



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 281 OF 2009

ZAKARIA MUGAI GAKIBE.....PLAINTIFF

=VERSUS=

JOHN MWENJA NGUMBA sued as the Administrator of

The Estate of Andrew Kimani Ngumba.....1ST DEFENDANT

KENYA COMMERCIAL BANK LIMITED.....2ND DEFENDANT

ROYAL BUILDERS AND INVESTMENTS LIMITED.....3RD DEFENDANT

THE ATTORNEY GENERAL on behalf of

THE COMMISSIONER FOR LANDS.....4TH DEFENDANT

EQUITY BANK LIMITED.....5TH DEFENDANT

JUDGEMENT

1. By a plaint dated 12th June 2009 and amended on 12th August 2011 the plaintiff seeks judgment against the defendants jointly and severally for:-

(a) A declaration that the property known as Land Reference No. 74/16 North East of Nairobi, was held by the late Andrew Ngumba and the 1st defendant in trust for the plaintiff and is currently held by the 3rd defendant in trust for the plaintiff, in the alternative

(b) A declaration that a resulting or implied trust sprang up in favour of the plaintiff subsequent to the payment of the deposit of purchase price and the grant of possession, the subsequent development thereof at tremendous cost without either late Andrew K. Ngumba or the 1st defendant disbursing him of the ownership thereof.

(c) A declaration that the purported sale on 26th August 2005 and subsequent transfer of the suit property known as Land Reference No 74/16 North East of Nairobi was illegal, null and void.

(d) An order do issue to compel the 3rd and 5th defendants to surrender the title issued to the 3rd defendant over LR NO 74/16 North East of the Nairobi for cancellation within fourteen (14) days of the judgment herein failing which, the Principal Registrar of Government Lands do take the necessary steps for cancellation thereof.

(e) An order do issue directing the 5th defendant to execute a suitable discharge of charge in respect of the charge executed by the 3rd defendant in favour of the 5th defendant over the suit property within 14 days of the judgment, failing which, the Deputy Registrar, High Court Nairobi to prepare and register the same at the 5th defendant's costs.

(f) A mandatory injunction compelling the 2nd defendant herein to give the plaintiff monthly statement of the loan account NO xxxx University Way Branch and refund to the plaintiff the sum of Kshs.1,656,494.50 or any excessive amount found to have been over paid to the 2nd defendant to liquidate the loan.

(g) A permanent injunction do issue against the defendants restraining them by themselves, their servants, agents, employees or any one claiming under them from evicting the plaintiff from LR NO 74/16 North East of Nairobi.

(h) A permanent injunction do issue against the defendants restraining them by themselves, their servants, agents, employees, or anyone claiming under them from selling, transferring, charging, leasing or in any other manner dealing with all that land known as LR NO 74/16 North East of Nairobi.

(i) General damages for fraud and or deceit as against the 1st – 4th defendants.

(j) Costs of this suit.

(k) Kshs.160,000,000 as against the 3rd defendant.

(l) Interest on (f), (i) and (k) at prevailing commercial rates with effect from accrual until payment in full.

(m) Any other or further relief that this honourable court may deem fit to grant.

2. Upon being served with copies of plaint and summons to enter appearance he 1st defendant entered appearance through the firm of M/S Nyairo & Co. Advocates. He also filed a statement of defence dated 14th July 2009 and amended on 26th March 2012. He denies that the plaintiff ever purchased the suit property from the late Andrew K Ngumba or that he paid the sum of Kshs.1,200,000/- as deposit for the purported sale of the suit property. That the plaintiff was allowed onto the suit property by his deceased father as a mere licensee to erect a store for building materials but he (plaintiff) converted the store into living quarters. He denied each and every allegation of fraud attributed to him in the plaint. He prays that the plaintiff's suit be dismissed with costs.

3. The 2nd defendant entered appearance through the firm of M/s Macharia-Mwangi & Njeru Advocates on the 5th September 2011. It also filed a statement of defence dated 29th September 2011. It denies the allegations of fraud attributed to it in the plaint and confirms that the public auction of 26th April 2005 was conducted on its behalf in a proper exercise of a mortgagee's statutory power of sale. It prays that the plaintiff's suit be dismissed with costs.

4. The 3rd defendant entered appearance through the firm of M/s Maina Muiruri & Co. Advocates and filed a statement of defence dated 1st September 2011. It denies each and every allegation of fraud attributed to it in the plaint. It states that honourable Elias Mbau attended the auction that took place on 26th April 2005 and his bid was declared the winning bid. The said winner, nominated the 3rd defendant as his nominee and to be registered as proprietor of the suit property.

5. In its counterclaim the 3rd defendant prays that the plaintiff's suit be dismissed with costs and judgment be entered against the plaintiff in favour of the 3rd defendant for:-

(a) A declaration that the 3rd defendant is validly registered as the proprietor of LR NO 74/16 North East Nairobi having been validly nominated by Honourable Elias Mbau, who placed the winning bid at the auction that took place on the 26th April 2005.

(b) Costs of the suit.

(c) Any other relief that the court deems fit.

6. The 4th defendant filed a statement of defence dated 21st February 2012. He stated that every action that was taken in dealing with the suit land by the 4th defendant was done in good faith without any irregularity and in accordance with the law. Further that the records were maintained as per the law. He prays that the plaintiff's suit be dismissed with costs.

7. The 5th defendant entered appearance through the firm of M/s J. K. Kibicho & Co. Advocates. It also filed a statement of defence dated 2nd November 2011. It denies each and every allegation of fraud attributed to it in the plaint. That it did due diligence and found that the 3rd defendant was the registered owner of the suit property and it met the requirements for the facility advanced to it. It prays that the plaintiff's suit be dismissed with costs.

8. The plaintiff filed reply to each defence. In answer to the 3rd defendant's counterclaim the plaintiff states that the auction held on 26th April 2005 was postponed after honourable Elias Mbau was outbid hence there is no basis in law to found a claim on a non-existent public auction. That the 3rd defendant's title cannot be taken to be that of an innocent purchaser for value and without notice as honourable Elias Mbau was aware of the plaintiff's claim.

The Plaintiff's Case

9. Andrew K. Ngamba hereinafter referred to as "the deceased" was the registered owner of the suit land known as LR NO 74/16 situated North East of Nairobi measuring 26.5 acres or thereabouts. That through an agreement of sale drawn in or about June 1991 he purchased the suit land from the deceased for Kshs 4.4 million of which he paid a deposit of Kshs 1.2 million on 10th June 1991 and a receipt was issued.

10. The plaintiff further stated that having paid the deposit to the deceased he was given possession of the suit property where he made

considerable developments and continued to live in one section of the suit property and cultivating the rest of it. That there was a further agreement between the plaintiff and the deceased where the plaintiff took a loan from the 2nd defendant and the deceased acted as a guarantor since the suit land was still in the deceased's name. Following this agreement the 2nd defendant advanced to the plaintiff a loan of Kshs. 1 million on Loan Account NO [....].

11. The deceased failed to execute the sale agreement as well as the necessary transfer documents. He also refused to obtain the consent from the Land Control Board. This necessitated the plaintiff to file a suit against the deceased being **Nairobi HCCC No 1850 of 1993; Zakariah Mungai Gakibe vs Andrew Ngumba and Mbangi Investment** where an application for extension of time within which the consent from the Land Control Board would be obtained was granted and the plaintiff obtained the said consent on 18th January 1996. The plaintiff further stated that to protect his interest as a purchaser of the suit land he lodged a caveat on 27th September 1993 and the deceased moved the court vide HCCC No 1850 of 1993 to have it lifted but the application was dismissed.

12. The plaintiff further stated that before HCCC 1850 of 1993 could be prosecuted to conclusion, Andrew Ngumba passed on, on 31st May 1997. The 1st defendant and Margaret Muthoni were issued with letters of administration *ad colligenda bona* for the purposes of defending the suit but the Grant was issued late. There was no application made to enjoin the two administrators to the suit within the time specified by law leading to the suit to abate.

13. The plaintiff further stated that the 1st defendant all along knew of the existing ownership dispute between the plaintiff and the deceased. The 1st defendant therefore held the suit land in trust for the plaintiff on account of the sale agreement payment of the deposit, the subsequent grant of possession and the developments undertaken by the plaintiff valued at over Kshs.160 million as at June 2009. There arose a resulting or implied trust in favour of the plaintiff.

14. The plaintiff sought statements of the loan advanced to him by the 2nd defendant but the 2nd defendant has refused to supply the same making the plaintiff to engage a bank loan reconciliation expert who after scrutiny the loan account found that as at 10th June 2005 the loan had been overpaid by Kshs. 1,696,494.50. That on 26th May, 2005 the 2nd defendant in cahoots with the 1st defendant fraudulently purported to exercise its statutory power of sale and sold the suit land to Honourable Elias P. Mbau for a bid of Kshs.17 million at an auction. The 4th defendant registered the 3rd defendant as the new owner on 27th July 2008 despite the said auction being postponed after David Gakibe Nduati outbid Honourable Elias P. Mbau with a bid of Kshs. 19 million.

15. The plaintiff particularized the fraud on the part of the 1st defendant as follows: Allowing the sale of the suit land knowing that its ownership was in dispute and that a caveat had not been lifted; that he withdrew suits filed by the plaintiff against the 2nd and 3rd defendant to wit HCCC 584 of 2007 and HCCC 285 of 2005 so as to facilitate the transfer of the suit land without the knowledge of the plaintiff. Further that he received the proceeds of the sale of the suit land which was over the recovery amount from the 2nd defendant without the knowledge of the plaintiff.

16. The plaintiff also set out the particulars of fraud against the 2nd defendant. That it sold the suit land knowing it had overcharged the plaintiff's account and there being ownership dispute which was yet to be resolved. That it colluded with the Principal Registrar of Titles to effect the transfer in favour of the 3rd defendant despite the caveat which had been registered. That it sold the suit land knowing that the statutory power of sale had not accrued and failing to heed observations by the valuers (Centenary Valuers) in the Valuation Report dated 19th April 2005, that they were unable to get an official search.

17. Further, that the 2nd defendant failed to disclose to the buyers that there was a caveat, releasing the balance of the proceeds of the sale to the 1st defendant without the plaintiff's knowledge or consent. It further purported to conduct a sale at the public auction on 26th April 2005, when there was no fall of the hammer and effected transfer of the suit property on 18th September 2008 which was three years after the purported public auction.

18. The 3rd defendant's fraud is particularized as failing to exercise due diligence in ascertaining the root of title to the suit land, buying the suit land, while aware of the irregularities in the dealings between the 2nd defendant and the Principal Registrar of Titles, buying the suit land which they ought to have known a caveat had been registered and the statutory power of sale could not be exercised.

19. The particulars of fraud in respect of the 4th defendant are given as effecting transfers of the suit land despite a caveat which had not been lifted, registering the transfer despite having reasons to suspect that there could be fraud in light of the fact that the some pages were missing from the Register. The entries in the main register had been ripped off and were missing. That they effected a transfer knowing that there was no court orders sanctioning the 2nd defendant's statutory power of sale.

20. The plaintiff further stated that due to the fraudulent sale of the suit land by the 2nd defendant, the 1st defendant and the plaintiff agreed to challenge the sale using the 1st defendant's name. The 1st defendant filed **HCCC No 285 of 2005 John Mwenja Ngumba vs KCB & Hon. Elias Mbau and HCCC 584 of 2007 John Mwenja Ngumba vs KCB & Elias Mbau**. That unknown to the plaintiff the 1st defendant entered into a settlement with the 2nd and 3rd defendants to be paid Kshs. 17 million out of the proceeds of the sale and in consideration the 1st defendant withdrew the suit and agreed to indemnify the 2nd and 3rd defendants of any future arising suits.

21. The 3rd defendant sought financing from the 5th defendant who vide a charge executed by the 3rd defendant offered the same without regard to the history of the ownership dispute and fraud surrounding the transfer to the 3rd defendant.

22. The plaintiff further stated that on 9th March 2009 he was served with a notice to vacate by the District Commissioner, Kiambu. The

same was subject to Judicial Review proceedings in **Nairobi, HC Misc. App. NO 27 of 2009** but on 28th and 29th May 2009, during the pendency of the said proceedings, the 3rd defendant sent a bulldozer and armed youths who illegally and without lawful order demolished the plaintiff's home and other buildings valued at Kshs.160 million as at June 2009.

The 1st Defendant's Case

23. The 1st defendant stated that the suit land belonged to the deceased until the same was sold by public auction pursuant to a statutory power of sale exercised by the 2nd defendant. He denied that the plaintiff ever purchased the suit property at any time or ever made payments to the deceased to the sum of Kshs. 1,200,000/- as deposit. That the plaintiff was allowed into the suit land as a mere licensee, limited to erecting of a store for storage of his building materials. The plaintiff without consent or authority from the deceased converted the store into living quarters. The 1st defendant admits that the deceased agreed to act as a guarantor for a loan advanced to the plaintiff by the 2nd defendant which the plaintiff defaulted.

24. The 1st defendant further admits that the plaintiff filed Nairobi HCCC No 1850 of 1993 against the deceased. That upon the deceased passing, the 1st defendant obtained letters of administration together with Margaret Muthoni Ngumba who has since passed away. Despite having obtained the said letters of administration within one year, the plaintiff took no steps to enjoin them in the suit and consequently the plaintiff's suit abated.

25. The 1st defendant denies ever acting in cahoots with the 2nd defendants in its exercise of the statutory power of sale. There has never been any suit between the plaintiff and the deceased on his estate over ownership of the suit and since June 1998.

26. The 1st defendant further states that he filed HCCC 285 of 2005 and HCCC 584 of 2007 to protect the estate of the deceased and since the plaintiff was not a party to the suit he did not have any obligation to inform him or seek his consent to withdraw the same. That before the suits were withdrawn the High Court made a declaration that the sale of the suit land by the 2nd defendant was prima facie valid.

27. He further stated that this suit is barred on law as it is based on unsigned sale agreement which formed the basis of HCCC 1850 of 1993. The same has been filed out of time and offends the provisions of the Limitation of Actions Act and the Law of Contract Act, He further stated that the plaintiff defaulted in loan repayment and the suit land was sold making the estate of the deceased suffer immense loss. The plaintiff is not entitled to any of the reliefs sought.

The 2nd Defendant's case

28. The charge created over the suit land in its favour was registered on 2nd May 1991 to secure a loan advanced to the plaintiff. No lawful purchase of the same could have been transacted in June 1991, as alleged by the plaintiff without its consent. A caveat by the plaintiff could not have created any interest over the suit land in his favour. By an order of the court dated 25th May 1994 in HCCC 1850 of 1993, the 2nd defendant's unassailable mortgagee's interest on the suit land by the 2nd defendant was acknowledged.

29. The loan statements of accounts were dispatched to the plaintiff though his known postal address on periodic basis just like all account holders. The plaintiff had not complained of lack of the statements until the commencement of this suit. The 2nd defendant denies that it is indebted to the plaintiff in the sum of Kshs.1,696,494.50 and that in previous proceedings in HCCC 1531 of 1999 he admitted that his repayments of the loan were irregular.

30. The 2nd defendant further states that it was not given notice to institute this suit by the plaintiff. That the suit is statute barred, bad in law. The same is *res judicata* having been raised in HCCC 1850 of 1993 and HCCC 1531 of 1999.

The 3rd Defendant's Case

31. There was an advertisement of an auction of the suit land upon which Honourable Elias Mbau attended the same. He was declared the highest bidder and paid 25% deposit. Before he could pay 75% being the balance, the 1st defendant filed a suit being HCCC 285 of 2005 obtaining an order staying the transfer of the suit property to the nominee, the 3rd defendant. That it is the validly registered proprietor of the suit land.

The 4th Defendant's Case

32. The 4th defendant denies the allegations of fraud attributed to the office by the plaintiff. All actions in respect of the suit land were done in good faith, without any irregularities and in accordance with the law. Further that a chargee's rights under the charge could not be affected by a caveat.

The 5th Defendant's Case

33. The 5th defendant confirmed that the 3rd defendant applied for a loan facility and upon undertaking due diligence, they registered a charge in its favour over the suit land. It further stated that the plaintiff's claim became extinguished after the other suit HCCC 1850 of 1993 abated.

Evidence of the Plaintiff

34. PW1 Zakaria Muigai Gakibe, testified on 30th July 2012. He adopted his witness statement dated 26th October 2011. He told the court that there was an agreement between him and the late Andrew Ngumba. That he (deceased) would sell him a portion of land measuring about 22 acres for Kshs.4.2 million. He paid a deposit of Kshs.1.2 million. That they later agreed that he (plaintiff) would apply for a loan from the 2nd defendant and the deceased guaranteed the loan as he was still the registered owner of the suit land. Out of the loan proceeds, the deceased got Kshs.1 million. The deceased did not issue him with a receipt.
35. The deceased allowed him to enter into possession and he constructed a cowshed, workers' quarters, a residential house and other houses for letting. He also undertook livestock and coffee farming. He relied on the valuation report by Kenstate Valuers dated 6th June 2009.
36. He further stated that the deceased declined to sign the sale agreement necessitating him to institute HCCC No 1850 of 1993. The case was not finalized as the said Andrew Ngumba died on 31st May 1997. He applied for a caveat to be registered to prevent any dealings on the suit land. He further stated that the 2nd defendant advertised the suit land for sale on 26th April 2005. He attended the auction with his nephew David Gakibe Nduati who bid for Kshs. 19 million while Honourable Elias Mbau bid for Kshs 17 million. The sale was not concluded and the auctioneer state that time was up and they would schedule another sale. He stated that he later learnt the suit land had been sold to Honourable Elias Mbau.
37. He was shown the memorandum of sale. The said honourable Elias Mbau however paid the balance after 2 ½ years. He also came across a sale by private treaty agreement between John Mwenja Ngumba and Honourable Elias Mbau for Kshs. 23 million. Later this suit land was transferred by the 2nd defendant to the 3rd defendant. The transfer was registered on 18th September 2008. This was despite a caveat that had been registered against the title. He said he did not receive any notice from the Commissioner of Lands or the Registrar of Titles about the transfer. Later the 3rd defendant charged the suit land to the 5th defendant. He told the court that all these defendants were aware that he was on the suit land.
38. He further stated that the 4th defendant registered the transfer in favour of the 3rd defendant despite the caveat that had been registered. They were also aware that the records were missing from the register in respect of the suit land. He told the court that the 5th defendant ought to have undertaken due diligence or investigations. It would have realized that he was on the suit land.
39. In support of his case he produced a bundle of documents dated 17th February 2012 as exhibit P1, the supplementary list of bundle of documents dated 23rd April 2012 as exhibit p2 and one dated 23rd May 2012 as exhibit P3.
40. When cross examined by counsel for the 1st defendant, the plaintiff admitted that the deceased denied that he sold to him the suit land until his death. He also admitted that he paid Kshs.1.2 million and that he gave Kshs.500,000 from the loan but he was issued with no receipt. He stated that the deceased allowed him to enter the suit land and he erected permanent structures. He also admitted that he did not make any application to substitute the deceased in HCCC 1850 of 1993. He also admitted that during the proceedings in HCCC 1850 of 1993 he said he would repay the loan and if he defaulted the suit land could be sold. Further that he was not a party in HCCC 285 of 2005 and HCCC 584 of 2004. He also admitted that the deceased refused to sign the agreement in 1991 but he filed this suit in 2009, eighteen (18) years later.
41. When cross examined by counsel for the 2nd defendant, he admitted that the title for the suit land was taken to the bank as security for the loan and a mortgage was registered in favour of the 2nd defendant. That it was his responsibility to repay the loan with interest and that he admitted in HCCC 1531 of 1999 that the loan outstanding was Kshs. 1,735,844.85. He further admitted that the caveat had been lodged three years after the mortgage in favour of the bank had been registered.
42. When cross examined by counsel for the 3rd defendant, he confirmed that Honourable Elias Mbau was at the auction. He stated that his nephew had the highest bid. Further that he could not recall when the house was demolished.
43. On being cross examined by counsel for the 4th defendant he admitted that the person who was doing evaluation for the 2nd defendant told him on phone that the pages, and the entries in the register had been ripped off. He said he did not make any complaint to the police as he did not have the documents. He did not have documents. He could not recall what he talked to the said person. He also stated that he had not seen the file in respect of the suit property to confirm the missing pages. He also did not have a receipt for the caveat that had been lodged. On cross examination by counsel for the 5th defendant he told the court that a registered owner of the suit property can get a loan from any bank. That there was no illegality by the bank to give the 3rd defendant a loan.
44. PW2 Joseph Githekenya Nguayi testified on 1st July 2014. He told the court that he knew the plaintiff as he used to visit the area. He had an interest in acquiring land in the said area. The plaintiff informed him that his land was being auctioned by the 2nd defendant at Kenyatta Market on 26th April 2005. PW2 said he attended the auction on 26th April 2005. That the auctioneer did not announce the reserve price. He said there were two bids for Kshs.17 million and 19 million respectively. The plaintiff's nephew made a bid of Kshs. 19 million and the Auctioneer said the auction could not proceed as time was up and the reserve price had not been met.
45. He further stated that after two days he met the plaintiff at Kiambu town who informed him that the suit property had been sold to someone else. He told that there was no fall of the hammer at the auction of 26th April 2005. When cross examined by counsel for the 1st defendant, he told the court that he could not recall the parcel number. He told the court that he did not hear a bid for Kshs.23 million.
46. On being cross examined by the 2nd defendant's counsel he admitted that he did not know anything about the auction apart from what the plaintiff told him. Further that he did not conduct a search on the suit property nor does he know the actual acreage of the suit property but he hoped to bid for it. On being cross examined by counsel for the 3rd defendant, he told the court that he did not notice the auctioneer

calling any bidder after the auction was cancelled.

When cross examined by counsel for the 5th defendant, he told the court that he did not accompany the plaintiff to the auction. He said the auction was outside.

47. PW3 David Gakibe Nduati, adopted his witness statement. He told the court that the plaintiff is his uncle. That on 26th April 2005, he accompanied his uncle (plaintiff) to an auction at Muli House Kenyatta Market. When cross examined by counsel for the 1st defendant he stated that the land belonged to the plaintiff.

He also admitted that there was a dispute between the plaintiff and the previous owners of the land. He said he knew the land had secured a loan that was being served by the plaintiff. He however, did not know if it was paid in full. He said he attended the auction with the intention of bidding. He said he and honourable Elias Mbau were the only bidders. That there was no reserve price. He said he bid Kshs. 19 million. That at midday the auctioneers declared the auction had not succeeded and cancelled it. He also admitted that he signed a document in the auctioneer's office confirming the auction was unsuccessful. He said Honourable Elias Mbau also signed.

48. When cross examined by counsel for the 2nd defendant, he confirmed that it is the plaintiff who told him the land had been sold. He admitted that he did not know the loan outstanding. When cross examined by counsel for the 3rd defendant, he admitted that he did not know how much loan balance was. He said he used a different name at the auction. When cross examined by counsel for the 5th defendant he said he gave a different name because he did not want the auctioneer to know that he was related to the plaintiff. He also said he did not carry any money to the auction.

49. PW4 Fackson Wainaina Kagure, an advocate told the court that he met the plaintiff through the late Andrew Ngumba. That the said Ngumba instructed him to prepare a sale agreement for LR NO 74/16 between him (Ngumba) and the plaintiff. He said the said agreement was not signed but the plaintiff took possession on completion period because they were relatives. He produced the letter to the 2nd defendant as exhibit P4 in this case.

50. When cross examined by counsel for the 1st defendant, he told the court that the sale agreement was not signed by either of the parties. He also stated that he did not witness the payment of Kshs.1.2 million as consideration towards the purchase price of the suit property. He also stated that he told the plaintiff the suit property was mortgaged to the 2nd defendant. He confirmed the mortgage instrument is dated 19th April 1991. When cross examined by counsel for the 2nd defendant, he confirmed that he informed the plaintiff of the mortgage. That he witnessed it and the same preceded the agreement between Mr. Ngumba and the plaintiff. When cross examined by the 3rd defendant's counsel he stated that a clause in the agreement reads that the vendor had taken possession and not the purchaser.

51. PW5 Geoffrey Wamburi a registered valuer practicing under the name and style of Kenstate Valuers confirmed that he received instructions from the plaintiff on 2nd July 2008 to undertake an open market valuation of the suit property (LR NO 74/16). He stated that he valued the land at Kshs.150 million and the improvements at Kshs.10 million. He signed the valuation report on 6th July 2009. He produced the report as exhibit p5. When cross examined by counsel for the 1st defendant he told the court that he never went to the site but Solomon Munge did. He said he never met the plaintiff. He also stated that he did not know who the owner of the land was. That they carried out a search but were advised the file could not be found. When cross examined by counsel for the 3rd defendant, he told the court that the house in the report appears to have been vandalized. He said he did not see the deed plan for LR NO 74/16 and that he did not visit the site personally.

52. PW6, Wilfred Abincha Onono, a certified public accountant adopted his witness statement dated 31st October 2014. He told the court they offer independent analysis of borrowers' accounts. He told the court that he was approached by the plaintiff to undertake an analysis of the current account of Equatorial Builders Ltd No [...] at Kenya Commercial Bank. They got a statement of account from 31st August 1985 to 10th June 2005. He further stated that as at per 10th June 2005, the plaintiff had overpaid by Kshs. 6,016,923.46. He produced the report as exhibit P6B, the letter of offer as exhibit P6C and the Gazette Notices exhibits P6D and P6E respectively. When cross examined by counsel for the 1st defendant, he stated that he was not shown the term of the loan hence he would not know if it was three years or less. When cross examined by counsel for the 2nd defendant, he stated that the plaintiff had admitted to being indebted to the 2nd defendant. He also stated that the interest rate of the said mortgage was 17% when cross examined by counsel for the 4th defendant he stated that he was not given any documents by the plaintiff in which he (plaintiff) complained/contested the interest rate of 17%.

Evidence of the 1st Defendant

53. DW1, John Mwenja Ngumba adopted his witness statement dated 10th April 2012. He told the court that the deceased, Andrew Ngumba was his father and the plaintiff is a relative. His father died on 31st May 1997. He said he and his mother were granted letters of administration in respect of the deceased's estate. He produced the grant and the certificate of confirmation of grant as exhibits D1A, 1B. He further stated that the deceased did not sell the suit property to the plaintiff. He stated that he was aware of the loan facility advanced to the plaintiff by the 2nd defendant. The title of the suit property was given as security. The plaintiff did not service the loan leading to the 2nd defendant selling the suit property. He learnt that the suit property was sold for Kshs.23 million. He filed HCCC 285 of 2003 to challenge the sale. The court declared the sale proper. He also stated that the plaintiff was not a party to the suit. He said the deceased's estate was entitled to the remainder of the proceeds of the sale. He said, HCCC 584 of 2007 was withdrawn after he settled with the bank.

54. Once he learnt who was the highest bidder at the auction he entered into an agreement with him dated 31st October 2006. After this he withdrew the suit challenging the sale. The highest bidder was Honourable Elias Mbau. He signed an indemnity, so that the 2nd defendant could release the proceeds of the sale to the deceased's estate.

55. He stated that he did not do anything fraudulent by accepting the money. He did this to protect the estate of the deceased. He prays that

the plaintiff's claim against him be dismissed with costs. When cross examined by counsel for the 3rd defendant, he states that he has no claim against the 3rd defendant.

56. When cross examined by plaintiff's counsel he said he did not know what was agreed between his father and the plaintiff. He got information that the plaintiff was a short term licensee. He admitted that he filed two cases challenging the transfer to the 3rd defendant. That he entered into an agreement with Honourable Elias Mbau in October 2006 to protect the estate of the deceased and that the agreement was to secure payment of the balance. He also stated that he was aware the plaintiff was residing on the suit property. He admitted he received Kshs.17 million. He stated in cross examination that the plaintiff occupies only two (2) acres of the suit property.

Evidence of the 3rd Defendant

57. Dw2 Julius Kamande Manyeki adopted his witness statement dated 2nd November 2011. He told the court that he is a shareholder and member of Board of Directors of 3rd defendant. He told the court that he attended a public auction on 26th April 2005. He said he had seen a notice put up by M/S Garam Auctioneers. He attended the auction with Honourable Elias Mbau. The auction was on the 3rd floor of Mugu building at Kenyatta Market. He said the plaintiff was present. That Elias Mbau was the highest bidder at Kshs.23 million. He was declared the highest bidder and he signed the memorandum of sale. A deposit of Kshs.5.73 million being 25% of the purchase price the same day. He referred to the receipt issued by the auctioneer.

58. That shortly thereafter they were served with an order of injunction issued by the court not to complete the sale. The 1st defendant had sued the 2nd defendant and Honourable Elias Mbau. The ruling is dated 26th May 2006, one year after the application was filed. That later the suit was dismissed. There were negotiations among the parties and the suit property was finally transferred to the 3rd defendant. The same was transferred legally. The 3rd defendant should be allowed to enjoy it. That later the suit property was charged to the 5th defendant to secure a loan facility of Kshs. 15 million. He relied on the 3rd defendant's list of documents dated 24th February 2012. The documents were produced as exhibit D8-23 respectively. When cross examined by the plaintiff's counsel he stated that the balance was not paid within ninety (90) days owing to the order in HCCC 285 OF 2005. He also stated that they did due diligence before purchasing the suit property. He also stated that a sale by private treaty does not amount to fraud.

59. DW3 Elias Peter Mbau told the court, he was one of the directors of the 3rd defendant. He said that he attended the public auction. He said prior to this he visited the area and saw the advertisement for the sale of the suit property by public auction. The auction was held on 26th April 2005. He stated that he attended the auction with DW2, his co-director. The auction was held at Kenyatta Market. He bid Kshs.23 million which was the highest bid. He said there was another bidder. He paid 25% deposit which translates to Kshs. 5,750,000/- by cheque on the same date. He signed the memorandum of sale. That upon paying 25% deposit he was given ninety (90) days to pay the balance. That when the 1st defendant filed the suit in court and obtained an injunction, he could not pay the balance within 90 days. He was later approached by the 1st defendant to enter into an out of court settlement so that he could get the balance of the proceeds of the sale. He said he later nominated the 3rd defendant to take over his rights over the suit property. When cross examined by the plaintiff's counsel he admitted that he did not pay the 25% deposit in cash but by cheques. That when the hammer fell he was ready to pay 25% deposit. He admitted that by 26th May 2016 he had not paid the balance.

Evidence of the 2nd Defendant

60. DW4 Joseph Mungai Gikonyo, an Auctioneer trading as M/S Garam Auctioneers adopted his witness statement dated 7th December 2018. He also relied on the 2nd defendant's bundle of documents dated 24th April 2012. He produced the notification of sale, a certificate of service, a valuation report by the bank, a copy of the advertisement as exhibits in this case. He stated that the public auction was held on 26th April 2005 and a memorandum of sale duly signed. He confirmed that payment of 25% deposit was made after the auction. The exhibits were produced as exhibits D24, 25(a-c) in this case.

61. When cross examined by the plaintiff's counsel he confirmed that he served a notification of sale on the chargor on 3rd March 2005. He also stated that he was not required to serve the plaintiff. He said the purchaser paid by cheques. He confirmed Elias Mbau was the highest bidder and not Nduati Gakibe. He also denied that he stopped the auction at some point. He told the court that his involvement ended at the fall of the hammer and he could not confirm if the balance was paid within 90 days.

62. DW5 Consolata Muthoni Muchunku a land valuer told the court she practices in the name and style of Centenary Valuers. She stated that she got instructions from the 2nd defendant to do valuation on the suit property. She said the estimated market value was Kshs.38 million and the reserve price was given as Kshs.23 million. The report was produced as an exhibit in this case. When cross examined by the plaintiff's counsel she told the court that the valuation took too long as she could not undertake the search at the land registry.

63. DW6, Anthony Nzioka Kyalo an accountant of the 2nd defendant adopted his witness statement dated 25th April 2012 as part of his evidence. He also relied on the 2nd plaintiff's list of documents dated 25th April 2012. They were produced as exhibits in this case.

64. When cross examined by the plaintiff's counsel, he told the court that he did not manage the plaintiff's account. He stated that Andrew Ngumba (deceased) never informed the bank that he had sold the suit property to the plaintiff. He confirmed that the borrower and the guarantor were served with demand notices culminating to the sale by public auction on 26th April 2005. Further that the balance was paid after the injunction was discharged. He further stated that the 25% deposit was sufficient to clear the debt owed to the bank. He denied that the transaction was fraudulent.

Evidence of the 4th Defendant

65. DW7, Edwin Wafula Munoko, a Land Registrar adopted his witness statement dated 11th February 2019. He also relied on the bundle of documents filed on 8th July 2019. The grant for LR 74/16 was produced as exhibit in this case. When cross examined by the plaintiff's counsel, he told the court that there was a process of ensuring all registers are in good form when cross examined by counsel for the 1st defendant, he told the court that a caveat cannot override a chargee's statutory power of sale. DW7, Edwin Wafula Munoko was recalled on 8th July 2019. He availed the original register in respect of the letter to the suit property. It was not in bound form and some entries were missing. He however told the court that the same was opened in 1954 and time, wear and tear were bound to take toll of the documents. He also admitted on cross examination that the state of the register has not affected the state of ownership. That no information was lacking in respect of the suit property.

Evidence of the 5th Defendant

66. DW8, Stanley Mwangi Gatonga, an employee of the 5th defendant adopted his witness statement dated 5th December 2018. He also relied on the list of documents dated 16th July 2012. The documents were produced as exhibits in this case. When cross examined by counsel for the plaintiff, he told the court that the 5th defendant did due diligence before lending out the money to the 3rd defendant. Further that he was not aware of the existing suit between the 1st, 2nd defendants and the plaintiff. That the loan was disbursed to the 3rd defendant in 2007.

67. At the close of the oral testimonies, parties tendered final written submissions

Plaintiff's Submissions

68. The Plaintiff through written submissions dated, 13th February 2020 raises 7 issues for determination:

I. Was a legally enforceable Agreement for sale of LR No. 74/16, Kiambu entered into between the Plaintiff and the late AKN in 1991?

II. Is the equitable doctrine of a constructive trust applicable in the circumstances of the case?

III. Was the suit property duly and properly sold by the 2nd Defendant at the auction held on 26/4/2005?

IV. Was there fraud practised on the Plaintiff by the Defendant in the sale of the suit property? If so, what is the effect of the fraud?

V. Did the Defendants comply with the law in transferring the suit property without removal of the caveat placed by the Plaintiff on 27th September 1993?

VI. Who is liable for the demolition of the Plaintiff's property on or about 28th and 29th May 2009?

VII. Did the 2nd Defendant comply with Section 39 of the CBK Act and Section 44 of the Banking Act in their application to the loan? Was the sale of the suit property on 26/04/2005 justified in law?

VIII. Is the Plaintiff entitled to the Prayers sought in the Amended Plaintiff?

69. On the first issue, the Petitioner submits that an agreement of sale existed between himself and the Late Andrew Kimani Ngumba ('AKM') by virtue of facts that: the Plaintiff paid the late AKN a deposit of Kshs 1.2 million through Mbang'u Incorporated; the Plaintiff was allowed to take possession of the entire suit property, L.R No. 74/16 Kiambu after the above payment; the Plaintiff built a 5 bedroom double-storey home, some domestic quarters, cowsheds and other agricultural activities within the farm; the Plaintiff has been in possession of the suit property since 1991 to date, despite the demolition of his home in May 2009.

70. This is supported by Section 3 (3) of the Law of Contract Act as it read in 1991; and the cases of Ratilal Gova Sumaria & another v Allied Industries Limited [2007] eKLR, Charles Odongo Ngani v Milka Akinyi Otieno [2017] eKLR. According to the referenced provision, a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of the contract- has in part performance of the contract taken possession of the property or any part thereof; or being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.

71. On the second issue, Plaintiff submits that by the Late AKM accepting the deposit of Kshs 1.2 million and allowing the Plaintiff to take possession of the suit property and develop it to the extent he did, a constructive trust sprung up in favour of the Plaintiff, which is indefeasible. It was the recognition of the existence of the trust that the Justice Pall (as he was then) declined to strike out the Plaintiff's suit as prayed by AKN in HCC 1850 of 1993. Likewise, the late Mr Justice Moijo Ole Keiwua granted the Plaintiff the Land Control Board consent with which to transfer the property once the other aspects of the transaction were duly complied with. The Plaintiff relies on the decisions in Steadman v Steadman [1976] AC 536; Yoxley v Gotts & another [2000] CH.16; Lloyd Banks PLC v Rosset [1991] 1 AC 107, 132; and Mwangi & another v Mwangi [1986] KLR 328 on the validity of constructive trusts.

72. On the third issue, the Plaintiff asserts that if the Court accepts the forgoing submissions as correct then the auction purportedly held on 26/4/2005 which was done by the 2nd Defendant oblivious of the Plaintiff's rights was illegal, null and void. This is because it took no cognizance of the Plaintiff's equitable rights to the suit property after they had arisen. The Plaintiff further argues that the highest bidder of

the auction was David Nduati Gakibe at Kshs 19 million, and the auction was called off at the very last minute. This has been denied by the Defendants who claim that the highest bidder was Hon. Elias Mbau at Kshs 23 million, yet he has not been called to the stand to confirm this.

73. On the fourth issue, the Petitioner submits that the removal of the caveat was done without notice to the caveator and, was hence illegal. The moment the 2nd, 3rd and 4th Defendants failed to follow the prescribed procedure for removal of a caveat under the Government Lands Act the whole process of transfer of the suit property became fraudulent null and void.

74. On the fifth issue, the Plaintiff alleges that the 3rd Defendant is liable for the demolition of the Plaintiff's property. This allegation is premised on the assumption that, prior to the demolition, the 3rd Defendant had already sent an auctioneer to illegally distress for rent against the Plaintiff. During the process of the distress, the Plaintiff's residence was destroyed in that some windows and doors were removed. The Petitioner argues that the similar facts evidence rule proceeds on the basis of evidence that bears similarity from which a reasonable inference may be drawn to the effect that the person who dares to make the illegal distress and eviction would most probably be the one that would dare take such drastic and illegal action subsequently.

75. On the next issue, the Plaintiff alleges that the 2nd Defendant did not apply Section 39 of the CBK Act between 1991-18th April 1997; did not apply the legal maximum rate of interest of 19% per annum upto April 1997 when the interest rates were decontrolled; never implemented the CBK Amendment Act 2000 in force between 1st January 2001 and 31st July 2005; and never obtained ministerial approval prior to the imposition of varied bank charges. Reliance is placed on the findings in Samuel Ndiba Kihara & another Housing Finance Company of Kenya Ltd & 2 others [2016] eKLR; Gatu Nderitu v Kenya Commercial Bank Ltd [2011] eKLR; and Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited [2014] eKLR. Since the 2nd Defendant did not comply with the law, it is submitted that the sale to Hon. Elias Mbau was illegal, null and void.

76. On the final issue, it is submitted that, being predicated on equity, the Plaintiff's suit succeeds and the orders should issue.

1st Defendant's Submissions

77. The 1st Defendant through his Submissions dated 1st February 2021, identifies the issues for determination as:-

- a) *Was there a valid agreement for sale of the suit land L.R No. 74/16 entered into between the Plaintiff and the Late Ngumba?*
- b) *If there was a valid agreement for sale of the suit land, what were the terms?*
- c) *If there was a valid agreement for sale of the suit land, did the Plaintiff live up to his obligations therein?*
- d) *Is the suit barred by the Limitation of Actions Act (Cap 22)?*
- e) *Is the equitable doctrine of a constructive trust applicable in the circumstances of the case?*

78. In the foregoing, the 1st Defendant denies the allegation that the Hon. Elias Mbau was not called to the stand. In fact, he testified on 6th November 2018 as the 2nd Witness of the 3rd Defendant.

79. On the first issue, the 1st Defendant submits that the agreement for sale drawn on or about June 1991 was not valid for non-compliance with the provisions of the Law of Contract Act as it is unwritten, unsigned and unattested. This assertion is supported by the decisions in Patrick Tarzan Matun & another v Nassin Shariff Abdulla & 2 others [2009] eKLR; Silverbird Kenya Limited v Junction Ltd & 3 others [2013] eKLR; and Daudi Ledama Moritat v Mary Christie Kiarie & 2 others [2017] eKLR. Furthermore, even if the pre-2002 provisions were to apply, the same would not cure the claim by the Plaintiff as there was no part performance by any of the parties. The allegation by the Plaintiff that he paid Kshs 1,200,000/- to the Late Ngumba was unsubstantiated and was not supported by any evidence. Similarly, the Late Ngumba never transferred any land to the Plaintiff.

80. On the second issue, it is submitted that the Plaintiff did not produce any sale agreement nor did he explain how the purchase price is to be paid and omitted other details such as the description of the parties and dispute resolution clause. There is also an inconsistency in the acreage of the property as the Plaintiff pleaded that he bought 26.5 acres while in his witness statement adopted under oath in Court states that he bought 23 acres. It is concluded that the inconsistencies of terms are conclusive that no sale ever existed.

81. On the next issue, it is averred that if the agreement was valid, the Plaintiff did not fulfil his obligations as a purchaser by paying the full purchase price of Kshs 4.4 million, according to his pleadings, or Kshs 4.1 million according to his witness statement. Moreover, the Plaintiff has never produced evidence to support the allegation that he paid the Kshs 1.2 million. As a consequence of the breach, the Plaintiff is undeserving of any remedies sought. The Court is urged to find in concurrence with the case of Kyangaro v Kenya Commercial Bank Ltd & another [2004] 1KLR 126 and Patrick Waweru Mwangi & another v Housing Finance Co. of Kenya Ltd [2013] eKLR where the Courts explored the maxim of *he who comes to equity must come with clean hands*.

82. On the fourth issue, the 1st Defendant asserts that the suit must fail as it is time barred under Section 7 of the Limitation of Actions Act as the alleged cause of action arose on 10th June 1991 and he filed the suit 18 years later in 2009. This is buttressed by Haron Onyantha v National Police Service Commission & another [2017] eKLR and Meta v Shah [1965] E.A 321.

83. On the final issue, it is submitted that a constructive trust can only flow from the intention of the parties, which is not the position in the instant suit. The Late Ngumba never intended to sell his land to the Plaintiff and vehemently denied ever making any sale until his demise.

Further, the Plaintiff never tendered any evidence to support payment of any money towards the purchase price of the suit land. This is supported by the cases of **Peter Ndungu Njenga v Sophia Watiri Ndungu [2000] eKLR as cited in Juletabi African Adventure Limited & another v Christopher Micheal Lockley [2017] eKLR.**

2nd Defendant's Submissions

84. The 2nd Defendant filed Submissions dated 7th October 2020 in which it raises three issues for determination:-

- i. Whether the suit is res judicata.*
- ii. Whether the Plaintiff has the locus standi to institute this suit.*
- iii. If not so, whether the Plaintiff has a claim as against the 2nd Defendant.*

85. On issue one it is submitted that the matter meets the threshold is *res judicata* and the current case is a cosmetic and surgical operation of the HCCC No. 1850 of 1993 and HCCC No. 1531 of 1991. They urge the Court to make a finding that the former suit having been abated and the latter one having been dismissed for want of prosecution, this suit was (and is) *res judicata* and cannot stand. Reliance is placed on the case of **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR** cited with approval in **Njue Ngai v Ephantus Njiru Ngai & another [2016] eKLR; Co-operative Bank of Kenya Limited v Cosmos Mrombo Maka & Legacy Auctioneering Services [2019] eKLR;** and **Omondi v National Bank of Kenya Limited & others [2001] EA 177.**

86. On the second issue, they submit that the Petitioner was not the registered owner of the property but was just the registered debtor, therefore he cannot challenge the auction sale. In the absence of any legal or registerable right by the Plaintiff, then he cannot purport to defeat the 2nd Defendant's legal and registered right as a Chargee. The Defendant cited the holdings in **Caneland Limited v Africa Banking Corporation Limited [2016] eKLR** on who between the borrower and charger has the *locus standi* to obtain an injunction against the chargee.

87. On the third issue, the Defendant submits that the 1st Defendant's equity of redemption was extinguished at the fall of the hammer. Any underlying relationship between the Plaintiff and the 1st Defendant in the form of a constructive trust would suffer the same fate. The Plaintiff can only claim from the 1st Defendant.

3rd Defendant's Submissions

88. Through its submissions dated 18th November 2020, it is submitted that the Plaintiff's suit is premised on an undated, unsigned sale agreement, which the Plaintiff wishes to have the Court infer the creation of a constructive trust between the Late Ngumba and himself. However, the Plaintiff has failed to prove that there was a common intention between him and the Late Ngumba and his claim for constructive trust is an afterthought brought over 30 years after the fact. This is supported by the case of **Robert Mbui v Kennedy Mwanzia Musembi [2019] eKLR** and **Peter Ndungu Njenga v Sophia Waitiri Ndungu [2000] eKLR** on the presumption of trusts.

89. On whether the Hon. Mbau was an innocent purchaser for value the 3rd Defendant relies on the witness testimonies of its witness, Hon. Mbau, as well as the 2nd Defendant's witness. Further reliance is placed on the decision of the Court in **HCCC 285 of 2005 John Mwenje Ngumba v K.C.B and Hon. Mbau.** where it was held that the Hon. Mbau was an innocent purchaser for value in the auction and he lawfully obtained a clean title to the property. Further reliance is placed on the decisions in **Kitu & another v Standard Chartered Bank & another (No. 2) [2002] 1 KLR 640; Joyce Wairimu Karanja v James Mburu Ngure & 3 others [2018] eKLR** and **Etrade Limited & another v Thrift Estates Limited & 2 others [2019] eKLR** where the Court determined on the issue of who is an innocent purchaser at an auction and what remedies are available to the aggrieved person.

90. It is further submitted that on the allegation that the 3rd Defendant caused the Plaintiff's property to be demolished, the Plaintiff never reported the allegation to any police station and or lodged any formal complaint about the same. Moreover, no reasons have been given for his allegations.

4th Defendant's Submissions

91. The 4th Defendant filed Submissions dated 10th March 2021 raising that the issue for determination are:-

- a) Whether the late Andrew Ngumba held suit land in trust for the Plaintiff.*
- b) Whether the sale dated 26/4/2005 was illegal, null and void.*
- c) Whether an order can be issued calling for surrender of the title issued to the 3rd defendant and or failing which the principal registrar take steps cancelling the title thereof*
- d) Whether an order can issue compelling the 5th Defendant to execute suitable discharge of the charge.*
- e) Permanent injunction against the defendants from claiming the suit land.*

f) General damages for fraud and deceit

92. On the first issue, the Defendant submits that the suit Land L.R 74/16 was duly registered in the name of the Late Ngumba and there is no evidence produced showing any agreement for the alleged trust. Moreover, it is contended that the suit land was to be used as security for a loan taken by the landowner on behalf of the Plaintiff and not the alleged sale. The Defendant further asserts that the document ZMG-2 in the Plaintiff's bundle of documents is dated 31st August 1996 which is 4 years after the registration of the charge dated 1991 and hence the suit land was encumbered by the 2nd Defendant and there could be engagement in the absence of the 2nd Defendant's registered interest. Finally, the said agreement is not executed as per the law society conditions of sale nor have the parties signed the said agreement.

93. On the second issue, it is submitted that the sale was vide a public auction by the 2nd Defendant in realization of the debts that had been created over the suit land. The Plaintiff witnessed and attended the auction proving that there was proper notice and knowledge that the security had been sold and the 2nd Defendant was entitled to realize its debt by the sale of the suit land. The Defendant relies on the Indian Transfer of Property Act 1989, which stated that the right of the mortgagee was superior to any other right over the registered property, and in execution of the said right the mortgagee shall not be precluded by any action to register the interest.

94. On the third issue, it is averred that the Plaintiff has not produced any evidence that can negate the purchase and transfer of the suit land to the 3rd Defendant and hence the Plaintiff has failed to discharge the burden of proving why the 3rd Defendant should surrender the title for L.R. 74/16, and the claim should be dismissed.

95. On the fourth issue, the Defendant asserts that the Plaintiff did not adduce any evidence of knowledge of the alleged disputed history of the suit land and nor was any alleged evidence brought to the attention of the 5th Defendant and hence the claim is frivolous and vexatious.

96. On the final issue, it is contended that the Plaintiff has not discharged the burden that indeed the Defendants and or more specifically the 4th Defendant caused any damages through deceit and or fraud to wit the claim for the said damages arises.

5th Defendant's Submissions

97. The 5th Defendant vide submissions dated 28th July 2020 avers that the issues for determination are:-

i. If HCCC 1850 of 1993 filed by the Plaintiff against the late Andrew Kimani Ngumba seeking L.R. 74/16 Kiambu abated, does the Environment and Land Court have jurisdiction to try the present fresh suit by the Plaintiff against the estate of the Late Andrew Ngumba the over the same suit property?

ii. Does the Environment and Land Court have jurisdiction to try matters to do with Banker- Customer relationship that relate to charges, mortgages, statutory sale, accounting and interest rates charged by a banker in breach of the Central Bank and Banking Acts?

iii. Was there a legally enforceable agreement for sale of L.R Number 74/16 between the deceased and the Plaintiff?

iv. Is the equitable doctrine of constructive trust applicable in the circumstances of this case?

v. Was the suit property sold at the auction held on 26/04/2005 or was there fraud practised on the Plaintiff?

vi. Who is liable for demolition of the Plaintiff's property within the suit property?

vii. Who should bear the costs of the suit?

98. On the first issue, it is submitted that Plaintiff's present suit is strictly forbidden by mandatory provisions of Order 24 rule 7 of the Civil Procedure Rules 2010. The Plaintiff's claim for the suit property L.R. No. 74/16 Kiambu from the Estate of the late Andrew Kimani Ngumba was extinguished the moment the initial suit HCCC 1850 of 1993 abated. The Court is urged to decline to determine the portion of the claim that relates to ownership of the suit property L.R No. 74/16 which was the subject matter of the abated suit HCCC 1850 of 1993 which was extinguished and never revived. Reliance is placed on the Court of Appeal decision in **Rebecca Mijide Mungole & another v Kenya Power and Lighting Company Ltd & 2 others [2017] eKLR.**

99. On the second issue, the Defendant avers that the Court lacks jurisdiction to deal with the portion of the claim relating to charges by the 5th Defendant, mortgages by the 2nd Defendant, auctions in the Banker-customer relationship, loan accounts and interest charged as those are matters which fall within the civil jurisdiction of the High Court. They rely on the Court of Appeal case of **Co-operative Bank of Kenya Ltd v Patrick Kangethe Njuguna & 5 others [2017] eKLR.**

100. On the next issue, it is contended that there was no legally enforceable agreement between the Plaintiff and the Late Ngumba. Moreover, the absence of consensus as idem and any agreement in writing renders the alleged agreement unenforceable.

101. On the fourth issue, the Defendant reiterates that this Honourable Court is barred by law from trying this question regarding the ownership of the suit property which was in issue in HCCC 1850 of 1993 and which was extinguishing when the suit abated. The Defendant contends that the doctrine of constructive trusts is not applicable in this case as at the filing this suit there was no substratum upon which this Honourable Court could find that a constructive trusts exists. They quote the decisions in **Peter Ndungu Njenga v Sophia Watiri Ndungu [2000] eKLR;** and **Heartbeat Ltd v Ng'ambwa Heartbeat Community Children's Home & Rescue Center [2018] eKLR** where the

Court has determined that where no intention to create a trust is discernible the Court will not presume a trust.

102. On the fifth issue, it is asserted that the Plaintiff has failed to prove his case against the 5th Defendant herein on a balance of probabilities.

103. On the liability for the demolition of the Plaintiff's property, the Plaintiff was never the registered owner of the land and the value of the land cannot be paid to him. They submit that the prayer for payment of Kshs 160,000,000/= is untenable in light of the action filed a Judicial Review case against the District Commissioner and urge the Court to dismiss the claim. The Defendants pray for the costs of the suit.

Analysis and Determination

104. I have considered the pleadings, the evidence on record, the written submissions filed on behalf of the respective parties and the authorities cited. The issues for determination are:-

- (i) Whether there was a valid sale agreement between the plaintiff and the deceased.*
- (ii) Whether there was a constructive trust created in favour of the plaintiff.*
- (iii) Was the suit property properly sold by the 2nd defendant at the public auction held on 26th April 2005?*
- (iv) Was the transfer in favour of the 3rd defendant proper?*
- (v) Is the plaintiff entitled to the reliefs sought?*
- (vi) Whether this court lacks jurisdiction to hear and determine this suit on the grounds of res judicata and the abatement of HCCC 1850 of 1993.*
- (vii) Whether the suit is time barred under section 7 of the Limitation of Actions Act.*
- (viii) Is the 3rd defendant entitled to the prayers sought on the counterclaim?*
- (ix) Who should bear costs of the suit?*

105. It is the plaintiff's case that there is a valid agreement for sale between him and the late Andrew Kimani Ngumba (deceased). That the total purchase price was Kshs.4.4. million. That he made an advance payment of Kshs.1.2 million. He also stated that he is in occupation of the suit property. **Section 3(3)** of the Law of Contract (Cap 23) Laws of Kenya provides :-

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) (ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

It is not in dispute that the plaintiff relies on a sale agreement that is not dated, signed nor witnessed.

106. PW4 Fackson Wainaina Kagure an advocate told the court that the deceased asked him to prepare a sale agreement between him and the plaintiff in respect of LR NO 74/16 but he refused to sign. He stated that neither party signed the agreement. The plaintiff admitted in his testimony in court that the deceased denied that he had sold him the suit property. The plaintiff also admitted that he never paid the full purchase price.

107. He stated that the Kshs.1.2 million was a deposit of the purchase price. In the case of **Leo investment Ltd vs Estuarine Ltd [2017] eKLR** the court stated that:-

“28. The Law of Contract Act (Cap 23) was enacted in 1960 and its purpose was to apply the English Common Law of Contract to Kenya with certain modifications.

29.....

30.....

31. *The legal framework in Section 3(3) of the Laws of Contract Act was informed by the desire to settle the uncertainty surrounding the pre 2002 framework which hitherto permitted written memoranda and part performance as saving elements in non-complaint land disposition contract. In my view Section 3(3) of the Law of Contract makes a strict formal requirement whose legal ramification is to completely preclude the cognizance of any non-compliant contract for a disposition of interest in land unlike in the pre-2002 framework, written evidence by way of memoranda would not save a non-compliant contract. Similarly, the doctrine of part performance was abolished by the framework in Section 3(3) of the Law of Contract Act. The net effect is that a contract which does not meet the formal requirements set out in Section 3(3) of the Law of Contract Act is a nullity ab initio.*

32. *In the present dispute, the material contract was signed by only one party, the plaintiff. There is ample jurisprudence on the legal validity of a land sale contract that is signed by only one party. In Kakal Properties Devt Ltd vs Tafazzal H. Maloo & 3 Others [1993] eKLR the Court of Appeal pronounced itself on a similar dispute where only one party had signed the agreement for sale of land. Commenting on the legal framework in Section 3(3) of the Law of Contract Act, Muli JA held as follows:-*

“With greatest respect, the learned trial judge misdirected himself completely. In the first place, it matters not what the parties or one of them believed or was made to believe. The real issue was whether the agreement was duly executed by the parties and if not, was the agreement binding and enforceable against any of the parties?.....”

It is trite law on this point and is made beyond doubt under section 3(3) of the Law of Contract Act (Cap 23) Law of Kenya.

I hold that the intended agreement between the appellant and the purchaser was inoperative and therefore unenforceable for lack of execution by the appellant; the sum total was that there was no valid agreement enforceable in law.....”

In the instant suit the draft sale agreement by Fackson Wainaina Kagire was not signed by any of the parties.

108. I find that there is no valid sale agreement that the plaintiff can rely on. In the case of **Silverbird Kenya Ltd vs Junction Ltd & 3 Others [2013] eKLR** the court stated as follows:-

“.....in my view it matters not whether the plaintiff had been let into possession of the premises if the contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law. The letter of 19th August 2009 in my view does not satisfy the requirements of Section 3(3) of the Law of Contract Act to be the foundation of the plaintiff’s claim against the defendant. Section 3(3) of the Law of Contract Act is indeed couched in mandatory terms and does in fact divest the court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the Law of Contract Act, the plaintiff’s suit must fail for being in contravention of Section 3(3) of the Law of Contract Act, (Cap 23 Law of Kenya)”

109. I agree with the 1st defendant’s submissions that even if the pre-2002 provisions were to apply the same would not cure the claim by the plaintiff as there was no part performance by either of the parties. The plaintiff produced a receipt dated 10th June 1991 for Kshs.1,200,000 by Mbangi Investments Inc. It is written being payment of LR NO 74/16. I find that this receipt does not aid the plaintiff’s case as it does not say much. It does not amount to an acknowledgement in furtherance of a sale agreement.

110. On the issue of whether there was a creation of a constructive trust. According to Black Law Dictionary 8th Edition a trust is defined as, *“the right enforceable solely in equity to the beneficial enjoyment of property to which another holds legal title, a property interest held by one person (Trustee) at the request of another (settlor) for the benefit of a third party”*.

A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing”.

I agree with the submission by the 1st defendant that a constructive trust can only flow from the intention of the parties. This is not the position in the instant suit. There is no valid sale agreement. The plaintiff did not pay the full purchase price. The late Andrew Ngumba in his lifetime denied that he sold the suit property to the plaintiff.

The plaintiff admitted in evidence that the deceased denied that he sold the land to him. In the case of **Peter Ndungu Njenga vs Sophia Watiri Ndungu [200] eKLR** as was cited in **Juletabi African Adventure Ltd & Another vs Christopher Michael Lockley [2017] eKLR** the Court held that:-

“The concept of trust is not new. In case of absolute necessity; but only in case of absolute necessity; the court may presume a trust. But such assumption is not to be arrived at easily. The court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied”.

It appears in the instant suit that the late Andrew Ngumba never intended to sell the land to the plaintiff. He denied ever making such a sale until his demise. The plaintiff has failed to demonstrate any intention of the parties to create a trust.

111. It is the plaintiff’s case that he further agreed with the late Andrew Ngumba to guarantee him (plaintiff) a loan from the 2nd defendant. The title for the suit property was given as security. The plaintiff admitted that he defaulted in the loan repayments. He stated that the public auction held on 26th April 2005 was fraudulent. It is not in dispute that the plaintiff was not the registered owner of the suit property to be

auctioned. He stated that he attended the auction on 26th April 2005 in the company of his nephew who bid for Kshs.19 million. That there was another bid for Kshs.17 million. That the auction was abruptly cancelled but was later surprised that the suit property had been sold to Elias Mbau a director of the 3rd defendant.

112. The plaintiff nephew (PW3) told the court that after the auction he was called into a room where he signed some documents. Elias Mbau was also asked to sign. I find that the plaintiff failed to substantiate his claim that the auction did not take place.

113. DW3 Elias Peter Mbau told the court that he attended the auction on 26th April 2005 in the company of DW3 his co-director. He stated that his bid was the highest at Kshs.23 million. He paid a deposit of 25% on that date. He produced some receipts for some cheques which he issued. He further stated that he could not pay the balance within 90 days owing to the case filed by the 1st defendant being HCCC 285 of 2005.

114. DW4 Joseph Mungai Gikonyo, the auctioneer confirmed that a public auction took place on 26th April 2005 and DW3 Elias Mbau who was declared the highest bidder at Kshs. 23 million and signed a memorandum of sale. He produced the notification of sale, a certificate of service, a valuation report by the bank and a copy of the advertisement as exhibits in this case.

115. It is very clear from the evidence on record that the plaintiff was not the mortgager. He was only the principal debtor. He cannot challenge the auction. The plaintiff further claims that the 2nd defendant over charged his account. It is admitted that the report by PW6 was made without the benefits of statement of accounts for the period 1992 to July 1995. The report cannot be said to be conclusive. In the case of **Venture Capital and Credit Ltd vs Consolidated Bank of Kenya Ltd** the Court of Appeal stated as follows:-

“.....the suit property does not belong to the applicant. The owner of the property M/S Komarock View Estate Limited is not a party to the suit and has not challenged the intended exercise of statutory power of sale by the Bank. So even if the suit property is sold the applicant will not lose any proprietary right to the property. In the circumstances, If the appeal succeeds, damages would be the only relief appropriate to the applicant. It has not been, said that that the respondent’s bank has no means to pay compensation that may be ordered”.

I find that the suit property was properly sold by the 2nd defendant at the public auction held on 26th April 2005. The 1st defendant’s equity of redemption was extinguished at the fall of hammer. I find that the plaintiff has no valid claim against the 2nd defendant.

116. It therefore follows that the suit property is properly transferred to the 3rd defendant. It is the plaintiff’s case that the 2nd, 3rd and 4th defendants failed to follow the prescribed procedures for removal of a caveat hence the whole transfer of the suit property is fraudulent, null and void. In the case of **Nancy Kahoya Amadwa vs Expert Credit Ltd & Another [2015] eKLR**. The Court of Appeal held thus:-

“The 2nd respondent argues that he was an innocent purchaser for value and was not a party to the fraud.

This brings us to the question/ What is the extent of due diligence to be exercised by the purchaser? In Captain Patrick Kanyagia & Another vs Damaris Wangeci & Others, this court held there is no duty cast in law or an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell.....”.

I find that the 3rd defendant was not privy to the dispute between the 1st, 2nd defendants and the plaintiff. In any case a caveat cannot confer any registrable rights and cannot override the rights of a chargee to realize security.

117. I find that the plaintiff has not tendered evidence to negate the purchase and the transfer of the suit property to the 3rd defendant. The 3rd defendant cannot be called to surrender the title as the transfer in its favour was properly done. I would not say much about the sale by private treaty between the 1st defendant and Elias Mbau. This is because as stated earlier the plaintiff was not the registered owner of the suit property and could not challenge the auction. Having said so I find that the transfer in favour of the 3rd defendant was proper.

118. The plaintiff has particularized allegations of fraud against the 1st – 5th defendants. Taking into consideration the totality of the evidence adduced I find that the plaintiff was unable to prove any allegations of fraud against any of the defendants.

It is now well settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt as was held in **Arthi Highway Developers Ltd vs West End Butchery Ltd 7 6 Others [2015] eKLR** where the Court of Appeal stated thus:

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs; precedent of pleadings 13th Edition at Page 427:-

“Where fraud is intended to be charged there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Willingford v Mutual Society [1880] S App Case 685, at 697, 707 709, Garden Neptune v Occident [1889] 1 Lloyd’s Rep 305,308)

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Laurence vs Lord Noreifs [1880] is App Case 210 at 221. It is not

allowed to leave fraud to be inferred from the fact pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy v Garrett [1878] 7 Ch.D 473 at 489) “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which an account ought to take notice”.

119. The upshot of the matter is that the plaintiff’s case cannot succeed for the reasons given in the foregoing paragraphs. The plaintiff told the court that the 3rd defendant sent a bulldozer and goons to undertake demolition of his house. When cross examined by the 3rd defendant’s counsel he stated that he could not recall the date the house was demolished. I find that he failed to prove that the demolition was undertaken by the 3rd defendant. he is not entitled to any of the reliefs sought.

120. The defendants argue that the cause of action herein has been raised on other suits being HCCC NO 1850 of 1993 and HCCC 1531 of 1999, where the plaintiff had sued the 1st and 2nd defendant respectively. That HCCC 1850 of 1993 abated after the demise of the late Ngumba. No application was filed to substitute him with the 1st defendant. (Deceased’s legal representative). The plaintiff admitted that he did not make the application within one year.

Order 24 rule 4 of the Civil Procedure Rules provides that:-

“(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.”

It therefore means that where the cause of action survives the death of a party in a suit the suit may continue if the application is made within one year for the legal representative to be enjoined the proceedings. If such application is not made then the suit shall abate. The effect of the suit abating is that no fresh suit can be brought on the same cause of action. The Court of Appeal in **Rebecca M’Jide Mongole & Another vs Kenya Power & Lighting Co. Ltd & 2 Others [2017] eKLR** held that:-

Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff’s legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted.”

It means that HCCC 1850 of 1993 abated.

121. It is also the defendant’s case that the suit is res judicata. The plaintiff on the other hand claims that the current suit cannot be res judicata as the former suit concerned the same subject matter but a different cause of action. **Section 7** of the Civil Procedure Act provides that:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

122. In the case of **IEBC vs Maina Kiai & 5 Others [2017] eKLR** the Court of Appeal held that:-

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) *The issue was heard and finally determined in the former suit.*

(e) *The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”*

123. Similarly in **Cooperative Bank of Kenya Limited vs Cosmas Mrombo Moka & Legacy Auctioneering Services [2019] eKLR** that:-

“[14] Undeniably the doctrine of res judicata is founded on public policy, which is aimed at achieving two objectives, namely, that there must be a finality to litigation and that a party should not be vexed twice on account of the same litigation. In the present appeal, it is not in dispute that both the former and the latter suit had the same parties in common. Also not disputed in this appeal, is the finding by the learned Judge that the subject matter in the two matters was one and the same; namely the recovery of monies owed in respect of an outstanding loan. What the appellant has laboured to contest is the finding that the former suit was not heard and decided within the meaning of Section 7 aforesaid.

[17] As stated hereinbefore, this Court has already addressed its mind as to whether a matter dismissed for want of prosecution could be resuscitated through a fresh suit and the categorical answer was that it could not as doing so would offend the doctrine of res judicata. Consequently, this matter being completely on four with the Njue Ngai matter, we find no justifiable reason to allow a party who had litigated on the same issues to re institute a similar suit. In our considered view, the former suit having been dismissed for want of prosecution, the latter suit was res judicata and cannot stand. The 1st respondent filed a suit which he failed and neglected to prosecute, it cannot be proper for him to wake up again and decide to start the same process again. We agree with the appellant this would be contrary to public policy that litigation must come to an end and the best the 1st respondent could do was to invoke the appellate process and not filling a fresh suit.”

124. It is true that the 1st defendant was not a party in HCCC 1850 of 1993. However, after procuring letters of administration for purposes of litigating as the personal representative of the deceased he has been sued in this capacity. There are four additional defendants in this suit. In the case of **Henry Wanyama Khaemba vs Standard Chartered Bank of Kenya Limited [2008] eKLR** it was held:-

“It is clear in my mind that parties cannot be allowed to go on in litigating the same subject matter with the same parties before different courts of equal jurisdiction simply because he makes cosmetic changes to the parties and often times the issues in an attempt to get what could not have been obtained in the earlier suit involving the same parties over the same subject matter. It is often desirably that there ought to be an end to litigation no matter how unpalatable and/or unpleasant the result may be to the aggrieved party. The discontinuance of the former suit, the failure to disclose the refusal of Ochieng J to grant the injunction sought and the filing of the present suit were all designed and/or employed to mislead this court and defeat the right of the bank to exercise its statutory power of sale.

In my humble view parties must go to court with all their causes of action and must sue all the persons they ought to sue. The doctrine of res judicata prohibits parties by suing in bits and pieces or giving a subsequent case a legal face lift by removing parties who are part of the earlier dispute and/or case filed and determined. The plaintiff was aware that HCCC No.45 of 2005 concerned the same subject matter as in the present suit. And if there was a defect in the earlier suit the opportunity of amendment was not exercised. The earlier suit was challenging the sale of the plaintiff's property which challenge was lost through the ruling of Ochieng J delivered on 19th July, 2005. In my humble view since application of injunction was dismissed in HCC 45 of 2005 and the plaintiff discontinued that suit and filed the present suit and obtained an order of injunction, the said action amounts not only to a res judicata but a fragrant abuse of court process. I take the view that the present suit should not have been filed without sufficient reasons and before payment of the costs incurred in the earlier suit by the bank. That has not been done by the plaintiff. And since the issues and the parties are similar and/or the same, the plaintiff by removing three defendants from this suit cannot purport to change the subject in this suit. In any case the three other defendants left out in this suit are not essential to the determination of the suit. The important thing is that in both suits the plaintiff intends to stop and/or injunct the defendant from realization of the security.”

125. In my view although the plaintiff has joined the 1st and 2nd defendants in one matter and added three new parties to these proceedings the matter still falls within the substance of res judicata. The claim against all the defendants emanates from the same cause of action, being whether there was a valid sale agreement between the plaintiff and the deceased. The claim herein is for ownership of the suit property, payment of Kshs.1.2 million as part payment for the land and the right of the 2nd defendant to auction the property. These issues arose in the former suits.

126. The root of the matter in this suit is the ownership of LR NO 74/16 and whether the Kshs.1.2 million was paid by the plaintiff as consideration for the purchase of the land or whether it was consideration for giving out the title for LR NO 14/16 as security for a loan. If these issues were not at the heart of the plaintiff's case then the case against the 2nd, 3rd, 4th and 5th defendants would not exist. This suit is not only res judicata but cannot proceed due to the fact that HCCC 1850 of 1993 abated upon the demise of the late Ngumba and failure by the plaintiff to substitute the 1st defendant.

127. The defendants have also raised the argument that the suit is time barred under Section 7 of the Limitation of Actions Act. The cause of action arose on 10th June 1991. This suit was filed in 2009, which means it was filed eighteen (18) years later. Section 7 as read together with section 26 of the Limitation of Actions Act and having made a finding that there was no fraud by the defendant herein makes this suit is time barred. I find that it is time barred.

128. The upshot of the matter is that the plaintiff's case against the defendants fails. The same is dismissed with costs to the defendants.

129. Consequently, the 3rd defendant's succeed in its counterclaim. I enter judgment in its favour as follows:-

(a) That a declaration is hereby issued that the 3rd defendant is validly registered as the proprietor of LR NO 74/16 situated in North East of Nairobi having been validly nominated by Elias Mbau who placed the winning bid at the auction that took place on 26th April 2005.

(b) That costs of the suit be awarded to the 3rd defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 29TH DAY OF JULY 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Kyalo Mbobu for the Plaintiff

Ms Kemboi for Mr. Nyairo for the 1st Defendant

Ms Nzaki for Mr. Mwangi for the 2nd Defendant

Mr. Chege for the 3rd Defendant

No appearance for the 4th Defendant

Ms Maina for Ms Cheruiyot for the 5th Defendant

Phyllis – Court Assistant