



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA- MILIMANI

COMMERCIAL & TAX DIVISION

HIGH COURT CIVIL CASE 205 OF 2003

NICHOLAS SHIVAJI AMUTAVI.....1ST PLAINTIFF

ROSE SHIVAJI.....2ND PLAINTIFF

VERSUS

NJUGUNA NJOROGI.....1ST DEFENDANT

MARY WANJIRU NJUGUNA2ND DEFENDANT

CONSOLIDATED BANK OF KENYA LTD.....3RD DEFENDANT

JUDGMENT

PLEADINGS

1. The Plaintiffs filed suit vide the Complaint on 15th April 2003 against the Defendants and sought the following orders;

- a) An Injunction restraining the Defendants from selling, disposing alienating charging or otherwise transferring title to the suit premises to any party other than the Plaintiffs.
- b) A declaration that the charge over the suit premises is void, the Plaintiffs are the lawful owners of the suit premises and an order to the Defendants to transfer the suit premises to the Plaintiffs.
- c) Any other order the Court may deem just and expedient in addition to or alternative thereto.
- d) Costs of and incidental to this suit.

2. The Plaintiffs claim against the Defendants is as follows;

On or around early in 1997 the 1st & 2nd Defendants agreed and sold to the Plaintiffs the suit property, 2nd Defendant was/is registered owner of suit property, Nairobi/Block 141/841 previously Plot Number 447B being sub-division of LR No 8479/447 which the Plaintiffs bought the suit property for Ksh.1,000,000/- & paid Ksh.80,000/- Land Agents Fee. The Plaintiff paid the Purchase price and Commission Ksh.1,080,000/- in instalments up to September 2000 as follows;

- a) 9th April 1997 Ksh.200,000/- vide Cheque No 0200018001 of 8th April 1997 in the name of Njuguna Njoroge by EABS/Akiba Bank Ltd.
- b) 21st December 1997- the 1st Plaintiff paid Ksh.120,000/- in Cash to Njuguna Njoroge at his house No. 1526 Fedha Estate and he acknowledged payment in writing.
- c) 29th October 1998- Ksh.200,000/- in cheque No 000026 Barclays Bank Ltd dated 30th October 1998.
- d) 10th July 1999- Ksh.100,000/- vide Cheque No 000057 from Cooperative bank by Rose. M. Mulusa to Njuguna Njoroge.

e) 4th September 2000 – The Plaintiffs paid Ksh.200,000/- in cash to 1st Defendant and it was in the presence of their daughter Wairimu.

f) Ksh.460,000/- vide cheque No. 000078 in the name of Lusaka Auto Garage of 29th September 2000 by Nicholas Shivaji Mboya Amutavi.

3. The details of payments are detailed are through documents, copies of cheques, receipts, acknowledgement notes confirmed in the Plaintiff's List of Documents filed on 25th May 2013.

4. These documents are also marked, 3,4,5,6,7, & 8 annexed to Plaintiff's Supporting Affidavit annexed to Chamber Summons filed on the same date 15th April 2003.

5. After completion of payment of the Purchase Price, the Plaintiffs moved and settled on the suit property and completed the house thereon.

6. The parties agreed that upon registration of the suit property and issuance of the Lease Certificate by the 2nd Defendant she would formally transfer the said suit property ownership to the Plaintiffs.

7. The 1st & 2nd Defendants without knowledge and/or notice to the Plaintiffs, secretly registered the suit property and Lease Certificate was issued on 16th May 2002 in the 2nd Defendant's name (attached to Plaintiffs' Supporting Affidavit to Chamber Summons of 15th April 2003 is a copy of Certificate of Lease title for Nairobi/Block141/841 in the name of Mary Wanjiru Njuguna of P.o. Box 59722, Nairobi. Lease for 99 years from 1st May 2000 issued on 13th May 2002 signed by May Wanjiru Njuguna and in the presence of Thomas Maranga Maosa Advocate) and by a Charge dated 1st July 2002 the Defendants charged the same suit property already sold to the Plaintiffs to the 3rd Defendant Bank.

8. The Plaintiffs alleged that the 1st & 2nd Defendants refusal to register and transfer the ownership of the suit premises to them after purchasing it and their subsequent charging the suit property to the 3rd Defendant Bank was/is unlawful and fraudulent.

9. The Plaintiffs pleaded and outlined particulars of Fraud by the Defendants as follows;

- a) They charged the suit property notwithstanding the fact they sold the same to the Plaintiffs and received full purchase price.
- b) They presented themselves as true owners of the suit premises and developments thereof [after the sale of the suit premises]
- c) They failed to disclose to the 3rd Defendant of the Plaintiffs' interest as owners of the suit property.
- d) They failed to disclose to the Plaintiffs that the suit property was registered at the Lands Office and Lease Certificate was issued with the intent to defraud them.
- e) The 1st & 2nd Defendants unlawfully and without notice changed their physical address and residence with intent to frustrate the Plaintiffs efforts to pursue the transfer [of ownership of the suit property to them after they paid full purchase price.]
- f) The Defendants charged the suit property for Ksh.1,000,000/- notwithstanding the fact they no longer had any proprietary interest in the suit property.
- g) The Defendants charged the suit premises for Ksh.1,000,000/- loan with no intent to repay the same.

10. On or about March 2002, the 3rd Defendant Bank commissioned Valuers who visited and valued the suit property. The Plaintiffs wrote to the 3rd Defendant and advised them that they were/are owners of the suit property.

11. On or about March 2003, the 3rd Defendant through its agent Dolphin Auctioneers gave the Plaintiffs 45 days' Notice of their intention to sell the suit property in exercise of their [statutory power of sale under the legal charge by the 1st & 2nd Defendants who defaulted in regularizing the loan facility.]

12. Despite demand the Defendants failed to transfer ownership/proprietary rights of the suit property to the Plaintiffs and at the same time the 3rd Defendant sought to dispose of the suit property that secured by Legal Charge the loan facility advanced to the Defendants by the 3rd Defendant.

13. The 3rd Defendant Consolidated Bank of Kenya Ltd filed its Defense on 28th May 2003 and deposed that;

- a) The 3rd Defendant held a legal charge over Title Number Nairobi/Block 141/841 in the name of Mary Wanjiru Njuguna.
- b) The Legal Charge was properly registered as there were no encumbrances to the lease hold.

c) The 3rd Defendant was/is a total stranger to the alleged Sale transaction between the Plaintiffs and the 1st & 2nd Defendants.

14. The 3rd Defendant further deposed it reserves the right to exercise its statutory power of sale under the **Registered Land Act Cap 300** (now repealed).

15. The 3rd Defendant opposed the Plaintiffs' claim against it as frivolous, vexatious and an abuse of the Court process as it does not disclose any cause of action against the 3rd Defendant.

16. The Plaintiffs' Advocates Njuguna & Partners filed Request for Judgment on 16th May 2003 filed on 19th May 2003 in default of 1st and 2nd Defendants entering appearance and /or filing Defenses by 1st & 2nd Defendants upon service of the Plaint, Summons & Chamber Summons application. Interlocutory /default judgment was entered against 1st & 2nd Defendants on 19th June 2003 against the 1st and 2nd Defendants.

17. On 17th January 2014 & 6th May 2014, 1st & 2nd Defendants filed Certificate of Urgency applications to set aside the Default/Interlocutory judgment. The Court was not moved, the applications remain pending and have not been heard or determined.

18. The Court on 17th June 2005, Justice O.K Mutungi, granted the Plaintiffs' Chamber Summons Application of 14th April 2003 of an injunction restraining the Defendants from selling, offering for sale, auctioning, transferring or otherwise disposing LR Nairobi/Block/141/841, pending hearing and determination of the suit.

19. The suit was dismissed on 6th October 2006 and was reinstated on 13th December 2011. The suit was again dismissed on 20th March 2017 and was reinstated on 20th March 2017.

PLAINTIFFS CASE/EVIDENCE

20. Nicholas Amutavi Shivaji 1st Plaintiff testified on 15th May 2019 and relied on his Witness statement and bundle of documents both of 24th May 2013 and stated as follows;

21. The Plaintiff saw in February 1997, an advertisement at Odeon Cinema for sale of Nairobi/Block/141/841Njiru/Kasarani Phase IIB. The Agent selling the land was James Muchiri Kinyua who took him to the 1st & 2nd Defendants at their residence in Fedha Estate. The 2nd Defendant confirmed appointment of the agent and authorized 1st Defendant to sign all relevant documents regarding the transaction. They negotiated and agreed to Ksh.1,000,000/- for the suit property and Ksh.80,000/- for the agent vide a document signed on 26th February 1997.

22. The Plaintiffs bought the suit property from 1st & 2nd Defendants; the suit property was in the name of 2nd Defendant but they dealt with 1st Defendant the 2nd Defendant's husband who was authorized to facilitate the sale of the suit property. The Property was sold for Ksh.1,080,000/- which they paid as illustrated by the documents in the Plaintiffs List of Documents. The parties signed the following Agreements to effect the sale of the suit property;

a) On 26th February 1997 an Agreement was signed between James Muchiri Kinyua and Mary Wanjiru Njuguna ID [...] who authorized James Muchiri Kinyua T/A Pajamko Services as Sole Agent to sell Plot 447 B Karura Farmers with the house & developments. She authorized Njuguna Njoroge of ID [...] of Lusaka Road Auto Garage P.O. Box 59722 Nairobi, to carry out the sale of the Plot and sign all documents and papers registered in her name.

b) Agreement for Commitment of 9th April 1997 for payment of Ksh.200,000/- to Njuguna Njoroge ID [...] who also signed on behalf of Mary Wanjiru Njuguna; Nicholas Shivaji Amutavi ID [...] also on behalf of Rose Mulusa and in the presence of the Agent James M. Kinyua ID [...].

c) Acknowledgement by Njuguna Njoroge on 21st December 1997 that in addition to the cheque of Ksh.200,000/- he received Cash Ksh.120,000/- as down payment for LR 8479/447 from Nicholas S. Amutavi. The same reads in part;

'Mr Amutavi will assume the right to develop and complete the property for occupation.' Again, it is signed by 1st Plaintiff ID [...] & 1st Defendant ID [...].

d) Agreement for Commitment of 29th October 1998 signed by Njuguna Njoroge ID [...] & Amutavi Nicholas ID [...] acknowledging payment received was in total Ksh.520,000/- and signed by the same parties.

e) Agreement For Commitment & Sale for LR 8479/447 Njiru/Kasarani Phase II, of 10th July 1999, Njuguna Njoroge acknowledged receipt of a further Ksh.100,000/-and total amount paid was Ksh.620,000/- signed by both parties; Njuguna Njoroge ID 4834934 (in the same document at the top ID [...]) & Nicholas Amutavi ID [...].

f) Payment for Plot 447B Karura-Mwiki acknowledged on 4th September 2000 by Written Agreement between Njuguna Njoroge ID [...]and Amutavi N. Shivaji. Ksh.200,000/- was paid by the 1st Plaintiff to 1st Defendant in Cash & Ksh.250,000/- was paid in form of a cheque being a replacement of Cheque 000075 of Ksh.450,000/-. The amounts paid on the day were also witnessed by the Defendant's daughter called Wairimu.

23. After payment in instalments as outlined above, of the suit property Nairobi/Block 141/841 previously Plot Number 447B, the Plaintiffs took possession of the suit property and settled and developed the suit property. The Plaintiffs sought from the 1st & 2nd Defendants the title documents and the Defendants were dodgy and evasive. The Defendants moved from their home, Fedha Estate House No 1526. The Plaintiffs reported the matter to the Land Selling Company, Karura Farmers Company Ltd in Mwiki Nairobi, Tom Ouko Apamo (PW II), the Company Secretary Karura Farmers informed them of 1st & 2nd Defendants new residence and took them to the house. They met and agreed on transfer of the suit property in the Plaintiffs names. Later, PW II at the Karura Farmers Company Ltd offices included the Plaintiffs names by removing the 2nd Defendant's name in the register. The 2nd Defendant informed 1st Plaintiff that she paid money to Kibatia Advocates who were processing the Title Deed for the lease of the suit property and they were to wait.

24. On 7th March 2002, Valuers from 3rd Defendant, Consolidated bank came to value the suit property. The valuation Report by Chrisca Real Estates is annexed to the Plaintiffs bundle of Documents. The 1st Plaintiff wrote to 3rd Defendant and copied Kibatia Advocates & Karura Farmers Co Ltd the letter dated 8th March 2002 annexed to Plaintiff's bundle. The 3rd Defendant replied vide letter of 14th March 2001 and denied that they sent the Valuers and asked for more details. The letter is part of Plaintiffs bundle of documents. Kibatia Advocates wrote back asking the Plaintiffs to prove their claim as owners of the suit property. They did and were informed to wait for the leases to be processed.

25. Whilst waiting, 20th March 2003 Auctioneers from the 3rd Defendant's law firm visited the suit property and gave notice of sale. The 1st Plaintiff visited the 3rd Defendant's advocates Kipkenda Lilan Advocates offices and reliably learnt that the 2nd Defendant was advanced a loan facility of Ksh.1,000,000/- by the 3rd Defendant bank and had defaulted and the bank had to sell the suit property through public auction.

26. The 1st Plaintiff visited the Lands Office and established that the 2nd Defendant went and collected the title document and applied for a loan facility from the 3rd Defendant and lodged the title to the suit property as security in form of a legal charge.

27. The 1st & 2nd Defendants were charged in **Criminal Case 2880 of 2003** with obtaining money by false pretenses and fraud and in 2011 and were acquitted.

28. The Plaintiffs averred that they fully complied with obligations under sale of suit property and paid full purchase price. The 1st & 2nd Defendants failed to perform outstanding obligations by failing to transfer ownership/proprietary rights in form of title documents in the Plaintiffs' name to the suit property to date.

29. In cross examination by the 3rd Defendant's advocate, 1st Plaintiff stated that he dealt with 1st Defendant who represented the 2nd Defendant as she did not have an account and she was not literate. He did not produce a Power of Attorney that authorized the 1st Defendant to transact on behalf of the 2nd Defendant but relied on the Agreement of 26th February 1997 where the 2nd Defendant authorized the 1st Defendant to carry out sale of the plot and sign documents. He also stated that he confirmed the ownership of suit property from Karura Farmers Co. Ltd that held the mother title and parcel titles were processed afterwards. He stated that the 1st & 2nd Defendants were acquitted of criminal charges because the Plaintiffs paid for the suit property and were in occupation, therefore there was no false pretense except for awaiting the processing of the title document.

30. On 11th June 2019, Tom. B.O. Apamo (PW II) testified relying on his statement filed on 24th May 2013 that in January 2001 1st Plaintiff visited the Karura Farmers Co Ltd in Mwiki, he enquired about the process of changing ownership of Plot 447B which he stated that he had bought from Mary Wanjiru Njuguna. As the Company Secretary of the Company, he confirmed from the records that the Plaintiffs sale Agreement(s) and evidence that he had paid the full purchase price. He advised the 1st Plaintiff to pay Directors' Fees of Ksh.10,000/- and further registration Fees of Ksh.14,120/- which he paid as shown by Payment Receipt dated 24th March 2002 of Ksh.14,120/- annexed to Plaintiff's List of Documents. He contacted the 2nd Defendant Mary Wanjiru Njuguna to come to their offices to execute a transfer, she did not come. He took the 1st Plaintiff to the Defendants' home at Fedha Estate and they sought a refund of money Ksh.18,620/- which the Defendants paid to the Advocate to process titles. When they went back the Defendants had moved to an unknown place. He called the Company's Advocate Mr Kibatia and he was informed that the Titles were underway but were not ready. He confirmed at the time survey of the land under mother title was done PW1 had bought the 2nd Defendant's Plot 447B which was originally part of Block 141/841.

31. On 17th September 2019, Njoroge Kibatia Advocate (PW III) for Karura Farmers Co Ltd testified and relied on his statement filed on 24th May 2013. The Company sought his legal services in subdivision and allocation of Plots in LR 8469/12 & LR 8469/13 which were consolidated to Block 141 which had 959 parcels of land. According to records, Mary Wanjiru Njuguna owned Plot 141/841. On 5th February 1st Defendant came to the office and paid Ksh.18, 620/- to process the title documents. On 8th & 25th March 2002 PW1, wrote to him and claimed to have bought the suit property from 2nd Defendant. On 12th March 2001 he replied to him seeking details/proof of purchase/ownership of the Plot. PW1 sent Agreements and correspondence between him and 1st Defendant confirming payment for the Plot vide letter of 23rd March 2001. The 2nd Defendant did not controvert the Plaintiffs claim.

32. He wrote to the 2nd Defendant's advocate Maranga Maosa & Co on 17th April 2002 as follows;

“Your alleged client Mary Wanjiru Njuguna, had through her husband one Njuguna ID [...] sold property to Nicholas Shivaji Amutavi and Rose Mulusa. This is in accordance with details received from the Purchaser. In fact, the Purchaser is already in actual occupation of the premises.

In the premises, we are unable to process the title on your client's behalf. Our attempts to obtain comments on the issue from Mr Njuguna [have] been fruitless. We intend to involve the Police as this appears like a case of fraud.”

DEFENDANTS CASE/EVIDENCE

33. Interlocutory /default judgment was entered against 1st & 2nd Defendants on 19th June 2003. These were formal proof proceedings with regard to 1st & 2nd Defendants.

34. The 3rd Defendant tendered evidence through Catherine Muthiani (DW I) on 17th September 2019 and relied on her statement filed on 20th March 2019. She stated that the 1st & 2nd Defendants approached the bank for overdraft to Lusaka Auto Garage ran by 1st Defendant. They offered Title LR Nairobi Block 141/841 to be held as security and valuation was conducted to the offered property. The Bank Manager of the Defendant's bank branch, Thika handed the Defendants documents to the bank's advocates. The legal charge was professionally and perfectly processed and duly registered with no encumbrances in favor of the 3rd Defendant Bank. The bank released Ksh.1,000,000/- overdraft to the Defendants. The 1st Defendant defaulted and failed to service the overdraft facility. He was evasive and on contact sought restructuring of monthly payments and even then, defaulted. The 3rd Defendant instructed its advocates to pursue recovery of the overdraft by sale of the suit property. The 3rd Defendant is a stranger to the Plaintiffs claim.

PLAINTIFFS SUBMISSIONS

35. The Plaintiffs submitted and relied on **Section 143 of Registration of Land Act** (repealed) by **Land Registration Act No 3 of 2012** that has similar provision in **Section 26 & 80 of the new Act**, which provide that the Court may order rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. Reference was made to the case of;

Esther Ndegi Njiru & Anor vs Leonard Gatei [2014] eKLR

“On the basis of the evidence tendered I am satisfied that the 2nd Defendant fraudulently acquired title to the suit property and could not therefore have acquired a good title to the property. It would thus in my view follow that if the 2nd Defendant did not have a good title in the property he could not pass a good title to anybody else.”

In the case of Elijah Makeri Nyang'ra vs Stephen Mungai Njuguna & Anor [2013] eKLR Hon. Sila J. held as follows; -

“The law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.

For the first limb, it appears to me that the title of the 1st Defendant was obtained by fraud or misrepresentation.

1ST & 2ND DEFENDANTS SUBMISSIONS

36. The Defendant raised what should have been a Preliminary Objection that this Court lacks jurisdiction to hear and determine the matter as the orders sought can only be issued by the Environment & Land Court.

37. The Parties relied on **Article 162(2) (b) COK 2010 & Section 13 of the Environment & Land Act** on jurisdiction of the ELC Court that ousts the jurisdiction of the High Court in land use matters.

They cited Patrick Ndegwa Munyua vs Benjamin Kiiru & Anor [2020] eKLR & Jane Wambui Ngeru vs Timothy Mwangi Ngeru [2015] eKLR to fortify this position.

38. The Defendant submitted that the 1st Defendant passed on in 2015 and the same is contained in the application of 21st March 2018. The Plaintiffs did not file application to substitute the 1st Defendant. **Order 24 Rule 4 CPR** provides that if an application to substitute is not made within 1 year then the suit abates against the deceased Defendant.

39. In the case of Lucy Wanjiru Kamau vs K. H. Osmond [2018] eKLR the learned Court opined as follows; -

“It was therefore the finding and holding of this suit that the suit as against the deceased Defendant herein could not be revived under the provisions of Order 24 Rule 4 (1), Rule 4 (3) and Rule 5 of the Civil Procedure Rules as had been sought by the Plaintiff for the simple reason that there was no provision for revival of an abated suit as against the deceased Defendant under Order 24 of Civil Procedure Rules.

It was also the concerned opinion of this court that it could also not make an order for the substitution of the representative of the estate of the Defendant to be made a party of the suit herein because firstly, it would be futile for this court to cause him to be a party of the suit herein under the provisions of Order 24 Rule 4 (1) of the Civil Procedure Rules because Order 24 Rule 4(3) of the Civil Procedure Rules was clear that where no such application is made within a year, the suit against the Defendant shall abate. Secondly, an abated suit against a deceased Defendant cannot be revived. Thirdly, the legal representative of the estate of the Defendant was unknown.”

40. Defendants did not file Defenses, the Proceedings of formal proof require the Plaintiff(s) discharge burden of Proof under **Section 107**

Evidence He who alleges must prove.....

41. Rosaline Mary Kahumbu vs National Bank of Kenya Ltd[2014] made reference to Samson Maitai & Anor vs African Safari Club [2010] where Emukule J defined formal proof proceedings thus;

“.....I have not seen judicial definition of the phrase “formal proof”. “Formal” in its ordinary Dictionary meanings – refers to being “methodical” according to rules (of evidence). On the other hand, according to Halsbury’s Laws of England, Vol. 15, para, 260, “proof” is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If the party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

42. The Defendants deposed that 2nd Defendant is legal owner of the suit property. The evidence adduced was that the Plaintiffs transacted with the 1st Defendant and not the owner of the suit property, 2nd Defendant and payments were by the Plaintiffs to the 1st Defendant and not the 2nd Defendant. Due to the different ID numbers, it was difficult to determine the 1st Defendant as shown by Pages 10,11,14 & 15 of Plaintiff’s bundle.

43. The particulars of fraud as enumerated in the Plaint were not proved. Fraud was/is defined in Vijay Moriaria vs NanSingh Madhusingh DarBar & Anor [2000] eKLR. The burden of Proof was defined in Kinyanjui Kamau vs George Kamau[2015]eKLR.

44. The 1st & 2nd Defendants posit that no Sale Agreement was produced in Court, no Power of Attorney authorizing the 1st Defendant to transact on behalf of the 2nd Defendant was produced in Court. The Defendants stated that they were acquitted of all charges in **Criminal Case 2880 of 2003**.

3RD DEFENDANTS SUBMISSIONS

45. The 3rd Defendant relied on **Section 21 of Registration of Titles Act** repealed by **Land Registration Act 2012** under **Section 27** of the new Act that provides that every title authenticated by the Recorder of Titles and a certificate of ownership shall be conclusive evidence against all person’s proof that the person to whom the certificate is granted is the owner.

46. The case of Francis Muthoga Muhika vs Paul Njuguna Kahia & Anor 2018 eKLR; while citing the Court of Appeal decision in Savings & loan (K) Limited v Kanyenje Karangaita Gakombe & Another [2015] eKLR outlined the principle of privity of contract as follows; -

“The doctrine of privity of contract stipulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.”

47. In the case of Clement Thuku Ikigu vs Housing Finance Coof Kenya Ltd [2005] eKLR dealt when statutory power sale is exercised by the Chargee in compliance with **Section 27 Registered Land Act** (repealed) as follows;

“provided further that notwithstanding anything to the contrary contained herein or in the Registered Land Act the Statutory power of sale and the appointment of a receiver shall be immediately exercisable by the chargee at any time after the chargee has demanded payment of any moneys from the borrower or the chargor and upon the chargor’s failure to pay the same in full upon demand and the provisions contained in the said Act as to the giving of statutory notice and the giving of time for payment or restrictions on the said powers shall not apply to this security and that a receiver shall have full power to sell the property hereby charged immediately after the date of his appointment notwithstanding the absence of any notice to the chargor as is provided for in the said Act.”

DETERMINATION

Upon considering the pleadings evidence and submissions the issues that emerge for determination are as follows;

1. Is this Court clothed with jurisdiction to hear and determine the instant dispute?
2. Has the suit against the 2nd Defendant abated?
3. Is there a valid sale of land transaction?
4. Is there a valid legal charge?
5. Was/is there fraud?
6. Remedies

1. JURISDICTION

48. The 1st & 2nd Defendants raised the issue of this Court hearing and determining this matter as jurisdiction is vested on Environment & Land Court by virtue of **Article 162(2) (b) COK 2010 & Section 13 of the Environment & Land Act. Section 26(3) & (4) of Environment & Land Act 2011 & Section 9(a) of Magistrate’s Courts Act 2015** bestows requisite pecuniary jurisdiction to Magistrates to hear and determine matters involving title of land and occupation of land.

49. **The Constitution** provides;

Article 162 (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

Article 165 (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2);

High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2)

The jurisdiction of ELC Court is spelt out by **Section 13 of Environment & Land Court Act** which provides;

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

50. In the case of **Lillian S vs Caltex Kenya Ltd [1989] eKLR** provides;

“Jurisdiction is meant the authority which a Court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision.....where the Court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given....

Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs its tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction.”

51. In **Samuel Kamau Macharia vs KCB & Others Supreme Court No 2 of 2011(SC)[2012] eKLR** stated;

“A Court’s Jurisdiction flows from either the Constitution or both. Thus, a Court can only exercise jurisdiction as conferred by the Constitution or other written law.....It cannot arrogate to itself jurisdiction exceeding that which is conferred by law.....the Court must operate within the Constitutional limits.”

52. This position was amplified in **Republic vs Karisa Chengo & 2 Others [2017] eKLR** The Supreme Court held thus;

“Judges appointed to the High Court and ELRC have no constitutional and statutory mandate to deal with ELRC matters.

Indeed, the Constitution expressly prohibits the High Court from hearing matters to do with environment, land and employment.”

53. In the instant case there are 2 legal claims;

a) The Plaintiffs in 1997 entered into a contract for sale of land suit property Nairobi/Block 141/841 previously Plot Number 447B with the 1st & 2nd Defendants for Ksh.1,000,000/- and Land Agent’s Fees Ksh.80,000/- in exchange for land ownership. They occupied the suit property from 2000 to date and awaited as promised by the 2nd Defendant to process the title document in the Plaintiffs names. That did not happen and is a live issue for determination.

b) The 1st & 2nd Defendants in 2002 approached the 3rd Defendant bank, Consolidated Bank for loan facility of Ksh.1,000,000/- to boost the Lusaka Auto Garage business. They produced Title Document of Lease for Nairobi/Block 141/841 as security. The 3rd Defendant alleged that after due diligence it was a clean title and the Legal Charge was drawn. On default of redemption of the loan facility, the 3rd Defendant proceeded to exercise its statutory power of sale. The Auctioneers visited the suit premises and found the Plaintiffs *in situ*.

54. From these salient facts of the dispute before Court is a ‘mixed grill’ case with both land and legal charge over land with monies owed to be recovered.

In the case of ***Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Ltd & Anor [2016] e KLR***, the Kiambu- High Court Commercial & Tax Division faced with similar ‘mixed grill’ situation and similar preliminary question raised the Hon J.Ngugi J considered;

“When faced with controversy whether a particular case is a dispute about land (which should be litigated by the ELC Court) or not, the Courts utilize the Predominant Purpose Test. In a transaction involving both a sale of land and other services or goods; jurisdiction lies at the ELC Court if the transaction is predominantly land, but the High Court has jurisdiction if the transaction is predominantly for provision of goods, services, construction, works.....”

55. In the case of ***Thomas Mutuku Kasue vs Housing Finance Co Ltd (HFC)& Anor 2021eKLR*** Hon O. A. Angote J ELC posited;

“The Plaintiff has not denied that as security for loan facility, he executed a Charge dated 26th February, 1998 and Further Charge on 22nd April 1999.....The Plaintiff has confirmed ..that the 1st Defendant is seeking to exercise its statutory power of sale of the charged property.....”

The substratum of the suit, therefore relates to legal charge and subsequent statutory power of sale.....”

The Court of Appeal ...has held that where the predominant issue in a suit involves mortgages, charges, collection of dues and rents, it is the High Court and not ELC, that has jurisdiction to deal with the dispute.....”

It is my finding that this Court does not have jurisdiction to hear and determine this suit.”

56. In the case of ***Cooperative Bank of Kenya Ltd vs Patrick Kangethe Njuguna & 5 others [2017] eKLR*** the Court of Appeal Hon Visram, Karanja,Koome JJA stated as follows;

“By definition, a charge is an interest in land securing the payment of money or money’s worth or the fulfilment of any condition (See Section 2 of the Land Act) As such, it gives rise to a relationship where one acquires rights over the land of another as security in exchange for money or money’s worth. The rights so acquired are limited to the realization of the security advanced (See Section 80 of the Land Act. The creation of that relationship therefore, has nothing to do with use of the land. Indeed, the relationship is simply limited to ensuring that the Chargee is assured of the repayment of money he has advanced the Chargor.

Further, Section 2 aforesaid recognizes a charge as a disposition of land. A disposition is distinguishable from land use...”

See also ***Kisimani Holdings Ltd vs Anor Fidelity Bank Ltd [2013]***

57. Going by the above cited cases and analogy, the facts of the instant case connote both land and legal charge wrapped up with allegations of fraud. The predominant issue is the 3rd Defendant’s right to exercise statutory power of sale over the suit property. In fact the genesis of the dispute is when Valuers and/or Auctioneers visited the suit premises and found the Plaintiffs in occupation and were unaware of an auction of the suit property. That being the predominant issue, although there are land issues, for purposes of determining the import of the legal charge, this Court has jurisdiction to hear and determine the dispute.

58. The 1st & 2nd Defendants’ Counsel, submitted that by virtue of **Section 26(3) & (4) of Environment & Land Act 2011 & Section 9(a) of Magistrate’s Courts Act 2015**, the dispute(s) ought to be heard by the Magistrate’s Court as required under **Section 11 of CPA**;

“Every suit shall be instituted in the court of the lowest grade competent to try it,.....”

59. That is the correct position of the law; the suit property was sold in 1997 at Ksh.1,000,000/- and the loan facility advanced was

Ksh.1,000,000/-At the time; 2000, the pecuniary jurisdiction of Magistrates Court had not been enhanced. Today, it is at Ksh.20,000,000/- To enable this Court determine the question of jurisdiction, whether to remit the dispute to Magistrate's Court or not a current Valuation Report availed to this Court would have aided the Court to make an informed decision. It is judicially noticed that land appreciates over time (from 2000- 2021) and in terms of physical development on the suit property either by extension and improvement of house(s) and /or advanced infrastructure such as dual carriageway, railway, shopping Malls/Centres and adjacent upmarket housing. In the absence of a recent Valuation presented in Court, the objection cannot be legally determined at this stage and is dismissed.

2. ABATEMENT OF SUIT AGAINST THE 1ST DEFENDANT.

60. 1st & 2nd Defendants Counsel submitted that the 1st Defendant passed on in 2015 and the information was relayed in Court. The Plaintiffs' Counsel acknowledged this position as shown by submissions filed in Court in 2018. No application was made by the Plaintiffs to substitute the 1st Defendant with the legal representative of his estate after being informed of his demise. **Order 24 Rule 4 CPR** provides that where the Defendant is deceased and the cause of action survives or continues, an application [ought] to be made in that behalf which shall cause the legal representative to be made a party and shall proceed with the suit.

61. In the instant case, the Plaintiffs served the Defendants with the Plaintiff Summons and Application 15th April 2003 and 1st & 2nd Defendant failed to enter appearance and Interlocutory /default judgment was entered against them in 2003. This judgment was not set aside by the time of his death in 2015 or to date. The 1st Defendant had judgment entered against him before his demise.

62. During the hearing of the suit, the 1st & 2nd Defendants were represented by Counsel. At no point was the issue of the 1st Defendant's demise raised except for the 1st time during submissions.

63. The **Evidence Act** provides for the maxim '*he who alleges must prove*' in the following provisions;

Section 109 of Evidence Act

"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."

Section 112 of Evidence Act

"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

64. It was incumbent upon the 1st & 2nd Defendants (who are man and wife) through Counsel to inform the Court of the 1st Defendant's demise and seek opportunity /adjournment from Court to allow the 1st Defendant's family lodge application for grant from Family Division of the High Court to enable the 1st Defendant's Legal Representative lawfully apply to join these proceedings and file defense. As it is, an original or certified copy of 1st Defendant's death certificate is/was not placed on record and the burden of proof is not discharged by the 1st Defendant, his family and/or his lawyer under **Section 109 & 112 of Evidence Act**. The suit cannot abate in the absence of tangible and cogent evidence of 1st Defendant's demise produced in Court. Secondly, the Defendant here had the responsibility to file for the legal representative of the 1st Defendant to take over the proceedings. They did not do so, they cannot successfully rely on **Order 24 Rule 4 CPR** from their omission.

2. IS THERE A VALID SALE OF LAND TRANSACTION?

65. There is on record the Agreement on Authority to Sell in letterheads of Pajamko Services P.O.Box 75975 where the 2nd Defendant Mrs. Mary Wanjiru Njuguna ID 4835512 on 26/5/1997 signed and authorized Mr Njuguna Njoroge ID 4834314/67, 1st Defendant (her Husband) of P.O Box 59722 Nairobi (Lusaka Road Auto Garage) to carry out the sale of her property Plot 447 Karura Farmers plus a house and other developments and sign all documents. All documents and papers are registered in 2nd Defendant's name. The 2nd Defendant appointed M/S Pajamko Services as sole Agent for the Transaction represented by James Muchiri Kinyua ID 10478363/73.

66. The numerous Agreements outlined above depict that the Plaintiffs paid the Purchase Price for the Plot in instalments to completion in 2000. In all agreements the vendors /1st & 2nd Defendants allowed the Plaintiffs to occupy the Plot and had the right to develop it. The Plaintiff settled on the premises after payment of last instalment in September 2000.

67. At the time of purchasing the suit property the Plot was one of the many plots sold to buyers and by Karura Farmers Co Ltd and as PW2 testified they were all in one mother title and the Company was in the process of subdividing and processing individual titles to /for each parcel of land. So, when the Plaintiffs agreed to buy the Plot and it was agreed between parties that upon registration of the Plot and issuance of the Lease Certificate, the 2nd Defendant would formally transfer the premises to the Plaintiffs.

68. The above chronology of events confirms a valid, regular and legal sale of land contract between the Plaintiffs and 1st & 2nd Defendants.

69. The above cited documents show acknowledgement of part payments by Plaintiff to 1st Defendant as authorized by 2nd Defendant in the Agreement of 26/5/1997 right upto the last instalment of September 2000. The Plaintiffs entered settled and developed the suit property from 2000 to date with the knowledge, approval and consent of the 1st & 2nd Defendants. There is no evidence on record that the 1st & 2nd

Defendants reported the matter to Law Enforcement i.e Police or Local Administration i.e Chief or SubChief for unlawful occupation or trespass by Plaintiffs onto the suit property. The Plaintiffs enjoyed possessory rights to the land and awaited as promised for the legal title to the land for Purchase price they paid the 1st & 2nd Defendants.

3. LEGAL CHARGE

70. The 1st & 2nd Defendants on 11th February 2002, approached the 3rd Defendant bank, Thika branch for loan facility. The 2nd Defendant presented a lease title for the suit property dated 1st May 2002. The 3rd Defendant annexed documents presented by the 1st & 2nd Defendants to the bank as follows;

a) Application to open Company/Partnership/Business/Current/ Savings Account of 16/10/2001 with photographs of 1st Defendant of Lusaka Road Auto Garage Ltd.

b) Application letter for loan facility of 11th February 2002 by 1st Defendant

c) Lease for Nairobi /Block141/841 by 2nd Defendant

d) Consolidated Bank Statement of Account of Lusaka Auto Garage Ltd

e) Legal Charge of 1st July 2002 of Mary Wanjiru Njuguna & Njuguna Njoroge T/A Lusaka Road Auto Garage to Consolidated Bank. Charge is over Title Number Nairobi/Block 141/841executed by 2nd Defendant.

71. The 3rd Defendant conducted due diligence and relied on **Section 27 Registered Land Act** and **Section 21 of Registration of Titles** that the 2nd Defendant had absolute ownership. The Register pertaining **LR Nairobi/Block 141/841** did not show any inhibitions or encumbrances on the suit property. Therefore, from the facts the 3rd Defendant prepared a perfect legal charge and was done professionally.

FRAUD/FRAUDULENT MISREPRESENTATION

72. Blacks Dictionary describes fraud as follows;

“Fraud consists on some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury....As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”

73. Fraudulent misrepresentation is a false representation made knowingly, without belief in its truth recklessly or carelessly.

See *Derry vs Peek 1889 LR 14 App Cas 337*

Fraud must be specifically pleaded and proved to a standard above balance of probabilities but not beyond reasonable doubt. The onus is on the Plaintiffs to discharge the burden of proof.

74. In the instant case, the Plaintiffs alleged fraud by defendants as they bought the suit property as *bonafide* purchasers who purchased in good faith for value without notice of defective title or knowledge of fraud as described **Lawrence Mukiri vs Attorney General & 4 Others [2013] eKLR;**

75. The Plaintiffs by various instalment payments acknowledged by the Commitment Agreements paid in full the agreed purchase price and occupied the suit premises.

76. It is the testimony of the 1st Plaintiff that the 1st & 2nd Defendants agreed on payment of the Purchase price and the Plaintiffs to take possession of the suit property and once payment was completed the Certificate of lease would be released to the Plaintiffs by the Defendants.

77. On completion, the Plaintiffs sought out the 1st & 2nd Defendants and they referred the Plaintiffs to their Advocate Mr. Maosa and demanded payment for preparing transfer and completion documents. The Plaintiff did not receive any completion documents.

78. The Plaintiff visited offices of Karura Farmers Co Ltd and met PW2 Mr.Tom Ouko Apamo who then accompanied the 1st Plaintiff to the 1st & 2nd Defendants home. The 2nd Defendant claimed that she was yet to receive the title deed and the Plaintiff was to be patient and wait as the matter was handled by their Advocate Mr. Kibatia PW3 whom she paid to undertake the process. When the Plaintiff visited the Defendants', they had relocated from their home to an unknown place.

79. Suddenly, on 7th March 2002, Valuers visited the suit property to undertake valuation. The Plaintiff wrote to the 3rd Defendant Bank, copied to 1st & 2nd Defendants Advocates and the Land Selling Company Karura Farmers Co Ltd. On 20th March 2002 Auctioneers from the

3rd Defendant's bank visited the Plaintiffs at the suit premises and issued 45-day Notice of Auction.

80. The 1st Plaintiff visited the 3rd Defendant's Advocates offices; Kipkenda & Lilan Advocates and he was informed that the 2nd Defendant charged the suit property with the 3rd Defendant bank and secure a loan facility of Ksh.1,000,000/-which she failed to pay.

81. From the chronology of events outlined above, the Plaintiffs carried out their obligations under the contract for sale of land by full payment of the purchase price. The Defendants failed to fulfil their obligations in the contract; apart from allowing the Plaintiffs to occupy the land, they did not transfer title to the suit property as promised by 2nd Defendant to the Plaintiffs. They concealed from the Plaintiffs that as they told them to wait for the title to be processed that they had processed the title in 2nd Defendants name.

82. The 2nd Defendants statement/promise to the 1st Plaintiff when he visited her home was fraudulent misrepresentation through dishonesty, deceit and bad faith, concealment and material non -disclosure of the truth, that the 1st & 2nd Defendants had on their own processed and received the title document in the 2nd Defendant's names to the suit property and had approached the 3rd Defendant bank for loan facility which funds they received and utilized and failed to make any payments to defray the outstanding loan.

83. The 1st & 2nd Defendants also committed fraud by receipt of instalment payments totaling Ksh.1,000,000/- for purchase of the suit property, then inducing the Plaintiffs to occupy the suit property without providing title so as to be evicted from the premises when the 3rd Defendant bank auctioned the suit property to realise the loan facility the Defendants defaulted on.

84. The 1st Defendant and 2nd Defendants obtained purchase price of Ksh.1,000,000/- from Plaintiffs from 1997 -2000 as sale of the suit property and loan of Ksh.1,000,000/- from 3rd Defendant on charging the same suit property. The Defendants did not refund the Purchase price to the Plaintiffs nor service the loan received from 3rd Defendant, the funds from both fraudulent transactions unjustly enriched them to the detriment of Plaintiffs and 3rd Defendant. In the case of ***Kenyatta International Conference Centre versus Greenstar Systems Limited [2018] eKLR*** Olga Sewe LJ. Stated; -

“...it would lead to unjust enrichment if the Respondent were allowed to keep the benefit and user of the refurbished premises without having them pay for their value...the Claimant has performed its obligations under an invalid contract. The counter-performance expected of the Respondent, being payment for those works has not materialized. The Respondent has thereby been unjustly enriched. It should be noted that it is immaterial whether the counter-performance is based on a valid contract or not...It is therefore my conclusion on this issue that there ought to be restitution and the parties be taken back to where they were as if the Contract had not been entered into...”

85. The 1st & 2nd Plaintiff committed fraud to Land Selling Company Karura Farmers Buying Company as shown by PW3's testimony its Company Secretary then. When asked to visit the office to confirm the 1st Plaintiffs allegation that he bought and paid for the suit premises from 2nd Defendant and dealt with her husband 1st Defendant who received the money on her behalf, both Defendants failed to appear or communicate with the Company. On Plaintiff's production of documents confirming sale the Register was accordingly regularized with the insertion of Plaintiff's names.

86. The Plaintiffs bought and occupied the suit property from 2000 and were awaiting the title document. By 2002 when 1st & 2nd Defendants approached the 3rd Defendant for a loan facility and charged the same suit property, they failed to disclose to the 3rd Defendant bank that the suit property **LR Nairobi/Block 141/841** was bought and occupied by the Plaintiffs who already enjoyed possessory rights to the land awaiting transfer of ownership rights to the suit property by issuance of title document. The 1st and 2nd Defendant posed as true owners of the suit property and concealed from the 3rd Defendant that the Plaintiffs bought the suit property.

87. The 1st Plaintiff informed the Karura Farmers Advocate Mr. Kibatia PW3 of the purchase of the suit property by letter of 8th March 2002 and thereupon, the Advocate contacted the 2nd Defendant to go to the office and confirm or deny the sale of the suit property to the Plaintiffs. Instead he received a letter from the Defendants Advocate Mr Maosa. PW3 replied vide letter of 17th April 2002 that in the absence of any verification, the Defendants committed fraud and he stopped the processing of the title document pending investigations as it was a police case. It is a mystery how they obtained the title document. The matter culminated to **Criminal Case 2880 of 2003** where the Defendants were acquitted of fraud. It is strange that this Court record contains complete Police File contents, Statements, exhibits, covering and investigative reports and the charge sheet but it is peculiar the all-important judgment is missing. The Court shall say no more on the subject.

88. The 1st & 2nd Defendants from evidence adduced by PW1 & PW2 and correspondence in the Court file depict parties who avoided/fled from PW1 after payment of the purchase price, they moved houses and the 1st Defendant closed down Lusaka Road Garage. They refused to attend or inform or communicate with /to the Karura Farmers Company on sale /purchase of suit property by PW1 from them The letter by advocates to Kasarani Police Station of 18th November 2003 that the defendants were flight risks speaks to the fact that they were in hiding to obtain unjust advantage from Plaintiffs and 3rd Defendants from funds they obtained and did not discharge their obligations.

DISPOSITION

89. From the totality of the evidence on record these facts disclose and confirm fraud by the 1st & 2nd Defendants to the Plaintiffs on the one hand and to the 3rd Defendant bank on the other hand as outlined above. The Plaintiffs have proved to the required standard of proof the particulars of fraud outlined in paragraph 8 of the Plaintiff.

90. The Plaintiffs claim against the 3rd Defendant bank of fraud was not proved by evidence during hearing of the matter. The 3rd

Defendant's position as evidenced by DW1 and the list of documents point to a perfect legal charge over the suit property **LR Nairobi/Block 141/841** based on documents filled in and signed by 1st & 2nd Defendants. The 3rd Defendant exercised due diligence on the title document and found no encumbrances. This evidence was not controverted. The 3rd Defendant was not privy to the contract of sale of suit property between Plaintiffs and Defendants from 1997-2000. The Defendants approached the 3rd Defendant in 2002 for loan facility and Plaintiff approached the 3rd Defendant in March 2002 after Auctioneers visited the suit property. The Plaintiffs claim against the 3rd Defendant bank is dismissed.

91. The Plaintiffs case is that as *bona fide* purchasers they bought and paid full value for **LR Nairobi/Block 141/841** and developed and occupied the suit premises from 2000 to date. There is no evidence that the Defendants evicted them or refunded their purchase price. Their quiet enjoyment of the suit property was interfered with when Valuers and later Auctioneers visited the suit premises and Plaintiffs were informed of imminent auction.

92. The Plaintiffs have been in occupation of the suit property for 21 years now. **Section 7 of Limitations of Actions Act** prohibits an action to recover land held /occupied for 12 years. Further, **Section 38 of Limitation of Actions Act** prescribes;

“Registration of title to land or easement acquired under Act (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land. (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

93. The Court of Appeal in *Kinyua vs Simon Gitura Rimuri Nyeri Civil Appeal Number 265 of 2005* held;

“With regard to the extent of adverse possession, we think that possession of 8 acres of land for a period exceeding 12 years has been clearly established and that the Respondent was in exclusive possession of the piece of land openly and as of right during all this time. With respect that is all the Claimant is required to establish.... It follows from the foregoing, the Appellant is deemed to have had either knowledge of the possession or had means of knowing of the possession or occupation but did nothing about it by way of asserting ownership. It is also not in dispute that the possession was never interrupted and was continuous for the entire period as prescribed.”

94. By virtue of adverse possession of the suit property over the years continuously with knowledge of 1st & 2nd Defendants who took no action or refunded the purchase price the Plaintiffs acquired title /ownership rights through adverse possession.

95. Secondly, the fact that the sale of the suit property in 1997, was way before the land was charged as security in 2002, the 2nd Defendant who sold the land to the Plaintiff lacked any registrable interest to register and obtain title and charge it as security to the 3rd Defendant bank.

96. Thirdly, **Section 23 of the Registration of Titles Act & Section 27 of Registered Land Act** (both now repealed) [now sections **25 & 26 Land Registration Act**] provided that the title of a registered owner would be challenged on grounds of fraud or misrepresentation which the owner is proved to be a party.

97. Although the Defendants submitted that the legal title and ownership of the suit property belonged to the 2nd Defendant, the evidence on record confirms it was obtained by fraud by Defendants to both Plaintiffs and 3rd Defendant among others.

98. In the case of *Kibiro Wagoro Makumi vs Francis Nduati Macharia [2018] eKLR* which had similar facts as the instant case; 1st Defendant obtained title through fraud and obtained a loan and charged the suit property, upon being sued and was served, he failed to enter appearance and default judgment was entered against him. After Formal Proof proceedings; the Court found;

“1st Defendant's title was acquired fraudulently; no valid title was charged to the 2nd Defendant capable of conveying a legal interest in the suit by way of a realizable security.”

99. See also; *Alice Chemutai too vs Nickson Kipkurui Korir & 2 Others [2015] eKLR*.

100. The 3rd Defendant proved that Ksh.1,000, 000 was advanced as loan facility to the 2nd Defendant to finance the 1st Defendant's business Lusaka Road Garage Ltd. The Defendants did not make a single payment to the bank. Although the 3rd Defendant had a right to exercise statutory power of sale based on the charged property and title, the title is defective as it was obtained by/through fraud by Defendants. Therefore, no legal interest was transferred to 2nd Defendant who had already divested herself of ownership of the suit property after sale to and occupation of the premises by the Plaintiffs.

101. The 3rd Defendants recourse is to pursue against 1st & 2nd Defendants, personally, jointly and severally a claim against them for money had and received with accrued interest and costs for the loan facility obtained and not defrayed. This matter has been in our Courts for close to 20 years, however, limitation of action may not apply by virtue of **Section 26 C of Limitation of Actions Act**.

ORDERS

1. The Plaintiffs are owners and occupants of LR Nairobi/Block 141/841 after payment of Purchase price to 1st & 2nd Defendants and occupied the suit property for 21 years.

2. The 1st & 2nd Defendants obtained title document Certificate of Lease of Nairobi/Block 141/841 and Legal Charge through fraud and fraudulent misrepresentation to 1st Plaintiff and 3rd Defendant respectively.

3. The Plaintiffs claim against the 3rd Defendant is dismissed.

4. The Legal Charge for Nairobi/Block 141/841 is tainted with fraud by 1st & 2nd Defendants and contains no valid legal interest as a realizable security. It is declared null and void.

5. The 3rd Defendant may pursue its claim against the 1st & 2nd Defendants for money had and received with attendant interest and costs.

6. The Title Document Lease for Nairobi/Block 141/84 in the 2nd Defendant's name shall be cancelled forthwith and the Plaintiffs registered as rightful owners of the same suit property and shall be issued with title documents of the suit property Nairobi/Block 141/841.

7. Each party to bear own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 11TH MAY 2021. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. JUMBA H/B MR. ODHIAMBO FOR 1ST AND 2ND DEFENDANTS

P. S. KISAKA & COMPANY ADVOCATES FOR PLAINTIFF – N/A

LILAN & KOECH ASSOCIATES FOR THE 3RD DEFENDANT – N/A

COURT ASSISTANT: GRACE

COUNSEL: We are requesting typed proceedings and certified copy of the Judgment to be granted upon payment of requisite fees.

The stay of execution be applied for formally.

M.W. MUIGAI

JUDGE