



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 35 OF 2009**

**RAJENDRA SANGHANI.....1<sup>ST</sup> PLAINTIFF**

**JAYANT RACH.....2<sup>ND</sup> PLAINTIFF**

**(Both suing in their capacities as administrators of the Estate of Ratilal Gordhandas Sanghani)**

**=VERSUS=**

**FAIRMILE INVESTMENTS LIMITED.....1<sup>ST</sup> DEFENDANT**

**KANTILAL MAGANBHAI PATEL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background:**

All that parcel of land known as L.R No. 209/73/12, Nairobi (hereinafter referred to as “the suit property”) was at all material times registered in the name of one, Maganbhai Javerbhai Patel, deceased (hereinafter referred to as “M. J. Patel”) as the leasehold proprietor thereof. By an agreement for sale dated 14<sup>th</sup> June, 1963 between M. J. Patel and a company known as H. P. Youtan and Company Limited (“hereinafter referred to as H. P. Youtan”), M. J. Patel sold the suit property to H. P. Youtan on terms and conditions that were set out in the said agreement. On 17<sup>th</sup> February, 1964, H. P. Youtan lodged a caveat against the title of the suit property claiming purchaser’s interest. M. J. Patel died on 18<sup>th</sup> May, 1967 before transferring the suit property to H. P. Youtan. Grant of Letters of Administration in respect of the estate of M. J. Patel was issued to his son, Kantilal Maganbhai Patel (hereinafter referred to as “the 2<sup>nd</sup> defendant”) on 5<sup>th</sup> August, 1975.

On 15<sup>th</sup> April, 1985, Grant of Letters of Administration in respect of the estate of M. J. Patel was registered against the title of the suit property. Sometimes in 1985, H. P. Youtan filed a suit in the High Court against the 2<sup>nd</sup> defendant in his (the 2<sup>nd</sup> defendant) capacity as the administrator of M. J. Patel in Nairobi HCCC No. 2337 of 1985 (O.S) (hereinafter referred to as “the High Court suit”) seeking an order that the 2<sup>nd</sup> defendant held the suit property in trust for H. P. Youtan and an order vesting the suit property in H. P. Youtan.

On 5<sup>th</sup> August, 1985, the High Court declared that the 2<sup>nd</sup> defendant held the suit property in trust for H. P. Youtan and made an order vesting the property in H. P. Youtan. The said vesting order was registered against the title of the suit property on 9<sup>th</sup> August, 1985. On 17<sup>th</sup> September, 1985, an order was issued in the High Court suit on application by the 2<sup>nd</sup> defendant restraining H. P. Youtan from alienating, selling or otherwise disposing of the suit property pending the hearing of the 2<sup>nd</sup> defendant’s said application inter-partes. The said order was registered against the title of the suit property on 22<sup>nd</sup> January, 1986. On 17<sup>th</sup> November, 1994 an order was made in the High Court suit by consent of the parties setting aside the said order of injunction that was issued against H. P. Youtan on 17<sup>th</sup> September, 1985. The said order raising the injunction against H. P. Youtan was registered against the title of the suit property on 12<sup>th</sup> February, 2001. As at 12<sup>th</sup> February, 2001, H. P. Youtan was the undisputable registered proprietor of the suit property by virtue of the vesting order aforesaid.

The suit property was a leasehold from the Government of Kenya for a term of 99 years with effect from 16<sup>th</sup> July, 1903. The term of the lease was to expire on 16<sup>th</sup> July, 2002. On 20<sup>th</sup> July, 2006, H. P. Youtan applied for the extension of the said lease. By a letter dated 4<sup>th</sup> December, 2006, the Commissioner of Lands informed H. P. Youtan that its application for extension of lease in respect of the suit property had been approved and that the Government had agreed to renew the lease for a further term of 50 years with effect from 1<sup>st</sup> July, 2002. The Commissioner of lands requested H. P. Youtan to submit a new deed plan approved by the Director of Surveys and pay Kshs. 19,000/= being the enhanced annual rent with effect from 1<sup>st</sup> December, 2006 and Kshs.8,465/= on account of land rent, registration, stamp duty and approval fees.

On 21<sup>st</sup> December, 2006, the Commissioner of Lands issued H. P. Youtan with a letter of allotment for the extended lease in respect of the suit property. On 15<sup>th</sup> May, 2007, H. P. Youtan paid Kshs. 8,465/= that was required to be paid as per the letter of allotment and was issued with a receipt for the same. Before H. P. Youtan was issued with the said letter of allotment, its application for extension of lease was approved by the Director of Physical Planning on 17<sup>th</sup> August, 2006, the City Council of Nairobi on 17<sup>th</sup> August, 2006 and the Director of Surveys on 30<sup>th</sup> August, 2006.

On 22<sup>nd</sup> December, 2006, a deed plan approved by the Director of surveys was issued for the purposes of renewing the lease in favour of H. P. Youtan. As at 22<sup>nd</sup> December, 2006, what remained was for the Commissioner of Lands to issue a new Grant to H. P. Youtan in respect of the suit property. For reasons which are unclear, the Commissioner of Lands failed to issue a grant in respect of the suit property to H. P. Youtan even after it complied with all the conditions.

Before H.P.Youtan applied for the extension of the lease for the suit property, it had assigned its interest in the suit property through a deed of assignment dated 22<sup>nd</sup> October, 1997 to Ratital Gordhandas Sanghani who died on 22<sup>nd</sup> May, 2007 (hereinafter referred to as “the deceased”) and his wife, Manjula Batilal Sanghani who died on 2<sup>nd</sup> November, 1995(hereinafter referred to as “the deceased’s wife”) in consideration of Kshs. 450,000/- that was paid to it by the deceased and his said wife. The plaintiffs are the administrators of the estate of the deceased. The deceased and his wife were to register the said instrument of assignment after H.P.Youtan had been issued with a grant for the extended lease in respect of the suit property. This was never to be. As I have stated above, the Commissioner of Lands failed to issue H.P.Youtan with a grant for the extended lease that had been approved. Through Gazette Notice No. 2651 dated 19<sup>th</sup> March, 2007 published on 23<sup>rd</sup> March, 2007, the Registrar of companies dissolved a company that was indicated in the said notice as H. P. Youtan (K) Limited and struck it off the register of Companies. The notice was intended to dissolve H.P.Youtan.

In a strange turn of events, on 30<sup>th</sup> May, 2008 one, Bhupesh Harshadray Rana claiming to be an attorney of the 2<sup>nd</sup> defendant applied to the Commissioner of Lands for the renewal of the lease in respect of the suit property in favour of the 2<sup>nd</sup> defendant. There is no evidence that the Commissioner of Lands had any communication with the 2<sup>nd</sup> defendant’s said attorney regarding the approval of the said application for extension of lease. However, on 18<sup>th</sup> September, 2008, the Commissioner of Lands issued a letter of allotment for the extension of the lease in respect of the suit property in favour of the 2<sup>nd</sup> defendant. The lease was extended for a term of 50 years with effect from 1<sup>st</sup> October, 2008. On 25<sup>th</sup> October, 2008, the 2<sup>nd</sup> defendant’s said attorney paid Kshs. 11,630/= that was set out in the letter of allotment and was issued with a receipt for the same on 29<sup>th</sup> October, 2008. On 3<sup>rd</sup> November, 2008; less than a week from the date of payment for the allotment, the Commissioner of lands issued the 2<sup>nd</sup> defendant with Grant No. 113786 in respect of the suit property. The Grant in favour of the 2<sup>nd</sup> defendant was registered on 10<sup>th</sup> November, 2008.

On 24<sup>th</sup> October, 2008 even before the 2<sup>nd</sup> defendant paid for the allotment and was issued with a grant in respect of the suit property, the 2<sup>nd</sup> defendant’s said attorney who had now been joined by one, Bhogilal Chotalal Ganatra who was said to be his co-attorney of the 2<sup>nd</sup> defendant entered into an agreement for sale of the suit property with the 1<sup>st</sup> defendant under which the property was sold to the 1<sup>st</sup> defendant at Kshs. 12,000,000/=. On 17<sup>th</sup> November, 2008, the 2<sup>nd</sup> defendant’s said attorneys transferred the suit property to the 1<sup>st</sup> defendant. The transfer was registered on 27<sup>th</sup> November, 2008. The 2<sup>nd</sup> defendant held the suit property for less than two (2) weeks before transferring it to the 1<sup>st</sup> defendant. There is no evidence on record that the Commissioner of Land’s consent was obtained prior to this hurried sale and transfer of the suit property.

#### The plaintiffs’ case:

The Plaintiffs brought this suit against the defendants on 29<sup>th</sup> January, 2009 as administrators of the estate of Ratital Gordhandas Sanghani (the deceased) seeking the following reliefs;

- (a) A declaration that the transfer of the suit property by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant is null and void as it was done fraudulently and as such the 1<sup>st</sup> defendant acquired no title or interest in the suit property.
- (b) A permanent injunction restraining the defendants by themselves or through their servants, agents and/or employees howsoever from interfering with the plaintiffs’ right and quiet possession and enjoyment of the suit property.
- (c) Costs and interest
- (d) Such other or further reliefs as his honourable court may deem fit and just to grant.

I have set out earlier in this judgment much of what is set out in the plaintiffs’ plaint dated 28<sup>th</sup> January, 2009. The plaintiffs averred that by an agreement dated 14<sup>th</sup> June, 1963 (hereinafter referred to as “the 1963 agreement”), M.J.Patel sold the suit property to H.P.Youtan on the terms and conditions that were contained in the said agreement. The Plaintiffs averred that M.J.Patel died on 18<sup>th</sup> May, 1967 before transferring the suit property to H.P.Youtan. The plaintiffs averred that Grant of Letters of Administration in respect of the estate of M.J.Patel was issued to the 2<sup>nd</sup> defendant on 5<sup>th</sup> August, 1975. The plaintiffs averred that by another agreement for sale dated 31<sup>st</sup> July, 1973 (“the 1973 agreement”) made between the 2<sup>nd</sup> defendant who was then the proposed administrator of the estate of M. J. Patel on the one part and Ratilal Gordhandaj Sanghani (the deceased) on the other part, the 2<sup>nd</sup> defendant sold the suit property to the deceased at a price of Kshs. 100,000/= subject to the terms and conditions that were contained in the said agreement. The plaintiffs averred that in 1985, H.P.Youtan brought an action against the 2<sup>nd</sup> defendant in the High Court at Nairobi over the suit property (the High Court suit). The plaintiffs averred that the High Court made an order on 5<sup>th</sup> August, 1985 vesting the suit property in H.P.Youtan.

The plaintiffs averred that on 11<sup>th</sup> May, 1994, the High Court ordered by consent that H.P.Youtan transfers the suit property to the 2<sup>nd</sup> defendant or his nominee and that in consideration of H.P.Youtan relinquishing its interest in the suit property, the 2<sup>nd</sup> defendant would pay to H. P.Youtan Kshs. 450,000/-. The plaintiffs averred that by a further consent order made by the High Court in the said High Court suit on 17<sup>th</sup> November, 1994, the prohibitory order that had been registered against the title of the suit property was lifted. The plaintiffs averred that in fulfilment of his obligations under the 1973 agreement with the deceased and pursuant to the said consent order made on 11<sup>th</sup> May, 1994, the 2<sup>nd</sup> defendant nominated the deceased and his wife to take over the title of the suit property from H.P.Youtan. The plaintiffs averred that it was agreed between the 2<sup>nd</sup> defendant and the deceased and his wife that the deceased and his wife would pay to H. P. Youtan Kshs. 450,000/= that was payable to it by the 2<sup>nd</sup> defendant under the said consent order of 11<sup>th</sup> May, 1994 in addition to the consideration that the deceased had paid to the 2<sup>nd</sup> defendant under the 1973 agreement.

The plaintiffs averred that in consideration of the said sum of Kshs. 450,000/= that the deceased and his wife paid to H. P. Youtan, H. P. Youtan assigned its rights, title and interest in the suit property to the deceased and his wife in 1994. The plaintiffs averred that H. P. Youtan, and the deceased and his wife executed an assignment of H. P. Youtan's rights and interests in the suit property to the deceased and his wife. The plaintiffs averred that H. P. Youtan authorized the deceased to procure all the necessary documents to enable the suit property to be registered in the name of the deceased and his wife. The plaintiffs averred that the deceased had the assignment stamped on 22<sup>nd</sup> October, 1997 in readiness for registration. The plaintiffs averred that since the lease for the suit property was about to expire, the registration of the assignment was delayed to await the extension of the lease that H. P. Youtan was to apply for. The plaintiffs averred that the Government of Kenya granted H. P. Youtan extension of the lease for the suit property on or about 4<sup>th</sup> December, 2006. The plaintiffs averred that after the extension of the lease, the deceased presented the assignment for registration and while the same was pending the deceased passed away on 22<sup>nd</sup> May, 2007.

The plaintiffs averred that it was when the issuance of a new title for the suit property was pending at the Lands Office that the 2<sup>nd</sup> defendant was purportedly issued with a title for the suit property in October, 2008. The plaintiffs averred that despite the existence of the 1973 agreement between the deceased and the 2<sup>nd</sup> defendant and the order that vested the suit property in H. P. Youtan, the 2<sup>nd</sup> defendant purported to sell the suit property to the 1<sup>st</sup> defendant at a consideration of Kshs. 12,000,000/= on or about 17<sup>th</sup> November, 2008. The plaintiffs averred that the defendants' claim over the suit property which belonged to the deceased was illegal and that the sale of the suit property by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant was fraudulent, illegal, null and void. The plaintiffs averred that the 2<sup>nd</sup> defendant had no title in the suit property that he could transfer to the 1<sup>st</sup> defendant. The plaintiffs averred that the deceased had been in possession of the suit property since 1973 and that no inquiry was made by the 1<sup>st</sup> defendant with regard to the said possession neither did the 1<sup>st</sup> defendant conduct any search on the property. The plaintiffs averred that the transfer of the suit property by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant was made with the intention of defrauding the deceased who had an interest in the suit property within the meaning of section 53 of the transfer of property Act and as such the same was voidable at the option of the deceased.

#### The 1<sup>st</sup> defendant's case:

The 1<sup>st</sup> defendant filed its statement of defence on 11<sup>th</sup> March, 2010. The 1<sup>st</sup> defendant averred that it was a stranger to most of the averments in the plaintiff's plaint. The 1<sup>st</sup> defendant averred that it was a bona fide purchaser of the suit property without notice or knowledge of the plaintiffs' interest in the same if any. The 1<sup>st</sup> defendant denied that the deceased owned the suit property as alleged in the plaint or at all. The 1<sup>st</sup> defendant denied that the transfer of the suit property to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant was illegal or fraudulent. The 1<sup>st</sup> defendant averred that before purchasing the suit property it carried out due diligence by doing a search on the title of the property. The 1<sup>st</sup> defendant averred that it purchased the suit property for valuable consideration without notice of the plaintiffs' interest in the same. The 1<sup>st</sup> defendant averred that the plaintiffs' suit was fatally defective in that the plaint was verified by an affidavit that was not competent. The 1<sup>st</sup> defendant urged the court to dismiss the plaintiffs' suit with costs. The 2<sup>nd</sup> defendant did not file a statement of defence.

#### The evidence tendered by the plaintiffs:

At the trial, the 1<sup>st</sup> plaintiff told the court that he was an administrator of the estate of the deceased who was his father. He stated that the suit property was bequeathed to him by his father in his will. He stated that the deceased purchased the suit property from the 2<sup>nd</sup> defendant in 1973 at a consideration of Kshs. 100,000/=. He stated that the deceased took possession of the suit property and that they were still collecting rent from the same. He stated that H. P. Youtan had an interest in the suit property although it was the deceased who was in possession thereof. He stated that there was a dispute in court between the 2<sup>nd</sup> defendant and H. P. Youtan and that the court vested the property in H. P. Youtan. He stated that the vesting order was registered against the title of the suit property.

He stated that the dispute between the 2<sup>nd</sup> defendant and H.P.Youtan was resolved through an agreement under which the deceased was to pay to H. P. Youtan Kshs. 450,000/= on behalf of the 2<sup>nd</sup> defendant. He stated that the deceased made the said payment to H. P. Youtan and that as at the time of the said payment, the registered owner of the suit property was H. P. Youtan by virtue of the vesting order aforesaid. The 1<sup>st</sup> plaintiff stated that after that payment, H. P. Youtan was supposed to transfer the suit property to the deceased and his wife and that an assignment was prepared, signed and stamped for that purpose. He stated that the said assignment was presented for registration but the same was not registered because the lease was about to expire. He stated that the registration of the assignment was put in abeyance pending the extension of the lease for the suit property.

The 1<sup>st</sup> plaintiff stated that H. P. Youtan applied for the extension of the lease in respect of the suit property which application was approved on 4<sup>th</sup> December, 2006 by the Commissioner of Lands. The lease for the suit property was extended for a period of 50 years with effect from 1<sup>st</sup> July, 2002. He stated that H. P. Youtan was issued with a letter of allotment for the extended lease on 21<sup>st</sup> December, 2006. H. P. Youtan was required to pay Kshs. 8,405/= for the allotment. The same was duly paid after which the Lands Office started to prepare a title for the suit property. A deed plan and a title were prepared but the title was not issued to them. He stated that they realized that a title for the suit property had been issued to someone else when one of their tenants on the suit property informed them that someone had gone to the

property and had threatened to evict the said tenants claiming that he was the owner of the suit property. He learnt later that the person who went to the suit property was an agent of the 1<sup>st</sup> defendant. It was after this incident that they carried out a search that revealed that the suit property was registered in the name of the 1<sup>st</sup> defendant. He stated that from the time the deceased purchased the suit property from the 2<sup>nd</sup> defendant he was the one who was paying the land rates and other outgoings in respect of the property. He stated that the 1<sup>st</sup> defendant acquired the suit property from the 2<sup>nd</sup> defendant at Kshs. 12,000,000/=. He stated that when the property was purportedly transferred to the 1<sup>st</sup> defendant, the same was registered in the name of H. P. Youtan. He stated that the property had never been registered in the name of the 2<sup>nd</sup> defendant and that that explains why they reported the matter to the police. He stated that the vesting order in favour of H. P. Youtan and the assignment in favour of the deceased and his wife were still in force. He stated that when the purported transfer was taking place, they had paid for the extension of the lease and that they were waiting for a title. The 1<sup>st</sup> plaintiff produced the documents that were attached to the plaintiffs' list of documents dated 10<sup>th</sup> February, 2013 filed on 11<sup>th</sup> February, 2013 as P Exh. 1.

#### The 1<sup>st</sup> defendant's evidence:

Hon. Joseph Muturia (DW1) gave evidence on behalf of the 1<sup>st</sup> defendant. DW1 adopted his witness statement dated 15<sup>th</sup> November, 2012 as his evidence in chief and produced the 1<sup>st</sup> defendant's bundle of documents and supplementary bundle of documents filed on 15<sup>th</sup> November, 2012 and 27<sup>th</sup> July, 2015 as DExh. 1 and DExh. 2 respectively. DW1 stated that he purchased the suit property from the 2<sup>nd</sup> defendant through the 1<sup>st</sup> defendant company. He stated that he was a director of the 1<sup>st</sup> defendant. He stated that he purchased the property from the attorneys of the 2<sup>nd</sup> defendant at Kshs. 12,000,000/=. He stated that after the agreement for sale between the 1<sup>st</sup> defendant and attorneys of the 2<sup>nd</sup> defendant, he carried out a search on the title of the suit property that revealed that the property was registered in the name of the 2<sup>nd</sup> defendant. He stated that the suit property was registered as Grant No. 113786. He stated that after the 1<sup>st</sup> defendant paid the purchase price, the suit property was transferred to the 1<sup>st</sup> defendant on 27<sup>th</sup> November, 2008 after which it was issued with a title. He stated that the 1<sup>st</sup> defendant had been paying land rates and rent since it was registered as the owner of the suit property. He urged the court to dismiss the plaintiffs' suit.

The 1<sup>st</sup> defendant's second witness was Alice Mwendwa (DW2). DW2 was Assistant Registrar in the Companies Registry. DW2 told the court that H. P. Youtan Ltd. Company No. C. 2884 was registered on 20<sup>th</sup> September, 1954 and that according to the records held at the Companies Registry, the company was dissolved in the year 2007 by Gazette Notice No. 265 dated 19<sup>th</sup> March, 2007 published on 23<sup>rd</sup> March, 2007. DW2 stated that before the dissolution of the said company, there was a notice of intended dissolution that was published in the Kenya Gazette as Gazette Notice No. 9777 of 24<sup>th</sup> November, 2006. DW2 told the court that the status of that company at the Companies Registry was that the company was dissolved. DW2 produced copies of the Kenya Gazette in which the notice of intended dissolution and the dissolution of H. P. Youtan Ltd. were published as DExh. 3.

#### Submissions:

After the close of evidence, the parties made closing submissions in writing.

#### The plaintiffs' submissions:

The plaintiffs filed submissions dated 18<sup>th</sup> May, 2021. The plaintiffs submitted that the sale and subsequent transfer of the suit property by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant was illegal and fraudulent. The plaintiffs submitted that the suit property was owned by the deceased and his wife who acquired the same through a deed of assignment dated 22<sup>nd</sup> October, 1997. The plaintiffs submitted that the deceased had occupied the suit property since 1973 pursuant to the 1973 agreement. The plaintiffs submitted that the defendants did not place before the court documents showing how the lease in respect of the suit property was extended in favour of the 2<sup>nd</sup> defendant. The plaintiffs submitted that in the absence of the said documents, the only inference the court could make was that the extension was fraudulent. The plaintiffs submitted that the 1<sup>st</sup> defendant did not carry out a search on the title of the suit property before entering into an agreement for sale with the 2<sup>nd</sup> defendant in respect of the suit property. The plaintiffs submitted that the 1<sup>st</sup> defendant did not also tell the court when it was incorporated and how it paid the purchase price for the suit property. The plaintiffs submitted that during the entire duration of the transaction, the 1<sup>st</sup> defendant never got into contact with the 2<sup>nd</sup> defendant and that it only dealt with the 2<sup>nd</sup> defendant's purported attorneys who applied for extension of the lease for the suit property even before the purported power of attorney was registered. The plaintiffs submitted that the 2<sup>nd</sup> defendant had no title in the suit property that he could transfer to the 1<sup>st</sup> defendant. The plaintiffs submitted that the purported attorneys of the 2<sup>nd</sup> defendant were arrested and charged with fraud and forgery at Kiambu Law Court in relation to the suit property in Kiambu Criminal Case No. E279 of 2021. The plaintiffs submitted that the issues for determination by the court were;

1. Who is the lawful owner of the suit property?
2. Whether the plaintiffs are entitled to the reliefs sought?
3. Who should bear the costs of the suit?

On the first issue, the plaintiffs submitted that a certificate of title is an end product of a process for acquisition of land. The plaintiffs submitted that the process of acquiring a title must be procedural. The plaintiffs submitted that they have demonstrated how the deceased acquired the suit property that he occupied since 1973. The plaintiffs submitted that the certificate of title held by the 1<sup>st</sup> defendant is null and void the same having been acquired fraudulently. The plaintiffs submitted that the said certificate of title was issued while the issuance of a title in favour of the plaintiffs was pending. The plaintiffs submitted that the certificate of title on which the 1<sup>st</sup> defendant's claim over the suit property is based is null and void. The plaintiffs submitted that in purporting to purchase the suit property at Kshs. 12,000,000/=: the 1<sup>st</sup> defendant was complicit in the fraud. The plaintiffs cited section 26(1) of the Land Registration Act, 2012 and submitted that the 1<sup>st</sup>

defendant's title is impeachable on account of fraud, and the illegal and unprocedural manner in which the title was acquired. The plaintiffs submitted that the alleged attorneys of the 2<sup>nd</sup> defendant fraudulently processed and acquired a title for the suit property. The plaintiffs submitted that the 2<sup>nd</sup> defendant did not acquire a valid title to the suit property that he could pass to the 1<sup>st</sup> defendant.

On the second issue, the plaintiffs submitted that they have placed sufficient evidence before the court showing that the 1<sup>st</sup> defendant's title was obtained illegally, unprocedurally and through a fraudulent scheme. The plaintiffs submitted that they have proved their case and as such are entitled to the reliefs sought in the plaint.

On the issue of costs, the plaintiffs submitted that the filing of this suit was necessitated by the defendants' actions and as such, they should bear the costs of the suit. In conclusion, the plaintiffs urged the court to enter judgment in their favour as prayed in the plaint.

#### The 1<sup>st</sup> defendant's submissions:

The 1<sup>st</sup> defendant filed submissions and further submissions dated 2<sup>nd</sup> July, 2020 and 2<sup>nd</sup> June, 2021 respectively. In its submissions, the 1<sup>st</sup> defendant submitted that it acquired and holds an indefeasible title over the suit property. The 1<sup>st</sup> defendant submitted that the plaintiffs have never held any interest in the suit property. The 1<sup>st</sup> defendant submitted that the deed of assignment dated 22<sup>nd</sup> October, 1997 on the basis of which the plaintiffs have claimed ownership of the suit property was purportedly signed by the deceased and his wife who died on 2<sup>nd</sup> November, 1995. The 1<sup>st</sup> defendant submitted that the plaintiffs did not produce in court the 1973 agreement through which the deceased is alleged to have purchased the suit property. The 1<sup>st</sup> defendant submitted further that when H. P. Youtan is alleged to have applied for the extension of the lease for the suit property, H. P. Youtan had been dissolved and was not in existence. The 1<sup>st</sup> defendant submitted that the 2<sup>nd</sup> defendant had a valid title over the suit property which he lawfully transferred to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant submitted that the plaintiffs have never been registered as owners of the suit property. The 1<sup>st</sup> defendant submitted that its title to the suit property has never been challenged by the issuing authority.

The 1<sup>st</sup> defendant submitted that there is no evidence that the 2<sup>nd</sup> defendant's father sold the suit property to H. P. Youtan in 1963 and that the 2<sup>nd</sup> defendant sold the same property to the deceased in 1973.

The 1<sup>st</sup> defendant framed the following issues for determination by the court;

1. Whether the plaintiffs have *locus standi* to institute this suit.
2. Whether the 1<sup>st</sup> defendant lawfully acquired the suit property.
3. Who should bear the costs of the suit?

On the first issue, the 1<sup>st</sup> defendant submitted that the plaintiffs have no *locus standi* to bring this suit. The 1<sup>st</sup> defendant submitted that the plaintiffs have not demonstrated that they have any interest in the suit property. The 1<sup>st</sup> defendant submitted that the plaintiffs have not demonstrated that they have brought the suit on behalf of H. P. Youtan which should have been the right party to bring the suit. The 1<sup>st</sup> defendant submitted that the plaintiffs should have joined as a party to the suit H. P. Youtan in whose favour the lease for the suit property was allegedly extended. The 1<sup>st</sup> defendant submitted that in any event, when the lease was purportedly extended in favour of H. P. Youtan, the company had been dissolved.

The 1<sup>st</sup> defendant submitted that the plaintiffs have failed to prove their case on a balance of probabilities. The 1<sup>st</sup> defendant submitted that it was a bona fide purchaser of the suit property for value without notice. In support of this submission, the 1<sup>st</sup> defendant cited the definition of a bona fide purchaser in Black's Law Dictionary, 8<sup>th</sup> Edition and the case of Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 Others [2017] eKLR. The 1<sup>st</sup> defendant submitted that a bona fide purchaser of a legal estate without notice has absolute unqualified defence against a claim of any prior equitable owner. The 1<sup>st</sup> defendant submitted that since no lease extension was granted to the plaintiffs, the plaintiffs have no valid claim over the suit property.

On whether it acquired the suit property lawfully, the 1<sup>st</sup> defendant submitted that it has proved that it acquired the suit property lawfully. The 1<sup>st</sup> defendant submitted that before purchasing the suit property it conducted a search which showed that the 2<sup>nd</sup> defendant was the owner of the suit property. The 1<sup>st</sup> defendant submitted that after the agreement of sale, the suit property was transferred to it through an instrument of transfer that was signed by the attorneys of the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant cited Section 26(1) of the Land Registration Act, 2012 and submitted that it is the absolute and indefeasible owner of the suit property. The 1<sup>st</sup> defendant submitted that the plaintiffs have not established valid grounds upon which its title can be impeached. In support of this submission, the 1<sup>st</sup> defendant cited several authorities including Vekariya Investments Ltd v Kenya Airports Authority & 2 Others [2014] eKLR, Esther Ndegi Njiru & Another v Leonard Gatei [2014] eKLR and Gitwany Investment Ltd. v Tajmal Limited & 3 Others [2006] eKLR.

The 1<sup>st</sup> defendant submitted further that the documents relied upon by the plaintiffs are fraudulent in that the purported assignment in favour of the deceased and his wife was signed by the deceased's wife after her death as submitted earlier. The 1<sup>st</sup> defendant submitted that the contention by the plaintiffs that the document was signed earlier by the deceased's wife but dated after her death to avoid payment of stamp duty penalties was an attempt to deny the Government of Kenya revenue. The 1<sup>st</sup> defendant submitted that the plaintiffs cannot be allowed to benefit from their own illegality.

The 1<sup>st</sup> defendant submitted further that fraud was not expressly pleaded against the 1<sup>st</sup> defendant and proved to the required standard. In support of this submission, the 1<sup>st</sup> defendant relied on a number of authorities including Eunice Grace Njambi Kamau & Another v The A. G. & 5 Others ELC No. 976 of 2012. The 1<sup>st</sup> defendant cited Dr. Joseph N. K. Arap Ngok v Justice Moijo Ole Keiuwa & Others, Nairobi Court of Appeal Civil Application No. Nai. 60 of 1997 and submitted that having been registered as the proprietor of the suit property and having been issued with a certificate of title, in the absence of fraud or illegality in the acquisition of the suit property, its title is indefeasible. On the issue of costs, the 1<sup>st</sup> defendant submitted that the same should be paid by the plaintiffs.

In its further submissions, the 1<sup>st</sup> defendant cited Alice Chemutai Too v Nickson Kipkirui Korir & 2 Others [2015] eKLR where the court held that a person with a good title cannot be deprived of his property by activities of fraudsters. The 1<sup>st</sup> defendant reiterated that the assignment that the plaintiffs' have relied on as a basis for their claim is fraudulent. The 1<sup>st</sup> defendant submitted further that in their submissions, the plaintiffs have raised matters which are not pleaded. The 1<sup>st</sup> defendant submitted that parties are bound by their pleadings. The 1<sup>st</sup> defendant submitted that the submissions that the attorneys of the 2<sup>nd</sup> defendant were charged with the offence of fraud in relation to the suit property was not pleaded. The 1<sup>st</sup> defendant cited Section 32 of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) and submitted that since the assignment that was relied on by the plaintiffs was not registered, the same could not pass any interest in the suit property to the plaintiffs. The 1<sup>st</sup> defendant submitted that the leasehold interest in the suit property that was assigned to the deceased and his wife expired in 2002 before the assignment was registered. The 1<sup>st</sup> defendant submitted further that the plaintiffs' suit offends the provisions of Section 3(1) of the Law of Contract Act, Chapter 23 Laws of Kenya. The 1<sup>st</sup> defendant cited Section 23(1) of the Registration of Titles Act and submitted that the title that was issued to it is conclusive evidence that it is the absolute and indefeasible owner of the suit property. The 1<sup>st</sup> defendant submitted that the plaintiffs' unregistered assignment cannot defeat the 1<sup>st</sup> defendant's registered title. The 1<sup>st</sup> defendant urged the court to dismiss the plaintiff's suit with costs.

#### Issues for determination:

From the pleadings and the submissions by the parties, the following in my view are the issues arising for determination in this suit in summary;

1. Whether Ratilal Gordhandas Sanghani("deceased") had any lawful proprietary interest in all that parcel of land known as L.R No. 209/73/12(the suit property).
2. Whether the 2<sup>nd</sup> defendant had any lawful proprietary interest in the suit property.
3. Whether the transfer of the suit property by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant was lawful and whether the 1<sup>st</sup> defendant acquired a valid title in respect of the suit property.
4. Whether the plaintiffs are entitled to the reliefs sought in the plaint.

#### Whether Ratilal Gordhandas Sanghani(deceased) had any lawful proprietary interest in all that parcel of land known as L.R No. 209/73/12(the suit property).

I am satisfied from the evidence on record that the following facts have been established by the plaintiffs: The suit property was at all material times registered in the name of M.J.Patel. M.J.Patel sold the suit property to H.P.Youtan. M.J.Patel died before transferring the suit property to H.P.Youtan. H.P.Youtan filed a suit against the 2<sup>nd</sup> defendant who was the administrator of M.J.Patel's estate in the High Court at Nairobi namely, HCCC No. 2337 of 1985(O.S)(the High Court suit) seeking an order for the suit property to be vested in its name. The High Court made an order on 5<sup>th</sup> August, 1985 vesting the suit property in H.P.Youtan. The vesting order was registered against the title of the suit property on 9<sup>th</sup> August, 1985. On 17<sup>th</sup> September, 1985, the High Court issued an order restraining H.P. Youtan from having any dealing with the suit property which order was lifted by the same court on 17<sup>th</sup> November, 1985. The prohibitory order and the order lifting it were registered against the title of the suit property on 22<sup>nd</sup> January, 1986 and 12<sup>th</sup> February, 2001 respectively. As at 12<sup>th</sup> February, 2001, H.P.Youtan was the registered owner of the suit property pursuant to the vesting order from the High Court that was registered against the title of the suit property on 9<sup>th</sup> August, 1985 as a foresaid. The 2<sup>nd</sup> defendant's interest in the suit property ceased upon the registration of the said vesting order.

Through a deed of assignment dated 22<sup>nd</sup> October, 1997, H.P.Youtan in consideration of a sum of Kshs. 450,000/- that was paid to it by the deceased and his wife, Manjula Ratilal Sanghani (the deceased's wife) assigned its leasehold interest in the suit property to the deceased and his wife to hold the same as joint tenants for the remainder of the term thereof. The deceased's wife died on 2<sup>nd</sup> November, 1995 before the date of the assignment. It appears that the deed of assignment was dated about 2 years after execution. The assignment was stamped on 23<sup>rd</sup> October, 1997 but was not registered.

The plaintiffs led uncontroverted evidence that the deceased did not register the assignment because the lease was about to expire. As I mentioned earlier, the suit property was leasehold from the Government for a term of 99 years from 16<sup>th</sup> July, 1903. The lease was to expire on 16<sup>th</sup> July, 2002. As at the date of the assignment, less than 5 years remained before the expiry of the lease. The plaintiffs led evidence that they wanted to register the assignment on the new lease. I have noted that the deceased had obtained consent from the Commissioner of Lands for the transfer of the suit property from H.P.Youtan to the deceased and the deceased's wife, and rent clearance certificate. The plaintiffs led evidence that they commenced the process of renewal of the lease for the suit property in the name of H.P.Youtan and the process progressed well until they were issued with a letter of allotment for the extended lease in the name of H.P.Youtan. From the evidence on record, I am satisfied that the deceased through H.P.Youtan followed due process in applying for the renewal of the lease for the suit property. H.P.Youtan applied for extension of the lease for the suit property in writing to the Commissioner of Lands. By a letter dated 4<sup>th</sup> December, 2006, the Commissioner of Lands informed H.P.Youtan that its application for extension of the lease had been approved and that

the lease would be renewed for a further term of 50 years with effect from 1<sup>st</sup> July, 2002. On 21<sup>st</sup> December, 2006, the Commissioner of Lands issued H.P.Youtan with a letter of allotment for extension of the lease for the suit property. In the said letter of allotment, H.P.Youtan was required to pay Kshs. 8,465/- which amount was paid on 15<sup>th</sup> May, 2007. The renewal of H.P.Youtan's lease was approved by the Director of Physical Planning, City Council of Nairobi and Director of Surveys by letters dated 17<sup>th</sup> August, 2006, 17<sup>th</sup> August, 2006 and 30<sup>th</sup> August, 2006 respectively. In readiness for the issuance of a new grant for the extended lease in favour of H.P.Youtan, a Deed Plan No. 273341 dated 22<sup>nd</sup> December, 2006 was issued by the Director of Surveys.

The plaintiffs led evidence that that was the far H.P.Youtan's application for renewal of the lease that would have enabled the deceased to register the assignment went. The deceased died on 22<sup>nd</sup> May, 2007 before H.P.Youtan was issued with a grant for the lease that had been renewed for a further term of 50 years. In his will dated 3<sup>rd</sup> March, 2006, the deceased bequeathed the suit property to the 1<sup>st</sup> Plaintiff and one, Manoj Kumar Ratilal Sanghani. On 7<sup>th</sup> August, 2008, Grant of Letters of Administration with written will annexed in respect of the estate of the deceased was issued to the plaintiffs.

From the evidence on record, what happened after H.P.Youtan was issued with a letter of allotment for the extended lease but before a grant in its favour was issued gives a picture of a fraudulent conspiracy, open greed and abuse of office that has become too familiar in our land offices. The renewal of H.P.Youtan's lease which would have benefited the deceased to whom the expired lease had been assigned was hijacked by fraudsters. A gentleman by the name Bhupesh Harshadray Rana claimed that he held a power of attorney donated by the 2<sup>nd</sup> defendant whom he claimed was the registered owner of the suit property. On 30<sup>th</sup> May, 2008, he wrote to the Commissioner of Lands seeking the renewal of the lease in respect of the suit property for a term not less than 50 years. He claimed in the letter that the 2<sup>nd</sup> defendant and he wanted to re-develop the suit property and that the financiers of the project had insisted on the suit property having a lease of at least 50 years. As at the time this application was being made, the Commissioner of Lands had already approved extension of the lease in respect of the suit property in favour of H.P.Youtan to which a letter of allotment had been issued and accepted. What H.P.Youtan was waiting for was a grant. The Commissioner of Lands was well aware of H.P.Youtan's application that was pending the issuance of a grant.

There is no evidence that this new application was subjected to the normal approval process. On 18<sup>th</sup> September, 2008, the Commissioner of Lands purported to issue another letter of allotment in respect of the suit property to the 2<sup>nd</sup> defendant on the strength of the said application by the 2<sup>nd</sup> defendant's purported attorney, Bhupesh Harshadray Rana. The new letter of allotment was for the extension of the lease in respect of the suit property for 50 years with effect from 1<sup>st</sup> October, 2008. To demonstrate that the Commissioner of lands was aware of H.P.Youtan's application that had been approved and that his office was determined to process the new application, on the same date namely, 18<sup>th</sup> September, 2008 on which the Commissioner of Lands issued a new letter of allotment to the 2<sup>nd</sup> defendant, the Commissioner of Lands wrote to H.P.Youtan that he wanted to verify the ownership of the suit property. In the letter, the Commissioner of Lands asked H.P.Youtan to provide him with a copy of the ruling and the original vesting order that vested the property on H.P.Youtan. H.P.Youtan was asked to provide these documents within 14 days. It is not clear as to what purpose these documents were supposed to serve since the Commissioner of Lands had already issued the 2<sup>nd</sup> defendant with a letter of allotment. The allotment in favor of the 2<sup>nd</sup> defendant was accepted on 25<sup>th</sup> October, 2008 by his attorneys who were now two in number; B.C.Ganatra and B.H.Rana. Within a period of less than 10 days, the 2<sup>nd</sup> defendant was issued with a grant for the extended lease which grant was registered on 10<sup>th</sup> November, 2008. The said grant was issued on the strength of the Deed Plan that was prepared for the issuance of a grant in favor of H.P.Youtan. I have also noted that the letter of allotment in favour of the 2<sup>nd</sup> defendant was issued pursuant to authority; REF: NO. 56723/34 which is the same authority pursuant to which the letter of allotment in favour of H.P.Youtan was issued.

I have stated earlier that the 2<sup>nd</sup> defendant ceased to be the owner of the suit property on 9<sup>th</sup> August, 1985 when the property was vested on H.P.Youtan through a High Court order. An application that was purportedly made by the 2<sup>nd</sup> defendant for the extension of the lease in respect of the suit property on the basis that the 2<sup>nd</sup> defendant was the registered owner of the suit property was in the circumstances deceitful and fraudulent. The 2<sup>nd</sup> defendant either by himself or through his purported attorneys did not file a defence to the suit and never appeared at the trial. All the averments made against the 2<sup>nd</sup> defendant in the plaint were not controverted. I am also of the view that the Commissioner of Lands having approved H.P.Youtan's application for extension of the lease in respect of the suit property and issued it with a letter of allotment which it accepted and made the necessary payment, H.P.Youtan had an enforceable reasonable legitimate expectation that it would be granted extension of the said lease. See, Karume Investments Limited v Kenya Shell Limited & The Commissioner of Land Nairobi Civil Appeal No. 201 of 2008.

In Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & 10 others, Nairobi Petition No. 359 of 2013 [2013] eKLR, the court described the term "legitimate expectation" as follows;

**"[133] At its core, and in its broad sense, the doctrine of legitimate expectation is said to arise out of a promise made by a public body or official which the person relying on anticipates will be fulfilled. It is also said to arise out of the existence of a repeated or regular practice of the public body or official which could reasonably be expected to continue. Essentially, once made, the promise or practice creates an estoppel against the public body or official, so that the person benefitting from the promise or practice would continue to so benefit, and that the promise or practice would not be withdrawn without due process or consultation."**

I am of the view that since H.P.Youtan had a letter from the Commissioner of Lands extending its lease that was followed by a letter of allotment of the suit property in its favour for the extended lease period, denying it extension of the lease and allocating the property again to the 2<sup>nd</sup> defendant after expectation was created was unfair treatment and as such unlawful.

Due to the foregoing, it is my finding that the deceased who was in possession of the suit property had a beneficial interest in the property by virtue of the assignment that was executed in its favour by H.P.Youtan and the letter of allotment that was issued by the Commissioner of Lands in favour of H.P.Youtan. I am in agreement with the 1<sup>st</sup> defendant that the said assignment did not convey proprietorship interest in the suit property to the deceased since it was not registered. The assignment was however binding upon the deceased and H.P.Youtan despite

non-registration and conferred upon the deceased beneficial interest in the suit property which is protected by law.

Whether the 2<sup>nd</sup> defendant had any lawful proprietary interest in the suit property.

From what I have stated above, there is no doubt that the 2<sup>nd</sup> defendant obtained renewal of the lease in respect of the suit property through misrepresentation, fraud and deceit. The suit property was also not available for allocation to the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant allegedly sought extension of the lease in respect of the suit property through attorneys on the basis that he was the registered proprietor of the property whose lease had expired. As I have demonstrated above, the 2<sup>nd</sup> defendant had no proprietary interest in the suit property as at 30<sup>th</sup> May, 2008 when he claimed to be the registered owner of the said property since his interest in the property was vested in H.P.Youtan on 9<sup>th</sup> August, 1985. Furthermore, as at that date, the lease in respect of the suit property had been renewed in favour of H.P.Youtan which had been issued with a letter of allotment on 21<sup>st</sup> December, 2006. H.P.Youtan had accepted the allotment, made the necessary payment and was only waiting for a grant when the process was hijacked by the 2<sup>nd</sup> defendant's attorneys who used the Deed Plan that had been prepared for the purposes of extending H.P.Youtan's lease to obtain a grant in favour of the 2<sup>nd</sup> defendant. Since the suit property had already been allocated to H.P.Youtan which had accepted the allotment, the property was not available for allocation to the 2<sup>nd</sup> defendant. The purported allotment of the suit property to the 2<sup>nd</sup> defendant was therefore illegal, null and void. The process of acquiring a title is as important as the title itself. A title acquired through an irregular and fraudulent process is not a valid title in law. 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.”**

It has been demonstrated by the plaintiffs that the acquisition of title for the suit property by the 2<sup>nd</sup> defendant was marred with irregularities and fraud. The 1<sup>st</sup> defendant had contended that when the suit property was allotted to H.P.Youtan, the company had already been dissolved. I have looked at the Gazette notices that were produced in evidence by the 1<sup>st</sup> defendant as DExh. 3 and DExh. 4 in proof of the dissolution of H.P.Youtan. In DExh. 3 that contained the notice of intended dissolution, the name of H.P.Youtan was given as H.P.Youtan & Co. Limited which is its correct name. In DExh. 4 which contained the notice of dissolution, the name of the company that was dissolved was given as H.P.Youtan (K) Limited. There is no doubt that H.P.Youtan (K) Limited that was dissolved through Gazette Notice No. 2651 dated 19<sup>th</sup> March, 2007 published in the Kenya Gazette of 23<sup>rd</sup> March, 2007 is not the same as H.P.Youtan & Co. Limited to which a letter of allotment dated 21<sup>st</sup> December, 2006 in respect of the extended lease for the suit property was issued. The company that was dissolved and H.P.Youtan which owned the suit property and which assigned its interest in the suit property to the deceased are different. In any event, contrary to the claim by the 1<sup>st</sup> defendant, as at 21<sup>st</sup> December, 2006 when H.P.Youtan was issued with a letter of allotment the purported H.P.Youtan (K) Limited had not been dissolved. The purported dissolution of H.P.Youtan appears to me to have been part of a wider scheme to dispossess H.P.Youtan and the deceased of the suit property.

The suit property was registered under Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). Section 23(1) of the said Act provides as follows:

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

This provision of the law cannot give protection to the 2<sup>nd</sup> defendant's title. From the evidence on record, it has been proved that the 2<sup>nd</sup> defendant through his purported attorneys was a party to the fraud and misrepresentation that led to the issuance of the impugned title. For the foregoing reasons, it is my finding that the 2<sup>nd</sup> defendant did not acquire a valid title to the suit property.

Whether the transfer of the suit property by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant was lawful and whether the 1<sup>st</sup> defendant acquired a valid title in respect of the suit property.

I have held above that the 2<sup>nd</sup> defendant did not acquire a valid title to the suit property. His title was illegal, null and void the same having been acquired fraudulently through misrepresentation. As I have held in a number of cases, a void title cannot confer a valid interest in land. It follows that the 2<sup>nd</sup> defendant did not have a valid interest in the suit property. In the circumstances, the 2<sup>nd</sup> defendant had no valid proprietary interest in the suit property that he could transfer to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant could not acquire a better title than what the 2<sup>nd</sup> defendant held. What the 2<sup>nd</sup> defendant purported to transfer to the 1<sup>st</sup> defendant was a void title. By transferring a fraudulent title to the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant was simply perpetuating the fraud against the deceased and H.P.Youtan. The transfer of a null and void title by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant was therefore unlawful and as such could not pass a valid title to the 1<sup>st</sup> defendant.

The 1<sup>st</sup> defendant submitted at length that it was an innocent purchaser of the suit property for value without notice of any defect in the 2<sup>nd</sup> defendant's title. I am not satisfied from the evidence on record that the 1<sup>st</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 Mwaura v. Attorney General & 4 Others, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of Katende v. Haridar & Company Ltd (2008) 2 EA 173, where the Court of Appeal in Uganda held that: -**

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

**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.”**

The plaintiffs have demonstrated that; H.P.Youtan was the registered proprietor of the suit property before the lease in respect thereof expired, H.P.Youtan assigned its interest in the suit property to the deceased, the deceased through H.P.Youtan applied for extension of the lease, the extension was accepted, a letter of allotment was issued to the deceased in the name of H.P.Youtan and that the allotment was accepted and payment made for the same. The plaintiffs have demonstrated further that what was remaining was for a grant to be issued to H.P.Youtan to enable the deceased to actualize the assignment that was executed in its favour by H.P.Youtan. The plaintiffs have also established that while the deceased and H.P.Youtan were waiting for a grant to be issued for the extended lease, the 2<sup>nd</sup> defendant through fraudulent misrepresentation caused the suit property to be registered in its name and subsequently sold the property to the 1<sup>st</sup> defendant.

The plaintiffs having established their interest in the suit property, the burden was upon the defendants to prove that 2<sup>nd</sup> defendant acquired the suit property legally and that the 1<sup>st</sup> defendant was an innocent purchaser of the suit property for value without notice of the deceased's interest in the same. The 2<sup>nd</sup> defendant as I have stated earlier did not file a defence neither did he tender evidence at the trial. The evidence on record shows that the suit property was allegedly allocated to the 2<sup>nd</sup> defendant on 18<sup>th</sup> September, 2008. The 2<sup>nd</sup> defendant accepted the allotment on 25<sup>th</sup> October, 2008 and made payment on 29<sup>th</sup> October, 2008. The title for the suit property was issued in favour of the 2<sup>nd</sup> defendant on 3<sup>rd</sup> November, 2008 and registered on 10<sup>th</sup> November, 2008. The agreement for sale between the 1<sup>st</sup> and 2<sup>nd</sup> defendants is dated 24<sup>th</sup> October, 2008. This means that as at the time the 1<sup>st</sup> defendant entered into an agreement with the 2<sup>nd</sup> defendant to purchase the suit property, the 2<sup>nd</sup> defendant had not even accepted the allotment neither had he paid for the same. There was in fact no title in the name of the 2<sup>nd</sup> defendant. If the 1<sup>st</sup> defendant had done due diligence as it claims to have done, a search on the title of the suit property as at 24<sup>th</sup> October, 2008 would have alerted it that the property was registered in the name of H.P.Youtan. All the searches produced in evidence by the 1<sup>st</sup> defendant show that they were conducted after the suit property had been registered in the name of the 1<sup>st</sup> defendant.

I am also satisfied from the evidence and other material on record that the deceased had been in possession of the suit property and that as at the time the 1<sup>st</sup> defendant purported to purchase the suit property, the plaintiffs were in possession thereof. This is clear from the correspondence on record that was exchanged between the 1<sup>st</sup> defendant's advocates and the tenants that were in occupation of the property. The plaintiffs filed this suit when the 1<sup>st</sup> defendant sought possession of the suit property from the plaintiffs' tenants. The 1<sup>st</sup> defendant could not have sought possession of the suit property if the same was vacant. Since the plaintiffs were in possession of the suit property when the 1<sup>st</sup> defendant purchased the same, if the 1<sup>st</sup> defendant was acting in good faith, it had a duty to inquire from the plaintiffs as part of its due diligence of what interest if any they had in the property. There is no evidence that the 1<sup>st</sup> defendant made such inquiry. The fact that the 1<sup>st</sup> defendant purchased the suit property before the 2<sup>nd</sup> defendant even had a title for the same and failed to make inquiries on the plaintiffs' interest in the property show that it did not carry out due diligence. This disqualifies the 1<sup>st</sup> defendant from being an innocent purchaser of the suit property.

Even if the 1<sup>st</sup> defendant was an innocent purchaser for value, the 2<sup>nd</sup> defendant had no valid title to pass to the 1<sup>st</sup> defendant as I have stated earlier. The principle of innocent purchaser for value does not give validity to an invalid title. It follows that even if the 1<sup>st</sup> defendant acquired the suit property from the 2<sup>nd</sup> defendant innocently for valuable consideration, that did not sanitize an invalid title that the 2<sup>nd</sup> defendant held. The 1<sup>st</sup> defendant could not acquire a valid title from an invalid one merely on account of its innocence. 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.”**

It is my finding that the transfer of the suit property by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant was unlawful and as such the 1<sup>st</sup> defendant did not acquire a valid title from the 2<sup>nd</sup> defendant in respect of the suit property.

Whether the plaintiffs are entitled to the reliefs sought in the plaint.

From the findings above, I am satisfied that the plaintiffs have proved their claim against the defendants and as such they are entitled to the reliefs sought in the plaint.

Conclusion:

In conclusion, I hereby enter judgment for the plaintiffs against the defendants in terms of prayers (a) and (b) of the plaint dated 28<sup>th</sup> January, 2009. I also award the plaintiffs the costs of the suit.

**DELIVERED AND DATED AT NAIROBI THIS 29TH DAY OF JULY 2021**

**S. OKONG'O**

**JUDGE**

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

Mr. Kibera for the Plaintiffs

Mr. Cohen for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

Ms. C.Nyokabi-Court Assistant