Maritim & 11 others v Tenai & 2 others (Civil Case 32 of 2019)
[2024] KEHC 14802 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KEHC 14802 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE 32 OF 2019

JRA WANANDA, J

OCTOBER 4, 2024

BETWEEN

HEZEKIAH KIPKORIR MARITIM ..... 1ST PLAINTIFF

LOICE CHELAGAT NGOSOSOSEI ..... 2ND PLAINTIFF

PATRICK MAKHAMA OKONDA ..... 3RD PLAINTIFF

JEPKEMEI CHANGWONY ..... 4TH PLAINTIFF

TONY KIPROTICH MAIYO ..... 5TH PLAINTIFF

EVERLYNE MUHATIA SHIVACHI ..... 6TH PLAINTIFF

JULIUS KIMAIYO KIMETEI ..... 7TH PLAINTIFF

SAMMY KIBET KOSGEI ..... 8TH PLAINTIFF

MILKA KOSKEI ..... 9TH PLAINTIFF

MATTHEW NGETICH ..... 10TH PLAINTIFF

ALEX MALAKWEN MITEI ..... 11TH PLAINTIFF

WILLIAM TUITOEK KANDAGOR ..... 12TH PLAINTIFF

AND

PHILIP KIPKOECH TENAI ..... 1ST DEFENDANT

JONATHAN KIPKETER KURGAT ..... 2ND DEFENDANT

COMMERCIAL BANK OF AFRICA LIMITED ..... 3RD DEFENDANT

JUDGMENT

1. This is another one of those old matters that have taken too long to be concluded. The suit was filed through Messrs Gicheru & Co. on 11/09/2015 in the Environment and Land Court as Eldoret ELC Case No. 361 of 2015 before it was transferred to this Court, seemingly because it touched on the exercise of a Chargee's statutory power of sale. Upon its transfer, it was assigned the current case number. The suit has therefore been in Court for more than 9 years.

2. I took over the matter on 14/2/2023 when it was already part-heard before Hon. Justice E. Ogola who had taken the evidence of the Plaintiff's 1st witness (PW1). By consent, the parties requested me, and I agreed, to take over and proceed with the hearing from where it had stopped.

3. The Plaintiff's claim is contained in the Amended Plaint dated 4/06/2021 and filed on 9/06/2021. The same seeks Judgment as follows:

    a. A declaration that the acts of the Defendants in seeking to exercise the Chargee's statutory power of sale are unlawful coupled with a perpetual injunction seeking to restrain the 3rd Defendant whether by itself, its servants and/or agents from selling or transferring the land parcel known as Eldoret Municipality Block 20 (Kapyemit)/2600.

    aa)) This Order be pleased to order the 3rd Defendant to surrender the original title to the Plaintiffs/their agent/heir or assigns and the deregistration of the 3rd Defendant's charge over all that parcel of land known as Eldoret Municipality Block 20 (Kapyemit)/2600.

    ab)) A declaratory order that the Plaintiffs are bona fide purchasers and/or owners of their respective portions of all that parcel of land known as Eldoret Municipality Block 20 (Kapyemit)/2600 as particularized in paragraph 23A above.

    ac)) That this Honourable Court be pleased to order the 1st Defendant to sign all relevant instruments for subdivision and transfer to enable the Plaintiffs acquire title of their respective portions of all that parcel of land known as Eldoret Municipality Block 20 (Kapyemit)/2600 as particularized in paragraph 23a above.

    ad)) In default to comply with (ac) above, the Deputy Registrar of this Court be authorized to sign all documents and instruments for subdivision and transfer on behalf of the 1st Defendant in execution of this decree.

    b. The Court do compel the 1st and 2nd Defendants to provide an alternative security to the 3rd Defendant and discharge Eldoret Municipality Block 20 (Kapyemit)/2600.

    c. That the Court do find the contract of mortgage between the 1st, 2nd and 3rd Defendants is void.

    d. Costs and interest at Court rates.

    e. Any other Relief as the Court may be pleased to grant

4. In the Plaint, it was pleaded that the 1st Defendant is the registered proprietor of the land parcel known as Eldoret Municipality Block 20 (Kapyemit)/2600 measuring approximately 1.522 Hectares within Uasin Gishu County (hereinafter referred to as the "suit land"), that the Plaintiffs, on various dates, individually purchased respective portions of the suit land from the 1st Defendant which portions collectively form part thereof, that the Plaintiffs are in physical occupation of their respective portions where they have constructed their houses and live with their families with no other place to call home.

It was further pleaded that the 3rd Defendant extended a financial facility (loan) to the 2nd Defendant in which the 1st Defendant was the guarantor and in which the 2nd Defendant is in breach of servicing, that the Plaintiffs, on 11/09/2015, found a notification of sale of the land in exercise of chargee's statutory power of sale and that the process of seeking to exercise the power of sale is improper. It was further pleaded that the Defendants fraudulently entered into a mortgage relationship knowing that the Plaintiffs were in occupation of the land, that no valuation of the property was carried, that the Defendant dishonestly charged the property with the intention to dispossess the Plaintiffs thereof, and that no consent was obtained from the Plaintiffs and that no exercise of exhaustion of alternative remedies has been carried out prior to resorting to sale of the collateral. It was therefore contended that the acts of the Defendants in charging the land was fraudulent.

5. Regarding particulars of fraud, as against the 1st Defendant, he was accused of fraudulent misrepresentation that the land belonged to him, failing to obtain consent from the Plaintiffs to charge the land, failing to obtain Land Control Board consent to subdivide and transfer the land to the Plaintiffs, failing to sign transfer forms and all necessary documentation for valid transfer of the respective portions to the Plaintiffs and colluding with the 2nd and 3rd Defendants to deprive the Plaintiffs of their constitutional rights over their respective portions of the land. As against the 2nd Defendant, the particulars of fraud listed were; colluding with the 1st and 3rd Defendant to deprive the Plaintiffs of their constitutional rights over their respective portions of the land, fraudulent charging of the land and failing to obtain the Plaintiffs' consent to charge the land. As against the 3rd Defendant, the particulars alleged were; colluding with the 1st and 3rd Defendant to deprive the Plaintiffs of their constitutional rights over their respective portions of the land, fraudulently charging the land, failing to obtain the Plaintiffs' consent to charge the land, failure to issue statutory notices and failing to conduct reasonable due diligence.

6. It was then alleged that as a result of the said fraudulent acts, the Plaintiffs have suffered great damage and deprivation of their rights to their respective portions of the land. The respective acreage alleged to have been purchased by each Plaintiff was then listed as against the name of each Plaintiff together with the date of the Sale Agreement, where available.

7. There is no evidence that the 1st and 2nd Defendants entered Appearance nor filed any Statement of Defence. On its part, the 3rd Defendant relies on its Amended Statement of Defence dated 17/06/2021 and filed on 22/06/2021 through Messrs Mburu Maina & Co. Advocates.

8. In the 3rd Defendant's defence, general denials were made but substantively, it was pleaded that the 3rd Defendant advanced several credit facilities to the 2nd Defendant and that, with the agreement and consent of the 1st Defendant, the suit property, L.R. No. Eldoret Municipality Block 20 (Kapyemit) 2600 was offered as security for repayment of the credit facilities and a Legal Charge was duly registered against the property. It was contended further that at the time of creation and registration of the Charge and Further Charge, the 3rd Defendant conducted due diligence thereon and the Plaintiffs' interests were not registered against the property, that if the Plaintiffs are in possession of the land, then they acquired possession after registration of the 3rd Defendant's securities against the land and such possession, if any, does not defeat the 3rd Defendant's registered interests. It was further pleaded that the registration of the 3rd Defendant's interests over the property was legal and not tainted by any fraud or misrepresentation, that the 3rd Defendant followed all due procedure in creating its interests through the Charge and the Further Charge and has fulfilled all its obligations without infringing on any of the Plaintiffs' statutory or constitutional rights and that the Plaintiffs' averments are defamatory. It was further denied that the Plaintiffs do not have any registered rights over the property and it was stated that in no way has the 3rd Defendant trespassed into the Plaintiff's property as the 3rd Defendant

is only seeking to exercise its statutory power of sale and which power has now crystallized due to default in repayment of the loan facilities granted against the security of the property. Further defence pleaded was that the interests that the Plaintiffs' have, if any, are imaginary and therefore, an order of specific performance cannot be issued as the interests created and registered by in the 3rd Defendant's favour are legal, regular and enforceable. In conclusion, it was averred that the suit does not disclose any cause of action against the 3rd Defendant and that the Plaintiffs' relief, if any, lies against the 1st and 2nd Defendants.

9. After close of pleadings and determination of several interlocutory Applications, the matter eventually proceeded to trial. The Plaintiffs called 3 witnesses while the 3rd Defendant called 1 witness. As already stated, the 1st and 2nd Defendants did not enter Appearances nor file Defences and neither did they participate in the trial.

Plaintiffs' Evidence

10. PW1 was the 1st Plaintiff, Hezekiah Kipkorir Maritim Arap Sugut who as aforesaid, testified before Hon. Justice E. Ogola on 19/07/2022. Led by his Counsel, Ms. Kiptoo, he adopted his Witness Statement and stated that he bought his portion of the land from the 1st Defendant in 2018 vide the Sale Agreement dated 21/03/2008. He testified further that on 16/04/2014, the land was charged to the 3rd Defendant for Kshs 2,675,000/-, that the green card and the mutation for the title show that he bought from plot No. 20(Kapyemit)/158 which later became 20(Kapyemit)/2600 and that plot No. 158 was again mutated to become Eldoret Municipality Block/20/Kapyemit/1707. He stated that he has been living in the property since he bought it on 2008, that he was not informed when the land was charged in 2014, and that he only learnt of it when he was informed by the 1st Defendant's wife who gave him a letter informing them that the bank wanted to sell the land. It was his testimony that they then went to the Lands Registry to inquire and found that the title was with the bank and had been used as a guarantee a loan to the 2nd Defendant, that the statutory notice was dated 6/08/2015 and is what prompted them to come to Court. He stated that his claim against the 1st Defendant is that the 1st Defendant did not transfer the land to him after he bought it and later charged the land without the Plaintiffs' knowledge and refused to give the Plaintiffs the title. It was his further testimony that the 2nd Defendant colluded with the 1st Defendant to use the title to secure a loan fraudulently, that the bank did not give them notice about the intention to sell and also did not come to the ground to find out if there were people living on the land, and that the 3rd Defendant did not therefore conduct due diligence. He produced several exhibits, including a copy of his sale agreement and also copies of title documents, green cards, and mutations referred to above.

11. In cross-examination by Mr. Lagat, Advocate for the 3rd Defendant, the 1st Plaintiff stated that he paid the full purchase price on 21/03/2008 and expected the transfer to be completed immediately, and that the process of transferring the land had started. He conceded that as at 16/04/2014, he had not lodged any caution thereon but stated that he had by then already initiated the process of obtaining a consent from the Land Board, and that the mother title has since been submitted and his portion given to him. He testified further that the 1st Defendant's wife still lives on the land but the 1st Defendant now lives elsewhere. He accused the Defendant for fraud but conceded that he had not reported such fraud to the police. According to him, had the bank carried out due diligence, it would have found out that the Plaintiffs were living on the same land that the bank intended to charge.

12. PW2 was the 7th Plaintiff, Julius Kimaiyo Kimitei who testified before me on 24/05/2023. He stated that he bought his portion of the plot on 2/10/2010 from the 1st Defendant, that the plot that he purchased was 0.05 acres and that they agreed in writing in the presence of the Chief, village elders

and neighbours. He stated that when he purchased the portion, there were other purchasers already in occupation, that he also built and settled and that the 1st Defendant assured him that he was procuring for him the title, and that he kept inquiring and the 1st Defendant continued to give him promises. He stated that in August 2015, he received a notice from the 3rd Defendant notifying the Plaintiffs to vacate the land because the owner had lodged the title as security for a loan, and that when he inquired from the 1st Defendant, the latter told him to wait. He testified that they then checked with the Lands office and discovered that the title had been issued in 2013, that the title for the entire land was still one, that the 1st Defendant has since relocated and that although there are about 22 purchasers, only the 12 Plaintiffs have sued. He stated further that before they received the notification, the bank had never interacted with them in any way over the property. He then produced a copy of his Sale Agreement.

13. In cross-examination, PW2 stated that when he purchased his portion around 2/10/2010, the land was known as Kabyemet Block 20/158 although he conceded that he never carried out a search at the Lands office before he purchased the portion. Upon being shown several successive mutations, he conceded that the number of the land has since changed on several occasions. He stated that Block 158 gave rise to Block 20/Kabiyemet/1707 and 1708, that Block 1707 then gave rise to 13 parcels (No. 1887-1899), that Block 1887 gave rise to Block 20/2330 and 20/2331, and that 2331 gave rise to 3 plots, namely, Kabyemit Block 20/2600, 2601 and 2602. He conceded that Block 2600 is the one in issue in this suit but insisted that at the time that he purchased his portion, the plot was Block 158 which, he agreed, has since been subdivided. He also conceded that at the time of his purchase, he never obtained the consent of the Land Control Board. He insisted that he has lived there since 2010 but conceded that he has never lodged any caution or caveat over the title and that therefore the bank could perhaps not have known about his interests. He also conceded that he has never given any written notice to the 1st Defendant over the failure to complete the transfer. He reiterated that he never saw anyone from the bank or surveyors coming to the ground although he conceded that he could not have been on the ground at all times not. He however contended that if anyone from the bank had come in his absence, then his wife, neighbours or other purchasers would have seen them. He also confirmed that the bank notice is dated August 2015, that it quoted plot No. 2600 and that it gave them notice to vacate.

14. In Re-examination, he stated that all 12 Plaintiffs and also other purchasers have built their houses on the plot 2600. He stated that when he went to purchase the land, he also saw beacons for other purchasers and reiterated that he was accompanied by the sub-Chief and neighbours. He stated that the plot is the only home that he has in Eldoret.

15. PW3 was the 3rd Plaintiff, Patrick Makhokha Okonda who also testified before me on the same 24/05/2023. He testified that he bought his portion on 6/6/2014 and also bought a second plot on 7/04/2018 from one Stephen Kurgat who had also bought the same from the 1st Defendant. He then clarified that even the first plot, he had bought it from one Thomas Injamela who had also bought it from the 1st Defendant. He stated that after buying the plots, he built his home there and it is where he resides to date. He stated further that before he made the purchases, he met with the 1st Defendant who showed him a copy of the title. He too stated that he received the 3rd Defendant notice in 2015 indicating that the 1st Defendant had obtained a loan from the 1st Defendant and lodged the title as security. He then produced a copy of his Sale Agreement.

16. In cross-examination, he conceded that upon having sight of the Charge, he noted that the same was registered on 16/04/2014 a date prior to both his Sale Agreements. He also conceded that his first Agreement dated 6/06/2014 relates to Block 20/2330. He also conceded that his second Agreement dated 7/07/2018 came after the filing of this suit and stated that even as he purchased it from the seller, he was by then aware of the legal issues relating to it.

17. In Re-examination, he stated that no one told him about the Charge at the time that he bought the land. He insisted that he occupies plot numbers 2330 and 2331 and stated that he is aware that plot number 2600 was carved out of plot 2331.

Production of Plaintiffs' Further Documents by Consent

18. After DW3 testified, the parties agreed that, to save on time, one of the Plaintiffs would come to produce all the Plaintiffs' remaining respective Agreements for Sale on behalf of the rest. However, on the date when the one nominated Plaintiff was scheduled to come and do so, he was not available. To avoid an adjournment, the parties agreed that the copies of the rest of the Sale Agreements be admitted in evidence by consent. This was then done and the copies so admitted. The Plaintiffs' case was then closed and the defence case commenced.

Defendant's Evidence

19. DW1 was one Edward Kibet Korir Mabil. He stated that he is a Business Banking Relationship Manager at NCBA Bank which, he stated, took over the interests of the 1st Defendant and NIC Bank and which takeover was gazetted in 2019. He then adopted his Witness Statement and also the Defendant's various List of documents in respect to which he produced the documents listed therein save for the Charge document which he stated, he would not be producing. The documents produced included copies of a certificate of Official Search, Letters of Offer, title deed for the suit property, Valuation Report and consent to Charge. He then testified that there was no other encumbrance in the Search Report apart from that of the bank and also that no other interest, apart from those of the registered owner (1st Defendant) were found therein. He insisted that the bank conducted due diligence by engaging a qualified Valuer who visited the premises and carried out the search.

20. In cross-examination, he stated that they carried out the due diligence after the loan was approved by sending the qualified Valuer who carried out the search at the Lands Registry and also made a site visit. He stated that the Valuation was carried out on 26/02/2014 and that it captured improvements made on the land as at the time of the site visit and which included a residential block and a "duka" (shop), 2 structures. He stated that he is not aware that the structures were 10 since the Valuation only captured 2 structures. He agreed that the existence of structures would affect the value of the land and conceded that the Report refers to other semi-permanent structures which had not however been captured. He stated that since the default in repayment of the loan, the bank had contacted both the borrower and the guarantor who are the 1st and 2nd Defendants, respectively, herein and had sent demand letters to them before the bank proceeded to recovery and that they made some payments. He however conceded that he did not have copies of such demand letters. He stated that there were 2 Charge facilities, that the second was a top-up, and that the 3rd Defendant inherited the second charge from another bank. He stated that the top-up was applied for 4 months after the 3rd Defendant took over the Charge, that the 3rd Defendant conducted a valuation at that time and did not conduct another valuation at the time of the top-up as it was within a short time. He stated that they normally carry out valuations on a security after 5 years.

21. In Re-examination, he stated that the Statutory Notice dated 6/08/2015 gave the Defendants 40 days to pay and that the amount was Kshs 4,168,285.70.

Submissions

22. The parties then filed written Submissions. The Plaintiffs filed their Submissions on 18/12/2023 while the 3rd Defendant filed on 15/02/2024.

Plaintiffs' Submissions

23. Counsel submitted that it is settled in law that a formal Charge can only be enforceable when it is registered against the title of the land, that the Plaintiffs tendered evidence to show that they had interest in the charged land and thus claiming ownership of the suit parcel of land Eldoret Municipality Block 20(Kapyemit)/2600, that to prove this position, they produced their Sale Agreements dated between 2008 and 2013 and duly executed between the Plaintiffs and the 1st Defendant therein. He submitted further that the Plaintiffs showed their compliance with the provisions of Section 3(3) of the *Law of Contract Act* which is to the effect that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract is in writing, signed and witnessed, that PW1 produced the official search certificate dated 10/06/2014 to prove that the titled deed was issued to the 1st Defendant on 8/2/2013 as well as the copy of green card which showed that the First and Further Charges were registered on 16/4/2014 and 8/8/2014, respectively, and that this shows that the Charge was maliciously registered in breach of the Sale Agreements executed between the 1st Defendant as the Plaintiffs and the property had already vested in the new buyers who took possession thereof pending the processing of their titles. He contended that in view thereof, the agreements created an implied trust by operation of law that the Vendor (1st Defendant) would transfer the titles to the new owners.

24. Regarding the 3rd Defendant's contention that the Plaintiffs' interests were not registered against the title, he submitted that such argument falls short of the disclaimer on the title deed that it is subject to the existing overriding interests. He cited Section 28 of the *Land Registration Act* which lists the "overriding interests" subject to which registered land is held even when not noted on the register and among which at sub-section (b) thereof is "trusts including customary trusts". He contended that the aforementioned interest is an unregistrable right which would not have been in the Defendants' knowledge only by dint of search at the Lands register but by doing an intensive and wide legal due diligence by visiting the site to find out who was in actual possession and/or in occupation. He urged that trusts can either be classified as express trusts or implied trust (created by operation of law), that express trust as observed in the case of Samson Ngugi Philip Kangori v Peter Njuguna Samson[2018]eKLR arise from instruments of trust which are registered on the title and the registered proprietor denoted on the register as a trustee whereas implied trusts are those which there is no instrument registered on the land but it is implied from the intention of the parties at the time of conducting conveyancing transactions and they include resulting and constructive trusts. He added that the trust created from the agreements between the 1st defendant and the Plaintiffs can be perfectly described as resulting trust and cited the case of Gissing Vs Gissing (1971) AC 886 where, he submitted, the Court reiterated that a resulting trust is created when a property is purchased by one party and the purchase price is paid in whole or in part by another person on the understanding that the person paying the money will receive an interest in the property. According to him therefore, the paper title is held by one party with a trust that results back to the person who provided the money. He also cited the case of Sirma v Singoei (Civil Appeal 109 of 2018) [2022] KECA 708 (KLR) (8 July 2022) (Judgment) in which, he said, the Judge made reference to the Supreme Court of British Columbia case of Warde v Slater [2017] BCSC 274 which itself cited the legal writings of Waters' Law of Trusts in Canada, 4th ed. 2012 which contradistinguished implied trust from express trust. According to him therefore, the 3rd Defendant cannot exercise statutory power of sale on what does not belong to the 1st Defendant. On the issue of trusts, He also cited the case of Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR.

25. Counsel submitted further that the Plaintiffs were in occupation of the suit parcel and from the agreement, the 1st Defendant was to complete the transaction by transferring the property to them, that a mutation form was produced to show that sub-division had been done so as to allow the completion

by transfer of the suit portions to the beneficial owners who were the Plaintiffs herein. He urged that PW1 produced payment receipts to process title deed as a conclusive proof that the 1st Defendant was in good terms with the Plaintiffs and was ready to complete the conveyancing transaction. According to him, this evidence was not denied by the 1st Defendant who failed to enter appearance or file defence to controvert the same and that the Plaintiffs was not privy to those agreements. He also contended that the Sale Agreement is still binding between the 1st Defendant and the Plaintiffs, that no consideration having been refunded, the Plaintiffs are entitled to quiet enjoyment and possession of the subject parcels pending the transfer of the title to them. He invoked the doctrine of nemo dat quod non habet to the effect that one cannot transfer what he does not have and submitted that the sole purpose of this doctrine is to protect the interest of the beneficial owner of the property. He cited the case of Katana Kalume & another vs Municipal Council of Mombasa & another (2019) eKLR in which, he submitted, the Court cited with approval the holding in Bishopsgate Motor Finance Corporation Ltd vs Transport Brakes Ltd (1949) 1 KB 322.

26. Counsel also submitted that the 1st Defendant misrepresented the entire parcel of the land as his in disregard to the Plaintiffs' interest thereon and that this proves fraud on the part of the 1st Defendant with intent to unjustly enrich himself by charging it to the 3rd Defendant, that the 3rd Defendant failed to demonstrate that he acted in good faith and without notice, that the Plaintiffs were interested parties, that had its Valuer visited the site or even taken note of the pictures in the Valuation Report, he would have known that there were people living on that land prior to the making of the alleged Charge document. According to him, no inquiry was ever done to ascertain that the people living on the land parcel had no interest thereon and also no consents of the Plaintiffs was ever sought as well, that this disqualifies the allegation that due diligence was done and that thus the actual intent is to defraud the Plaintiffs in collusion with the 1st Defendant. He cited Section 26 of the *Land Registration Act* which provides exceptions to the absolute conclusiveness of title doctrine as including "on the ground of fraud or misrepresentation to which the person is proved to be a party".

27. He submitted further that having acquired interest over the property, though unregistered, in their favour, the Plaintiffs were the first in time and are entitled to equitable remedy followed by the second equitable charge by the 3rd Defendant, that it is a well settled principle of equity that where two equities are equal, the first in time prevails and that the Plaintiffs' equity will therefore have to be settled before the 3rd Defendant's. He contended that the Plaintiffs produced a certificate of official a search which shows that the 3rd Defendant's charge was entered on 16/4/2014 whereas the Plaintiffs' agreements were made between 2008 and 2013, that this is conclusive proof that sale took place earlier, even before the Charge was registered and that in any case, the 3rd Defendant failed to produce the Charge document as proof of its existence. He contended that the suit property comprised the Plaintiffs' matrimonial homes in which they had settled with their families and that the 1st Defendant had no issue with them living thereon since he had not pursued any remedy availed to him under Section 152 of the *Land Act* on eviction of trespassers to show that he had any ownership dispute with the Plaintiffs. He cited the case of Wangui & 2 others v Wangui & another (Environment and Land Appeal 3 of 2021) [2022] KEELC 3755 (KLR) (29 June 2022) (Judgment) on the principle that "when two equities are equal, the first in time prevails" and in which, he submitted, the Judge cited the case of Augustine Thuo v James Maina Thuita & Another [2020] eKLR.

28. On whether there was a valid Charge and whether the same is enforceable against the Plaintiffs, he submitted that the alleged Charge is a mere sham registered without any regard to the legal process of securing a Charge over a suit property in Kenyan laws thus rendering it unenforceable in law, that for a Charge to be created, there need to be an express written document known as a Charge duly executed by the parties thereon, that although it was DW1's testimony that a Charge was registered

on 16/4/2014, the Plaintiffs and the Court are strangers to such Charge as it was not produced in evidence, that although a certificate of official search dated 10/6/2014 was produced as proof that a charge was registered, it could not serve as proof of existence thereof, that neither did the 1st and 2nd Defendant enter appearance to show an admission of the existence of the Charge. He cited Sections 107 and 108 of the *Evidence Act* to the effect that whoever alleges facts must prove and also Section 3(4) thereof and urged the Court not to rely on mere allegations of existence of the charge. He averred that, in any event, the 3rd Defendant was mandated to conduct due diligence before accepting the property as a security, and that although due diligence was done, it was not done conclusively. He referred to the 3rd Defendant's Valuation Report dated 27/2/2014 which at page 4 (on improvements) states that the plot was developed with a residential house, a shop and other semi-permanent structures, and submitted that the 3rd Defendant failed to make any inquiries by visiting the site to confirm whether the 1st Defendant was the only person in occupation thereof and that the Report shows the photographs of the Plaintiff's matrimonial homes and which proves that the Plaintiffs were in possession and actual occupation thereof.

29. Counsel then cited Section 79(3) of the *Land Act* which requires that for a Charge on a matrimonial home to be valid, it is to be also executed by the spouse of the chargor living in that matrimonial home and submitted that being the beneficial owners of the land, the Plaintiffs were the only persons entitled to execute a Charge over the respective portions that they had purchased from the 1st Defendant. He urged that the 3rd Defendant failed to seek the Plaintiffs' consent before executing the Charge against the mother title to the subdivided portions and which was in the process of being closed. He cited the case of Julius Mainye Anyega vs. Eco Bank Limited [2014] eKLR on the issue of exercising power of sale over a matrimonial home, Section 97 of the *Land Act* on the requirement for a Chargee to obtain a Valuation before exercising such power of sale and also Rule 11 (b)(x) of the Auctioneer's Rules which lists, as one of the requirements, that "the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale."

30. He referred to the 3rd Defendant's Valuation Report dated 27/2/2014 which was produced as proof that valuation was carried out 12 months prior to the proposed sale and submitted that to controvert the timelines of the period in which the valuation was conducted, the Plaintiffs produced the statutory notice dated 6/8/2015 served on them. He then cited Section 96(2) of the *Land Act*, 2012 which requires a Chargee to give 45 days notification of sale and submitted that the alleged valuation was done on 27/2/2014 and the 12 months period lapsed on 28/2/2015 and that instead, the statutory notice was given on 6/8/2015. He contended that 45 days was after 15/9/2015 being the intended sale date according to the notice, that the 45 days Auctioneer's notice had not been issued and the process thus violated Rule 15 of the Auctioneers Rules which also requires the Auctioneer to give 45 days for the Chargor to redeem the property. He submitted that the above provisions were violated thus rendering the said valuation useless and not purposeful in law as much time would have lapsed rendering the valuation meaningless as the value of the land would be auctioned below 75% of the prevailing market value as at 2/12/2015. He cited the case of Peter Bogonko Onchonga v National Bank of Kenya Limited & Another [2020] eKLR, the case of David Limo Bundotich v Housing Finance Company of Kenya Limited [2022] eKLR and also the case of Martha Khayanga Simiyu Vs Housing Finance Co. of Kenya & 2 Others Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540.

31. In conclusion, he urged the Court to grant Judgment in favour of the Plaintiffs and not to depart from the well-set principle in Section 27 of the *Civil Procedure Act* that costs follow events and award costs to the Plaintiffs herein.

3rd Defendant's Submissions

32. The first issue that Counsel dealt with was whether the Plaintiffs hold any beneficial interests against the suit property and if so, whether the same rank high in priority against the 3rd Defendant's charge. He submitted that there is a lack of a cause of action by the Plaintiffs over the suit land since as can be seen from the sale agreements, none of the parties purchased the suit land known as Eldoret Municipality Block 20 (Kapyemit)/2600 which is the subject of this suit, that going by the mutations produced, it is evident that their sale agreements refer to different parcels that were not subdivided to form Eldoret Municipality Block 20 (Kapyemit)/2600. He submitted that facts on subdivision chronologically starting from the latest and its effects is as shown below:

    i. Eldoret Municipality Block 20 (Kapyemit)/2600 is among the 3 resultant subdivisions of the parcel known as Eldoret Municipality Block 20 (Kapyemit)/2331 and its title was issued on 8.2.2013, that evidence from the Mutation form produced as PExbt No. 7 is that parcel no. Eldoret Municipality Block 20 (Kapyemit)/2300 and Eldoret Municipality Block 20 (Kapyemit)/2331 both resulted from a sub division of Eldoret Municipality Block 20 (Kapyemit)/1887 and that consequently, the further sub division of Eldoret Municipality Block 20 (Kapyemit)/2331 did not in any way affect the interests allegedly held by the 3rd Plaintiff as per the sale agreement between him and Thomas Injemela dated 6/6/2014 as the same refers to the 3rd Plaintiff's purchase of Eldoret Municipality Block 20 (Kapyemit)/2330.

    ii. Eldoret Municipality Block 20 (Kapyemit)/2331 was one of the 2 resultant parcels that arose from the subdivision of Eldoret Municipality Block 20 (Kapyemit)/1887 which subdivision was undertaken at the site on 13.4.2011 as per the Mutation Form dated 5.7.2011 produced as PExbt-6, that consequently, it was imperative for the 3rd and 12th Defendants to produce evidence to the effect that their sale agreements dated 7/04/2018 and 6/10/2019 respectively that refer to parcel number Eldoret Municipality Block 20 (Kapyemit)/2331 were actually in relation to parcels of land that are currently located within the parcel that is currently registered as Eldoret Municipality Block 20 (Kapyemit)/2600.

    iii. Eldoret Municipality Block 20 (Kapyemit)/1887 was one of the 13 resultant subdivisions of parcel number Eldoret Municipality Block 20 (Kapyemit)/1707 that was undertaken at the site on 30/04/2008 as per the Mutation Form dated 18/9/2008 produced as PExbt-5, that similarly, it was incumbent upon the 4th, 5th and 6th Plaintiff's to avail proof that their sale agreements dated 24/06/2009, 21/12/2010, and 19/07/2009 respectively, related to parcels of land that are currently located within the parcel that is currently registered as Eldoret Municipality Block 20 (Kapyemit)/2600.

    iv. Eldoret Municipality Block 20 (Kapyemit)/1707 was one of the 2 resultant subdivisions of parcel number Eldoret Municipality Block 20 (Kapyemit)/158 that was undertaken at the site on 3/7/2007 as per the Mutation Form of even date produced as PExbt-4,that similarly, the 1st, 7th & 11th Plaintiffs were by the law of evidence mandatorily required to avail proof that their sale agreements dated 21/03/2008, 2/10/2010 and 12/06/2006 respectively, related to parcels of land that are currently located within the parcel that is currently registered as Eldoret Municipality Block 20 (Kapyemit)/2600.

    v. That as for the 11th Plaintiff, no mutation was produced to show that his sale agreement with Reformed Church E. Africa dated 9/01/2014 referring to Plot Number 158/2030 in any way was linked to the suit land, that if the same is to be considered as arising from the original parcel,

then the burden of proof to link its transition throughout all the sub divisions fell on him and that he failed to discharge that burden.

vi. That the Sale Agreement between one Fred Kemoi Sartam and one Daniel Kipkorir Chepyegon dated 9/01/2013 witnessed by Kirwa Jonah Kipkemei Advocate referring to Eldoret Municipality Block 20 (Kapyemit)/2330 and the one dated 13/11/2008 between Philip Tenai and Benjamin K. Kiyeng do not belong to any of the Plaintiffs in the suit and he urged the Court to disregard them as they are not anchored on any claims/pleadings.

33. Counsel submitted that in view of the summary of the particulars highlighted above, the Plaintiffs, despite bearing the burden of proof as the persons alleging occupational rights, they did not call a Surveyor to testify and produce a report to demonstrate that the Plaintiffs' parcels after all these subdivisions remained located within the suit parcel and that they actually hold any occupational rights as alleged. He cited Sections 109 and 112 of the *Evidence Act* regarding burden of proof. He submitted further that the facts above coupled with the Valuation Report produced by the 3rd Defendant that showed the presence of only two temporary structures lends credence to the defence that none of the Plaintiffs' resided in the suit parcel and that if that was so, then their alleged matrimonial homes and homesteads could have been visible to the Valuer given the testimony of PW1 that there were over 22 homes composed of theirs and those of other alleged residents who did not join the suit.

34. Counsel contended further that there was lack of due diligence on the part of the Plaintiffs and that they were the authors of their own misfortunes since the agreements for by the 3rd and 12th Plaintiffs were made after the Charge in favor of the 3rd Defendant had been created and that curiously, the 3rd Plaintiff's further agreement dated 7/04/2018 and the 12th Plaintiff's Sale Agreement dated 6/10/2019 was made after the filing of this suit yet the Plaintiff's want such Agreement to supersede the Charge. He also pointed out that as at the date of purchase by all the Plaintiffs, the parcel numbers referred to in the Sale Agreements had ceased to exist as a result of the various mutations and subdivisions of the parcels that were happening within their knowledge yet none of the Plaintiffs made any attempt to conduct a simple search at the Lands Registry that would have informed them that the properties they were allegedly purchasing no longer existed. He also submitted that the mutations produced by the Plaintiffs show that the parcel underwent massive mutations and subdivisions between the years 2007 and 2013 and yet none of the Plaintiff's sought to find out why the parcels were being sub divided and yet they were not being issued with titles or being asked to attend the Land control Board for purposes of issuance of the requisite consents to enable the registered owner transfer the parcels to them. According to Counsel, the Plaintiffs failed to be vigilant and cannot seek the aid of equity as equity does not aid the indolent.

35. He urged further that unlike the 3rd Defendant who obtained the Land Control Board Consent to charge (D-Exbt 5) when acquiring its interests, none of the Plaintiffs attempted to obtain such consent despite the land being "agricultural" and being the subject of the provisions of Section 8 of the *Land Control Act* that requires the said consent to be obtained within 6 months failure to which the agreements would be rendered null and void. He cited the case of M W K v S K K & 5 others [2018] eKLR. According to Counsel therefore, the Plaintiffs cannot be declared as bona fide purchasers as they did not carry out due diligence before purchasing the properties nor do they hold title deeds. He also cited the case of Joseph Muriithi Njeru vs Mary Wanjiru Njuguna & Another [2018] eKLR, where, he submitted, the Court of Appeal stated that "a purchaser who does not hold a title to property and who did not exercise due diligence in acquiring a registered property cannot be described as a bonafide purchase or innocent purchaser...". Counsel also submitted that the contracts entered into after the Charge had been registered are also null and void for want of the Chargee's consent as provided under Section 88(1) (g) of the *Land Act* 2012 that provides that there shall be implied in every charge,

covenants by the chargor with the chargee binding the chargor "not to transfer or assign the land or lease or part of it without the previous consent in writing of the chargee which consent shall not be unreasonably withheld." He also cited the case of Mechanised Clearing & Forwarding Co. Ltd & 2 Others –Vs- Tulip Apartments Limited & Another [2000] eKLR.

36. On whether the 3rd Defendant is guilty of fraud and misrepresentation, Counsel submitted that the 3rd Defendant is accused of collusion, fraudulently charging the property, failing to obtain the Plaintiffs' consent, failing to obtain a Valuation Report, failing to issue statutory Notices and failure to conduct due diligence but that the averments remain mere allegations as they were not proved. He cited the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR on the principle that "fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.". He also cited the case of Kinyanjui Kamau vs George Kamau [2015] eKLR. Counsel's view was therefore that despite making the serious allegations of fraud, the Plaintiffs did not establish any such fraud or misrepresentation on the part of the 3rd Defendant who genuinely entered into a commercial transaction based on the records it found at the Land Registry and facts revealed by the Valuation Report that it conducted prior to advancing the loan.

37. As for the alleged failure to obtain the Plaintiffs' consent, he submitted that no law required the consent to be sought before the Charge could be registered as the Plaintiffs were not the registered owners or in vacant possession of the property. On the alleged non-issuance of statutory notices, submitted that the Plaintiffs are not in the category of persons required to be so served under the provisions of section 96 (3) of the *Land Act* given that they have failed to show that they hold any proprietary rights over the property and as such, no obligation rested on the 3rd Defendants to issue statutory notices to the Plaintiffs. He contended further that in any event, the Plaintiffs cannot purport to claim that no notices were issued when it is within their pleadings and evidence that they came to Court after they came across the 3rd Defendant's notification of sale of the land in exercise of a Statutory power of sale. See paragraph 19 of the Amended Plaint. He cited the case of Maheshkumar Popatlal Shah v Highgrove Holdings Limited & another [2020] eKLR and also the case of Nairobi Mamba Village –Vs- National Bank of Kenya [2002]1 E.A.

38. On whether the Charge and Further Charge registered in favour of the 3rd Defendant are legal and enforceable, Counsel submitted that at the request of the 2nd Defendant, the 3rd Defendant granted him banking facilities of Kshs, 2,675,000/- for purposes of purchasing 2 plots in Kapsoya, Eldoret Town at Kshs 2,200,000/- and the balance of Kshs 475,000/- to facilitate takeover of facilities from Letshego Micro Finance through a Letter of Offer dated 18/02/2014 produced as DExh-2(a). He submitted further that part IV of the Schedule clause of the Offer Letter laid down the collaterals that would be used to secure the loan, that among the documents that were to be obtained, executed and registered in favour of the 3rd Defendant were a First Legal Charge for Kshs 2,675,000/- over the suit property, Eldoret Municipality Block 20(Kapyemit)/2600 registered in the name of the 1st Defendant together with the original title and a comprehensive Valuation Report from the bank's approved Valuers in respect to the property as security. He pointed out that DW1 testified that the 3rd Defendant carried out due diligence before disbursing the loan to the 2nd Defendant, that the 3rd Defendant employed the services of a Valuer who conducted a site visit on the property and prepared a Valuation Report, and that the 3rd Defendant obtained the Land Control Board's consent to charge the property and adduced a copy of thereof.

39. Counsel submitted further that DW1 also produced a copy of the Supplemental Letter of Offer dated 15/07/2014 which granted the 2nd Defendant additional LPO Finance Facility to the existing Letter of Offer dated 18/02/2014, that this additional facility was to be secured by a couple of documents including a Further Legal Charge of Kshs 1,125,000/- over the same property to make an aggregate

charge of Kshs 3,800,000/-. He also submitted that DW1 produced copies of the Charge and Further Charge, title deed and an official search which indicated that both the Charge and Further Charge were lawfully registered on 16/04/2014 and 8/8/2014 respectively, and that the testimony was also supported by the Green Card which reflected the same information. According to Counsel therefore, given that the 3rd Defendant's rights were created and registered under the *Land Act* and the *Land Registration Act*, the Charge remains superior to any other alleged interests. He cited the case of Paul Gatete Wangai –Vs- Capital Realty Ltd & Another [2020] eKLR and also Section 35(6) of the *Land Registration Act*. He submitted further that the proposition above on priority of registrations stems from the role played by the Torrens system of land registration in Kenya that guarantees indefeasibility of title based on the registered records, that the 3rd Defendant, on being offered the suit property as security, undertook due diligence through a search and valuation thereof and in doing so, it did not come across any records or evidence to suggest that the Plaintiffs had any interest thereon. He cited the Court of Appeal case of *Fanikiwa Limited v Sirikwa Squatters Group & 17 others (Civil Appeal 45 & 44 of 2017* (Consolidated)) [2022] KECA 1286 (KLR) (18 November 2022) (Judgment).

40. Counsel also discounted the Plaintiffs' submissions that the 1st Defendant did not have any interest in the property to charge and that by reason thereof, the principle of nemo dat quod non habet applies. He distinguished this case from applicability of the nemo dat rule because according to him, the Plaintiffs did not prove any occupation or possession of the property in addition to failing to prove any fraud on the part of the 3rd Defendant. He also submitted that the rule cannot apply herein because the Plaintiffs were not diligent in their transactions having failed to obtain the requisite Land Control Board consents to transfer the property in their favour and having failed to register their interests in the Register or to register any caveats or cautions. He contended that it is a principle of equity that "equity aids the vigilant and not the indolent" and that in this case, the Plaintiffs were not vigilant enough to protect their interests because had they done so, the 3rd Defendant would have come across their alleged claims and obviously would not have accepted to take the property as security for repayment of the loan. He again cited the case of Fanikiwa vs Sirikwa (Supra) and submitted further that the Plaintiffs did not make any case for the Court to validate their alleged interests to the property in place of those of the 3rd Defendant and that as such, the prayers to declare the Charge unlawful and for the title to the property transferred to the Plaintiffs must fail. He urged the Court to maintain the sanctity of the Register by holding that the Charge and Further Charge registered in favour of the 3rd Defendant was and remains lawful and enforceable.

41. Counsel also touched on the Plaintiff's submissions that an equitable remedy in terms of a Constructive trust and a resultant trust was created as a result of the sale agreements and that these trusts divested the 1st Defendant of the title to the property and that the 1st Defendant could not therefore create a valid charge and that the trusts are overriding interests that needed not to be registered. According to Counsel, this argument is not valid in law for the reason that the Charge created in favour of the 3rd Defendant is a statutory right envisaged under the *Land Act* and the *Land Registration Act*. He submitted further that the Plaintiffs never specifically pleaded or raised any averments on trusts in their Plaint and as such, going by the doctrine that parties are bound by their pleadings, it will be unfair and prejudicial to the Defendants, if the Plaintiffs were allowed to introduce the issue of trust in their submissions given that the Defendants were not notified that the same would be an issue for determination to enable them respond adequately. He cited the case of Adetoun Oladeji (Nig) Ltd Vs. Nigeria Breweries Plc S.C. 91/2002 which, he submitted, was cited with approval by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR. He also cited the case of Kingora Estates Limited v Victor King Mbithi [2021] eKLR.

42. He submitted further that even in the event the Court were to consider the equity of constructive and resulting trust, such equitable principles would not be applicable to this case since the Plaintiffs did not prove any possession of the suit parcel or fraud on the part of the 3rd Defendant. He added that the Plaintiffs have also not established that they undertook due diligence or that their agreements ought to be exempted from the mandatory provisions of the *Land Control Act* that make it mandatory for the consent of the Land Control Board to be obtained which consent was not obtained thus rendering their respective sale agreements null and void in addition to rendering any continued possession criminal. According to him therefore, with the express provisions of the *Land Control Act*, the Court is not in a position to infer the provisions of equity to override the statute. He contended further that since the 3rd Defendant obtained the consent of the Land Control Board, its transaction is recognized in law and the Plaintiffs cannot seek to supersede it with the provisions of equity when they themselves did not comply with the law. He cited the Court of Appeal case of David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR. He also contended further that the Plaintiffs have not made a case for the Court to disregard the doctrine of indefeasibility of the Register as discussed in Fanikiwa vs Sirikwa (supra) and that as such, the Plaintiffs cannot rely on the provisions of Section 30 of the *Land Registration Act* to argue that their alleged occupation has created any trust in their favour given that they never obtained the consent of Land Control Board.

43. In conclusion therefore, Counsel urged the Court to dismiss the suit and award costs to the 3rd Defendant in line with the principle that costs follow the event.

Determination

44. Upon considering the pleadings, evidence presented, Submissions and authorities cited, I find the issues that arise for determination to be the following:

    i. Whether the Plaintiffs have established that they purchased respective portions of land from the 1st Defendant.

    ii. Whether the 3rd Defendant has proved that it holds an existing registered Charge over the suit property.

    iii. Between the Plaintiffs' Sale Agreements and the 3rd Defendant's Charge which one was first in time.

    iv. Whether the Plaintiffs have proved that the respective portions claimed by them are located within the suit property.

    v. Whether the Plaintiffs have established fraud committed by the Defendants in the process of registering the Charge over the property.

    vi. Whether the failure to obtain the consent of the Land Control Board vitiated the alleged purchases by the Plaintiffs.

    vii. Whether the Plaintiffs possess the locus to question whether the 3rd Defendant complied with the procedures laid out before exercising its power of statutory sale

    viii. Whether the 3rd Defendant should be permitted to proceed with the exercise of its statutory power of sale by auctioning the suit property.

45. I now proceed to analyze and answer the said issues.

i. Whether the Plaintiffs have established that they purchased respective portions of land from the 1st Defendant

1. In this matter, the parties are in agreement that the 1st Defendant was at all material times the registered owner of the suit property, Eldoret Municipality Block 20 (Kapyemit)/2600. Indeed, respective copies of the title deed for the property were produced in evidence by both parties and who also both produced respective copies of search certificates confirming that the property, measuring 1.522 hectares was registered in the name of the 1st Defendant on 1/08/2013. The documents also indicate that the title deed was issued in the name of the 1st Defendant on the next day, 2/08/2013. The Plaintiffs also produced a copy of the Green Card which also confirms ownership by the 1st Defendant. The documents also indicate that the property was itself a sub-division from a Plot No. 2331.

47. As regards the alleged purchase by the Plaintiffs of portions of land from the 1st Defendant, the Plaintiffs produced respective copies of the Agreements for Sale executed between 2006 and 2021. Particularized chronologically, the same are as follows:

Purchaser	Vendor	Property purchased & size	Date
Reformed Church E.A. Kapsaos	Philip Kipkoech Tenai	100x100 of plot No. 158 (Block 20 Kapyemit)	12/06/2006
Thomas Injemela Tabasia	Philip K. Tenai	50x100 (1/8) of plot No. 2330 Block 20, Kapyemit Location	7/08/2007
Hezekiah K. Maritim	Philip Kipkoech Tenai	100x100 ft of Block 20 (Kapyemit) 158	21/03/2008
Stephen Kiptoo Kurgat	Philip Kipkoech Tenai	50x100 (1/8) of plot No. 2331	20/05/2008
Everlyne M. Shivachi	Philip Kipkoech Tenai	1/8 of an acre of plot No. 1887 Kapsaos village, Kapsaos sub-location, Kapyemit division	19/01/2009
Jepkemei Changwony	Philip Kipkoech Tenai	1/8 of Eldoret Municipality Block 20 (Kapyemit) 1887	24/06/2009
Everlyne M. Shivachi	Philip K. Tenai	1/16 of acre	3/11/2009
Julius K. Mitei	Philip Kipkoech Tenai	0.005 Ha of E.M.C 20/158	2/10/2010
Tonny Kiprotich Maiyo	Philip Kipkoech Tenai	50x100 ft of Eldoret Municipality Block 20 (Kapyemit) 1887	21/12/2010
Daniel Kipkorir Chepyegon	Fred Kemoi Staram (3rd Party, Philip K. Tenai)	1/8 of acre of Eldoret Municipality Block 20 (Kapyemit) 2330	9/01/2013
Patrick Makhama Okonda	Thomas Injemela Tabasia	50x100 ft (1/8) of Kapyemit Eldoret Municipality Block 20/2330	6/06/2014
Patrick Makhama Okonda	Stephen Kurgat	50x100 of Kapyemit Block 20/2331	7/04/2018

William Tuitoek Kandagor	Daniel Kipkorir Chepyegon	50x100 of Kapyemit Block 20/2331	6/10/2019
Alex Malakwen Mitei	Reformed Church E.A. Kapsaos	0.2 of acre of plot No. 158/2030, Taremoi village, Kapsaos sub-location, Kapyemit location	10/02/2021

48. From the above particularization, it is evident that some of the purchasers who bought plots from the 1st Defendant subsequently also sold them off to new purchasers, including to some of the Plaintiffs herein. I also note that except perhaps for two Agreements, the one for Jepkemei Changwony dated 24/06/2009 and the one for Daniel Kipkorir Chepyegon dated 9/06/2013, which are indicated to have been drawn by Advocates, the rest are home-made, and some even handwritten. I also note that some of the Agreements are indicated to have been witnessed by the local Chief and some by village elders. It is also apparent that some of the Agreements produced in evidence involve "purchasers" who are not even parties to this suit.

49. Further, it is apparent that there are no Sale Agreements produced for 4 of the Plaintiffs in this suit. These Plaintiffs are Loice Chelagat Ngososei (2nd Plaintiff), Sammy Kibet Kosgei (8th Plaintiff), Milka Koskei (9th Plaintiff), and Mathew Ngetich (10th Plaintiff). This analysis therefore technically "knocks out" the 4 Plaintiffs' claims in this suit. Only 8 out of the 12 Plaintiffs' claims therefore in respect to whom there are Sale Agreements on record bearing their names remain in contention herein and proceed to the next stage of consideration. These 8 are the 1st, 3rd, 4th, 5th, 6th, 7th, 11th and 12th Plaintiffs.

50. It is also clear that none of the Agreements produced mentions the suit property the subject of this suit, namely, Eldoret Municipality Block 20 (Kapyemit) 2600. In answering this question, the Plaintiffs stated that the suit property, Eldoret Municipality Block 20 (Kapyemit) 2600 is a sub-plot that arose from previous successive sub-divisions of previous mother titles and since they only purchased respective portions, the mother titles were subsequently sub-divided for the purposes of obtaining respective titles for the respective portions purchased by the respective Plaintiffs. In respect thereto, they produced copies of various mutations to prove the sub-divisions.

51. On my part, the link that I can establish from the mutations, the title deed for the suit property and the Green Cards produced between the respective parcels of land indicated in the respective Sale Agreements and the instant suit property are, chronologically, as follows:

    i. Eldoret Municipality Block 20 (Kapyemit) 158 measuring 9.93 hectares was sub-divided around 3/07/2007 and gave rise to 2 sub-plots, among them Eldoret Municipality Block 20 (Kapyemit) 1707 measuring 9.167 hectares.

    ii. Eldoret Municipality Block 20 (Kapyemit) 1707 measuring 9.167 hectares was then sub-divided around 2/05/2008 and gave rise 13 sub-plots, among them Eldoret Municipality Block 20 (Kapyemit) 1887 measuring 6.446 hectares.

    iii. Eldoret Municipality Block 20 (Kapyemit) 1887 measuring 6.446 hectares was subsequently also sub-divided around 13/04/2011 and gave rise to Eldoret Municipality Block 20 (Kapyemit) 2330 measuring 4.856 hectares Eldoret Municipality Block 20 (Kapyemit) 2331 measuring 1.618 hectares.

iv. Eldoret Municipality Block 20 (Kapyemit) 2331 as aforesaid was then sub-divided around 7/01/2013 and gave rise to 3 sub-plots, among them the suit property herein, Eldoret Municipality Block 20 (Kapyemit) 2600 measuring 1.522 hectares.

52. In view of the foregoing, and coupled with the Plaintiffs' uncontroverted evidence, I am prepared to find, which I do, that out of the 8 Plaintiffs whose claims remained for consideration, 7 of them (1st, 3rd, 4th, 5th, 6th, 7th and 12th Plaintiffs) have demonstrated by the copies of their Sale Agreements that indeed they purchased respective portions of land from the 1st Defendant and from people who had themselves bought the same from such purchasers. However, although the specific identities of such purchased plots are not easily ascertainable, it can be concluded that they all emanate from sub-divisions made from the same mother title (Eldoret Municipality Block 20 (Kapyemit) 158) that the suit property also emanated from. Regarding the 11th Plaintiff (Alex Malakwen Mitei) however, his Sale Agreement refers to plot No. 158/2030 which does not feature in any of the mutations herein and cannot therefore be traced from any of the titles herein. The 11th Plaintiff's claim therefore joins those of the 2nd, 8th, 9th and 10th Plaintiffs (Loice Chelagat Ngososei, Sammy Kibet Koskei, Milka Kosgei and Mathew Ngetich, respectively) as having failed at this preliminary point.

53. I also find that out of the 7 Plaintiffs whose claims have surmounted the preliminary stage, 5 Plaintiffs (1st, 4th, 5th, 6th and 7th Plaintiffs) purchased their portions directly from the 1st Defendant while 2 (3rd and 12th) purchased from people who had themselves earlier purchased such portions from the 1st Defendant. I cannot however ascertain whether the 1st Defendant or the other Vendors were paid the purchase price in full as there is no sufficient material placed before me to enable me conclusively make such determination.

54. I also find that the latest portion that the 1st Defendant sold was the one he sold to the 6th Plaintiff, Tony Kiprotich Maiyo, vide the Sale Agreement dated 21/12/2010. All subsequent sales made after this date were not technically new sales since they were sales made by people who had earlier purchased their portions from the 1st Defendant and were now, in turn, selling the same to new purchasers.

55. What I will still have to determine in the issues following below is whether the Plaintiffs have established that the portions that they purchased are indeed located within the suit property herein, Eldoret Municipality Block 20 (Kapyemit)/2600.

Whether the 3rd Defendant has proved that it has an existing registered Charge over the suit property

56. As regards the Charge said to have been lodged by the 3rd Defendant, it is not in dispute that the same was not produced in evidence. For this reason, the Plaintiffs have contended that existence thereof has not been proved. It is however also not in dispute that in the certificates of official searches produced by both parties, there are express entries therein indicating that indeed there are Charges registered against the title in favour of the 3rd Defendant as follows:

Charge securing a sum of Kshs 2,675,000/-	16/04/2014
Further Charge securing a sum of Kshs 1,125,000/-	8/08/2014

57. The 1st Charge securing the sum of Kshs 2,675,000/- is also indicated in the copy of the title deed produced in evidence. Existence of both the Charge and the Further Charge are also acknowledged in the Green Card.

58. With the above uncontroverted evidence, and although they were not produced in evidence, I am satisfied that the existence of both the initial Charge and the Further Charge entered into between the 1st Defendant and the 3rd Defendant and registration thereof against the title to the suit property have been sufficiently demonstrated and proved.

Between the Plaintiffs' Sale Agreements and the 3rd Defendant's Charge which one was first in time

59. From the particularization set out above, it is clear that while the latest portion sold by the 1st Defendant was in 2010, the Charge was registered 4 years later in 2014. Although therefore the Sale Agreements for the said 7 Plaintiffs whose claims have reached this far, did not mention the suit property, the same having emanated from the same mother title as the portions purchased by the 7 Plaintiffs, I find that by the date that the 3rd Defendant's Charge was registered, the 7 Plaintiffs had already obtained possession thereof.

60. However, the major question that still remains for determination is whether the portions purchased by the respective Plaintiffs are located within the suit property.

Whether the Plaintiffs have proved that the respective portions claimed by them are located within the suit property

61. Since it is the suit property herein, Eldoret Municipality Block 20 (Kapyemit) 2600, which the 3rd Defendant's Charge is registered against and it is therefore the suit property that the 3rd Defendant intends to put on auction, for the Plaintiffs to stand any chance of succeeding in this suit, they must demonstrate that indeed the portions that they are claiming are situated within the suit property.

62. It is however evident that the material placed before me, not even the mutations, does not enable me to make a determination on whether the portions purchased by the Plaintiffs (at least the 7 whose claims remain) are indeed located within the suit property, Eldoret Municipality Block 20 (Kapyemit) 2600 over which the 3rd Defendant's Charge is prevailing. The Plaintiffs purchased portions of mother parcels of land but their Sale Agreements did not specify or identify the exact locations of the portions so purchased. Being the parties who are seeking Judgment herein, I would have expected the Plaintiffs to, perhaps, commission an expert witness, say a Surveyor, to prepare and come to Court and produce a formal Survey Report which would then have clearly provided the specific location of the portions claimed by the Plaintiffs and therefore, assist in ascertaining whether indeed, the portions are situated within the suit property.

63. The commissioning of a Survey was even more important for the Plaintiffs since, as aforesaid, the 3rd Defendant produced its own pre-Charge Survey Report dated 27/02/2014 over the suit property, Eldoret Municipality Block 20 (Kapyemit) 2600. The 3rd Defendant's witness (DW1) testified that the Report was commissioned by the 3rd Defendant after approval of the 2nd Defendant's Application for the loan but before the loan was disbursed. Clearly therefore, the Report was meant to assist the 3rd Defendant to ascertain the position on the ground and to satisfy itself that the suit property sufficiently secured the loan that it had advanced and that it was therefore safe to proceed to disburse the loan. I believe that one important fact that the 3rd Defendant wished to ascertain by the Report was that there were no other occupants on the ground, whether illegal (squatters) or otherwise, whose occupation could threaten the 3rd Defendant's ability to recover its outlay in the event of default. Although the Surveyor who made the Report was not called as a witness, the Report was produced in evidence by DW1 without any objection from the Plaintiffs. The salient facts established by the Report about the property as at the time of the survey on 26/02/2014, include the following:

i. Absolute title was registered in the name of the 1st Defendant.

ii. As per a Search carried out at the Lands Registry, the title was free from all encumbrances (a copy of the certificate of official Search dated 25/02/2014 is indeed attached to the Report).

iii. The boundaries of the property were marked by barbed wire fencing and partly enforced by sisal hedges and the property was accessible via a simple barbed wire.

iv. The property was utilized for agricultural purposes.

v. The property was developed with a residential house, a shop and other semi-permanent structures that were ignored for purposes of the valuation (photographs of the developments, including these semi-permanent structures, were attached).

64. The Report does not therefore mention the presence of the Plaintiffs on the ground or of any other significant occupants or inhabitants or of any scattered ongoing constructions therein. The Report paints the picture of a well-secured private parcel of land with a gate and a fence and with minimal human occupants. If indeed there were other occupants on the ground such as the Plaintiffs, the Surveyor could not have missed to notice them. I did not hear any of the Plaintiffs claiming ownership of the residential building or of the shop captured in the Report and which seem to have been the only substantial developments thereon. I therefore presume that the same belonged to the 1st Defendant as the registered owner of the land. I note the testimony of PW1 that at the time of the survey, there were as much as 22 houses already constructed on the property by the Plaintiffs and also by other purchasers. In light of the 3rd Survey Report and in the absence of any other controverting evidence, I take PW1's testimony with a pinch of salt. It does not sound true.

65. On the issue of who bears the burden of proof in a Court case, Section 107, 108 and 109 of the *Evidence Act* provide as follows:

> " 107. Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. Incidence of burden
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. Proof of particular fact
>
> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

66. The general rule is therefore that the burden of proof always lies on the Plaintiff. It is therefore the Plaintiffs who will fail in this case if the Court is left in a position where it is unable to conclusively resolve which of two conflicting set of facts presented is the true position. For this reason, I find that it is the Plaintiffs who have failed to demonstrate that the portions claimed by them fall within the location of the suit property. The 3rd Defendant's Report having been served upon the Plaintiffs long before

the trial, the Plaintiffs ought to have commissioned their own Survey Report or any other sufficient evidence to confirm that the respective portions claimed by them were indeed situated within the suit property. Although the Plaintiff's witnesses doubted whether indeed the 3rd Defendant's said Surveyor really visited the site, they did not adduce any evidence of their own to controvert the Report.

67. I therefore find that the Plaintiffs having failed to prove that their purchased portions purchased from the 1st Defendant or his successors are located or situated within the suit property. On this ground alone, I would dismiss this suit.

68. Having found as above, I cite Section 36(5) of the *Land Registration Act* which provides as follows:

> " Interests appearing in the register shall have priority according to the order in which the instruments which led to their registration were presented to the registry, irrespective of the dates of the instruments and notwithstanding that the actual entry in the register may be delayed:
>
> ....."

69. The Plaintiffs having no registered interest in the suit property, as confirmed by the copies of official search produced in evidence, which did not find any registered encumbrance, they have no legal basis to challenge the bank's (3rd Defendant) right over the Charge, which right was duly registered against the Title.

70. Counsel for the Plaintiffs had also cited Section 28 of the *Land Registration Act* which lists the "overriding interests" subject to which registered land is held even when not noted on the Register. It is true that that among such "overriding interests" at sub-section (b) thereof is "trusts, including customary trusts". For the above reason, Regarding the 3rd Defendant's contention that the Plaintiffs' interests were not registered against the title, he submitted that such argument falls short of the disclaimer on the title deed that it is subject to the existing overriding interests. According to Counsel therefore, the Sale Agreements created an "implied trust" by operation of law that the Vendor (1st Defendant) would transfer the titles to the new owners. This submission may be persuasive but the Plaintiff, having failed to prove that the subject portions of land are indeed located within the suit property, the "resulting" and/or "constructive trust" argument falls by the wayside.

71. In any event, the 3rd Defendant's Counsel has opposed the consideration of this ground by the Court on the ground that the Plaintiffs never specifically pleaded or raised any averments on "trusts" in their Plaint. I accept this objection since, in light of the principle that parties are bound by their pleadings, it will be unjust and prejudicial to the Defendants, if the Plaintiffs were allowed to introduce, at the stager of Submissions, this new issue of "trust" in their submissions. I reach that conclusion because there is no evidence that the Defendants were at any time given prior notification that the same would be an issue for determination to enable them respond. Trial by ambush is not allowed in our justice system and especially, when introduced at such late stage (see the Court of Appeal case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR and also the case of Galaxy Paints Co Ltd V Falcon Guards Ltd [2000] 2 EA 385).

72. The failure to prove the location of the subject portions of land also puts paid to the Plaintiffs' invoking of the doctrine of nemo dat quod non habet to the effect that one cannot transfer what he does not have. While the doctrine is correct, and is meant to protect the interest of a beneficial owner of a property it cannot only apply herein without the Plaintiffs first proving that the subject portions of land lie within the suit property.

73. It therefore seems an academic exercise to proceed to determine the remaining issues herein including whether the Plaintiffs' interest supersedes or takes priority over the 3rd Defendant's registered Charge. Nevertheless, for the satisfaction of the parties, I see no harm in still considering such other matters arising herein. I will also proceed to consider them.

Whether the Plaintiffs have established fraud by the Defendants in the process of registering the Charge over the property

74. As aforesaid, the 3rd Defendants Survey Report dated 27/02/2014 states that as per a Search carried out at the Lands Registry, the title to the suit property was found to be free from all encumbrances. The finding was that no caution or caveat of any kind was registered against the property before the 3rd Defendant's Charge was registered. As aforesaid, a copy of the certificate of official Search dated 25/02/2014 confirming the above information is attached to the Report. As also already stated, the Surveyor did not mention that he found anything on the ground that could compromise the 3rd Defendant's right to foreclose in the event of default in repayment of the loan. According to the 3rd Defendant's witness (DW1), it is upon the above confirmation that the 3rd Defendant then registered the Charge on 16/04/2014. The intention to register the Charge against the suit property was also presented to the Eldoret Municipality Land Control Board which considered it and approved it by issuing the consent dated 28/11/2013.

75. In regard to the sanctity of a title, Section 24(a) of the *Land Registration Act* provides as follows:

> " the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;"

76. Section 26 then also recognizes that a Certificate of title in regard to land is conclusive evidence of ownership of the land except in cases of fraudulent acquisition. It provides as follows:

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

77. Since the 1st Defendant is the registered proprietor of the suit land, his title can only be impeached if it is established that the title was acquired through fraud, misrepresentation or illegality, or if the title was acquired un- procedurally or through a corrupt scheme. The manner of establishing fraud in such

cases was considered by the Court of Appeal in the case of Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR, where the following was stated:

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See Davy v Garrett (1878) 7 Ch. D 473 at 489."

78. Applying the above principles to this case, in my view, it has not been demonstrated that the 3rd Defendant was aware of any claims or interests by the Plaintiffs over the suit property or any occupation thereon by the Plaintiffs, if any. I therefore find that the Plaintiffs have failed to controvert the 3rd Defendant's contention that it sufficiently carried out the necessary due diligence before registering the Charge. I cannot therefore find any act of fraud demonstrated as having been committed by the 3rd Defendant in the process of registering the Charge.

79. As regards the 1st Defendant however, the Plaintiffs allege that they paid him full purchase price for their respective portions of the land that they purchased and that the 1st Defendant was to then take steps to sub-divide the mother titles and obtain title deeds for the Plaintiffs. It has however now turned out that the 1st Defendant instead charged the property with the 3rd Defendant as collateral for a loan advanced to the 2nd Defendant. The 1st and 2nd Defendant having failed to enter appearance or participate in this case, the Plaintiffs' claims against the 1st Defendant remain uncontroverted. If the facts alleged by the Plaintiffs are true, then clearly, the 1st Defendant will have committed acts of fraud against the Plaintiffs, perhaps even a criminal offence of obtaining money by false pretences. However, noting my finding that the Plaintiffs have failed to demonstrate that the respective portions claimed by them are situated within the suit property, I am unable to make a conclusive determination on whether the money received by him, if any, was in respect to the suit property herein. In the circumstances, I am unable to declare in this suit that the 1st Defendant's actions as being fraudulent.

80. As regards the 2nd Defendant, the evidence on record is that he was the Applicant and/or recipient of the loan disbursed by the 3rd Defendant and upon which the 3rd Defendant lodged the Charge as security. It is clear that no evidence was produced to show that the 2nd Defendant participated in any fraudulent activity in the process of securing the loan and charging of the suit property as collateral. In the circumstances, I also find that the Plaintiffs have failed to demonstrate the commission of any acts of fraud committed by the 2nd Defendant.

Whether the failure to obtain the consent of the Land Control Board vitiated the alleged purchases by the Plaintiffs.

81. The parties are in agreement that the suit property is "agricultural land" and therefore subject to the provisions of the *Land Control Act*. Even assuming that the Plaintiffs had established that the respective portions claimed by them are situated within the suit property, it is not denied that the transaction was never presented before the relevant Land Control Board for the purposes of obtaining consent to proceed with the transfer. Section (6(1) of the *Land Control Act* provides as follows:

> " An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any part thereto".

82. Regarding the said provision, the Court of Appeal in the case of David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR stated the following

> " The following five fundamental conclusions, in our view, are self-evident and flow directly from the above express provisions of the *Land Control Act*:
>
> i. All transactions involving agricultural land situate in a land control area are void for all purposes unless the land control board within that land control area has sanctioned them.
>
> ii. Even declaration of a trust in agricultural land situated in a land control area is not spared; without consent of the land control board, it is also void.
>
> iii. Consent of the relevant Land Control Board must be obtained within six months of the making of the agreement relating to agricultural land. The High Court however has power, for good reason, to extend the period for applying for consent.
>
> iv. Where the transaction is ultimately void for lack of consent, any money or consideration paid by a would-be purchaser is recoverable as a debt.
>
> v. It is a criminal offence punishable by imprisonment or fine or both to pay or receive payment in respect of a void transaction or to take possession or remain in possession of land, which is the subject of such void transaction."

83. As per the said Court of Appeal pronouncement, the import of the failure to obtain the consent of the Land Control Consent as required under Section 6(1) of the *Land Control Act* within the 6 months' timeline renders the entire subject transaction void. My own personal view however is that the failure to obtain such consent within the time stipulated should merely render the transaction voidable, as opposed to being declared outrightly void. In my view, considering the injustice that can be caused to the public as a result of literally interpreting and applying the provisions of Section 6 aforesaid, that would be one area where the principles of equity ought to be applied in the manner that I am proposing, to mitigate unjust results. However, considering the hierarchy of Courts and the hallowed principle of "stare decisis", the cited Court of Appeal decision is binding and this Court has no choice but to follow it, this Court's misgivings notwithstanding.

84. In light of the above, the Sale Agreements entered into by the Plaintiffs may as well have been rendered void and unenforceable in law, save for refund of the Plaintiffs' outlay and possibly, compensation in damages.

Whether the Plaintiffs possess the locus to question whether the 3rd Defendant complied with the procedures laid out before exercising the power of statutory sale

85. It is not in dispute that the statutory notice communicating the 3rd Defendant's intention to realize the property is dated 6/08/2015 and is what, upon coming into contact with, the Plaintiffs moved to Court. The Plaintiffs have raised questions and cast aspersions and doubts on whether the 3rd Defendant has complied with the laid down legal requirements before proceeding to exercise its statutory power of sale.

86. In connection thereto, the Plaintiff cited Section 79(3) of the *Land Act* which requires that for a Charge on a "matrimonial home" to be valid, it is to be also executed by the spouse of the chargor. The Plaintiffs' urged that the 3rd Defendant failed to seek the Plaintiffs' consent and that of their

spouses. I therefore understand the Plaintiffs to be urging that the Charge is invalid for this reason. The Plaintiffs also cited Section 97 of the *Land Act* and also Rule 11(b)(x) of the Auctioneer's Rules, on the requirement for a Chargee to obtain a Valuation conducted within a period of 12 months before exercising its statutory power of sale. They submitted that the Valuation Report relied on herein is outside such 12-month timeline. The Plaintiffs also cited Section 96(2) of the *Land Act*, 2012 which requires the service of a 40 days' notice of intention to sell and also Rule 15 of the Auctioneers Rules which requires that a 45 days' redemption notice be served. They contend that no such 45 days notification of sale was given.

87. My simple answer to the above contention is that in as much as the said submissions restate the correct position of the law, the obligations cited as imposed on a Chargee as highlighted by the Plaintiffs are meant to protect the Chargor (registered owner of the security lodged) and in the event of charging of a "matrimonial home", his/her spouse, not third parties. In this case, the Plaintiffs are neither the Chargors nor Guarantors or spouses to either. The Plaintiffs were not party to the Charge Agreement between the bank (3rd Defendant) and the guarantor (1st Defendant) and the borrower (2nd Defendant). Under the doctrine of "privity of contract", the Plaintiffs possess no locus standi to question the 3rd Defendant's procedure of exercising its statutory power of sale. This principle was restated in the case of Nairobi Mamba Village –vs- National Bank of Kenya [2002]1 E.A, where the following was made:

> "In my Judgment the only person who can legitimately complain that the power of sale is being exercised unlawfully, irregularly or oppressively is the chargor."

88. In the circumstances, they clearly possess no locus or capacity to challenge or question whether the 3rd Defendant as the Chargee complied with the prescribed procedures before exercising its statutory power of sale. In this case, it is the 1st and 2nd Defendants, not the Plaintiffs, who have the legal right or locus to raise the said questions.

Whether the 3rd Defendant should be permitted to proceed with the intention to exercise its statutory power of sale by auctioning the suit property

89. I believe that I have said enough to leave no doubt that my finding is that the Plaintiffs have not established any ground recognized in law to justify this Court to issue an order stopping the 3rd Defendant from exercising its statutory right to recover the amount due to it from the 2nd Defendant by selling the suit property, which as I have found, was lawfully offered as security for the loan and duly registered as such.

90. For the above reasons, there are also no grounds for this Court to grant the further orders sought, namely, order to the 3rd Defendant to surrender the title deed to the suit property to the Plaintiffs, order for deregistration of the 3rd Defendant's Charge over the suit property, declaration that the Plaintiffs are the bona fide purchasers and/or owners of the said respective portions, order to the 1st Defendant to sign instruments for sub-division and transfer of the said portions to the Plaintiffs, or in default, permission to the Deputy Registrar of this Court to do so, an order compelling the 1st Defendant to provide an alternative security to the 3rd Defendant and discharge the suit property and that the Court do find that the contract of mortgage entered into by the Defendants is void. In light of my findings above, there is no basis for granting these orders.

91. The Plaintiffs are the authors of their own misfortune. They seem to have entered into respective Sale Agreements with the 1st Defendant in respect to parcels of land that were undergoing sub-divisions and yet they failed to ensure that the Agreements sufficiently secured their interests. They failed to ensure that the exact location of the portions they were purchasing were sufficiently captured in the

Agreements. As it stands, one cannot ascertain the location of the portions from the Agreements since in any case, the parcels of land mentioned in the Agreements long ceased to exist upon being sub-divided to create several new titles. The Plaintiffs also failed to exercise vigilance and failed to get involved in the sub-division process. They also failed to document their communication with the 1st Defendant, if any, confirming their pursuit of the 1st Defendant to provide the title deeds for the portions purchased.

92. By leaving everything to the 1st Defendant, they allowed him a lot of latitude and as such they were clueless as to what was going on and allowed themselves to get caught by surprise considering that they were not even aware that the 1st Defendant had already obtained a title deed for suit property in February 2013. Similarly, because of their lackadaisical attitude, they were not even aware that the 1st Defendant had given out the title to suit property, 1 year later, in April 2014 as collateral for a loan. Considering that the Plaintiffs allege that they purchased the said portions between 2006 and 2010, it is strange that for all those intervening years, there is no evidence that they even seriously pursued the 1st Defendant for their title deeds, until 2015 when they received the statutory notice. This inordinate delay should have by itself sounded a red flag. "Equity aids the vigilant, not the indolent". The Plaintiffs' recourse may only be to pursue the 1st Defendant for refund of the respective purchase prices paid, if any.

Final Orders

93. The upshot of my findings above is as follows:

    i. This suit is dismissed.

    ii. Since costs follow the event, the 3rd Defendant is awarded costs of this suit to be borne by the Plaintiffs, jointly and severally.

    iii. Having not entered Appearance or participated in this suit, I award no costs to the 1st and 2nd Defendants.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 4TH DAY OF OCTOBER 2024

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ms Terer h/b for Langat for 3rd Defendant

N/A for all other parties

Court Assistant: Brian Kimathi