendant which was a duly registered limited liability company would keep Kshs. 120,000,000/- in its directors' houses instead of keeping the money in a bank and then take the risk of carrying the said amount of money in sacks or boxes to an advocate's office to pay for land. The evidence that was given by DW1 and DW3 regarding this mode of payment is hard to believe and paints a picture of an illicit transaction if there was indeed any sale transaction which I do not believe there was.

I have also noted that the 4<sup>th</sup> defendant who is a director of the 2<sup>nd</sup> defendant was charged, tried and convicted in Criminal Case No. 1603 of 2012 on 10<sup>th</sup> September, 2019 of procuring the registration of the suit property in the name of the 2<sup>nd</sup> defendant by false pretences. That judgment has not been stayed, varied or set aside. Before this court and the court that heard the criminal case, the 4<sup>th</sup> defendant who is a director of the 2<sup>nd</sup> defendant did not tender any evidence on how the 1<sup>st</sup> defendant from whom the 2<sup>nd</sup> defendant allegedly acquired the suit property had acquired the property from the Patels. I am not persuaded that the 2<sup>nd</sup> defendant was an innocent purchaser of the suit property.

Even if the 2<sup>nd</sup> defendant was an innocent purchaser that it was not, its interest in the suit property cannot defeat that of the plaintiffs. In the case of Arthi Highway Developers Limited v West End Butchery Limited & 6 others (supra), the Court of Appeal clarified the distinction between legal rights and equitable interests when it comes to the invocation of the doctrine of innocent purchaser as follows:

**“...Furthermore, the protection accorded by law in the event of fraud, is to a “bona fide purchaser without notice” and even then, only against equitable interests...Snell's Principles of Equity(supra) illustrate the issue, thus;-**

**“An important qualification to the basic rule is the doctrine of the purchaser without notice, which demonstrates a fundamental distinction between legal estates and equitable interests.**

**1. The doctrine. A legal right is enforceable against any person who takes the property, whether he has notice of it or not, except where the right is overreached or is void against him for want of registration. If A sells to C land over which B has a legal right of way, C takes the land subject to B's right, although he was ignorant of the right. But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law, the purchaser's conscience not being in any way affected by the equitable right. Where there is equal equity the law prevails.”**

**It is also stated therein that “the doctrine of purchaser without notice never enabled a purchaser to take free from legal rights, as distinct from equitable interests”. So that, even if the issue of bona fide purchaser arose in this matter which, in our finding, it did not, we are not satisfied that the evidence tendered by Arthi supports a credible finding that it was a bona fide purchaser of the disputed land.”**

The Patels had a legal and not equitable interest in the suit property. It follows therefore that even if the 2<sup>nd</sup> defendant was an innocent purchaser of the suit property which I have held it was not, the interest that it acquired could not prevail over that of the Patels. In the circumstances, it is my finding that the 2<sup>nd</sup> defendant did not acquire a valid title over the suit property.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

I find no merit in the various objections that were taken against the plaintiffs' suit by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants in their defence and submissions. As I have stated earlier, the 1<sup>st</sup> defendant which is alleged to have acquired the suit property on 18<sup>th</sup> January, 1994 did not defend the suit. For the 2<sup>nd</sup> defendant, it allegedly acquired the suit property on 23<sup>rd</sup> May, 2006. I can see no basis for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants' contention that the suit herein was time barred as against them. In any event, the plaintiffs' suit was based on fraud and as such time could only start running for the purposes of limitation of actions from the time when the fraud was discovered. From the evidence on record, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants' fraud was not discovered until 2012 when they invaded the suit property and started surveying it. On the allegation that the plaintiffs had no *locus standi* to bring this suit, the issue was not raised expressly in the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants' defence. Order 2 rule 4 of the Civil Procedure Rules provides that any matter which is claimed to render a suit unmaintainable must be expressly pleaded in the defence. The plaintiffs pleaded in the plaint that they were the legal representatives of the estates of two of the registered proprietors of the suit property who were deceased, Y.P.Patel and P.P.Patel. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants did not deny this averment in their statement of defence. They did not also plead that the plaintiffs had no *locus standi* to bring this suit. This was therefore not an issue that required proof at the hearing of the suit. As the legal representatives of the estates of two of the registered proprietors of the suit property, the plaintiffs had a right to come to court to protect the property on behalf of the estates of the said deceased proprietors. On the 3<sup>rd</sup> and 4<sup>th</sup> defendants' contention that they were wrongly joined in the suit, I am of the view that they were necessary parties to the suit. From the evidence on record, they participated actively on the fraudulent and illegal transfer of the suit property to the 2<sup>nd</sup> defendant. The 4<sup>th</sup> defendant was charged and convicted for obtaining registration of the suit property in favour of the 2<sup>nd</sup> defendant by false pretences. The 3<sup>rd</sup> defendant on the other hand was among the directors of the 2<sup>nd</sup> defendant who executed a sale agreement before a deceased advocate and allegedly paid Kshs. 120,000,000/- in cash to the said deceased advocate as purchase price for the suit property. I am satisfied that the 3<sup>rd</sup> and 4<sup>th</sup> defendants were properly joined as parties to the suit.

From the findings above, I am satisfied that the Plaintiffs have proved their claim against the defendants save for the claim for general damages for trespass. From the evidence on record, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants entered the suit property but did not occupy the same. According to the evidence of DW1 that was not challenged, the 2<sup>nd</sup> defendant's agents who had gone to survey the suit property were chased away from the property by the police. I will therefore not award the plaintiffs general damages for trespass.

#### Whether the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are entitled to any reliefs.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants urged the court in their submissions to make certain findings and to grant certain reliefs in their favour. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants did not file a counter-claim against the plaintiffs or co-defendants. In the circumstances, there is no basis upon which the court can grant any relief in their favour.

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

The costs of and incidental to a suit are at the discretion of the court. As a general rule, costs follow the event. The plaintiffs have succeeded in their claim against the defendants. No reason has been put forward to warrant denying them the costs of this suit. The plaintiffs shall have the costs of the suit.

#### Conclusion:

In conclusion, I hereby enter judgment for the plaintiffs against the defendants as follows;

1. I declare that the estates of Yogendra Purshottam Patel(deceased) (Y.P.Patel), Prahladbhai Purshottam Patel(deceased)(P. P. Patel) and Rajnikant Purshottam Patel(deceased)(R. P. Patel) are the bona fide proprietors of all that parcel of land known as L.R No. 12442(Original Number

4508/2/1)(suit property).

2. I declare that the entries numbers 7, 8, and 10 in the title of the suit property, Grant No. I.R 33904 made on 10<sup>th</sup> January, 1994, 18<sup>th</sup> January, 1994 and 23<sup>rd</sup> May, 2006 are illegal, null and void.

3. A permanent injunction is issued restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants whether by themselves or through their agents and/or employees or otherwise from trespassing, transferring, offering for sale, leasing, subletting, charging or alienating the suit property and/or otherwise dealing in any other manner howsoever with the suit property.

4. A mandatory injunction is issued compelling the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants to forthwith remove any structures that they have erected or caused to be erected on the suit property or on any part thereof.

5. The 6<sup>th</sup> defendant shall cancel forthwith entries numbers 7, 8, and 10 in the title of the suit property, Grant No. I.R 33904 made on 10<sup>th</sup> January, 1994, 18<sup>th</sup> January, 1994 and 23<sup>rd</sup> May, 2006 if he has not done so already.

6. The plaintiffs shall have the costs of the suit to be paid by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants jointly and severally.

**DELIVERED AND DATED AT NAIROBI THIS 1ST DAY OF JULY 2021**

**S. OKONG'O**

**JUDGE**

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

Mr. Mwihuri for the Plaintiffs

Ms. Nasimiyu for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Ms. C. Nyokabi - Court Assistant