



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 378 OF 2017

(FORMERLY NAIROBI ELC NO. 867 OF 2014)

JOSEPH KARANJA GATUTHU.....1ST PLAINTIFF

PETER NJUGUNA GATUTHU.....2ND PLAINTIFF

SAMWEL NJUGUNA GATUTHU.....3RD PLAINTIFF

VERSUS

JOTHAM NJAMI MWARIRI.....1ST DEFENDANT

HANNAH NJERI GATUTHU.....2ND DEFENDANT

MONICA GATUTHU.....3RD DEFENDANT

GATUTHU NJUGUNA ESTATES LIMITED.....4TH DEFENDANT

JUDGMENT

By a Plaint dated 1st July 2014, the Plaintiffs herein sought for Judgment to be entered against the Defendants jointly and severally for:-

- (a) *A declaration that the 2nd, 3rd and 4th Defendants jointly and severally held L.R. Number 4953/478; I.R Number 13765 in trust for the Plaintiffs and the beneficiaries of the estate.*
- (b) *A declaration that the purported transfer of L.R. Number 4953/478; I.R Number 13765 to the 1st Defendant on 8th March 2012, was fraudulent and in breach of trust.*
- (c) *An order directing the Registrar of Lands at Nairobi to cancel and/or revoke the purported transfer of L.R Number 4953/478; I.R Number 13765 to the 1st Defendant on 8th March 2012.*
- (d) *The 2nd, 3rd and 4th Defendants be ordered to refund monies if any received from the 1st Defendant.*
- (e) *Costs of the suit.*
- (f) *Interest.*
- (g) *Any other relief this Honourable Court may deem fit to grant.*

The Plaintiffs are the children and beneficiaries of the **late Gatuthu Njuguna**. The dispute arose herein is on ownership of **L.R. Number 4953/478; I.R 13765**, a commercial property situated in **Thika Town Centre**. The plot is about **0.140** of an **acre** as described in a copy of title produced as Plaintiff document 4. It was the Plaintiffs' averments that **Gatuthu Njuguna** (deceased), was the registered owner of the said property. He died on **19th January 1988**, and prior to his death, the deceased distributed his property by a Will dated **19th January 1988**. Under the terms of the said Will, specifically clause 4, the deceased directed his three spouses being, **Esther Mumbi** (now deceased), **Hannah Njeri** (2nd Defendant) and **Monica Waithira** (3rd Defendant) to incorporate a Limited Liability Company to be known as **Gatuthu**

Njuguna Estates Limited and the three were to hold and subscribe equal shares in the said company. Such shares as alleged by the Plaintiffs were to be held in trust for each of the three houses.

It was the Plaintiffs further averment that on the or about **8th March 2012**, the Defendants **fraudulently** and in **breach of trust** transferred and/or caused the property to be transferred to the 1st Defendant. The said transaction according to the Plaintiffs was **unlawful** and violated the trust and/or was perpetuated fraudulently by the Defendants.

The suit is contested and the 1st Defendant filed his Defence on **13th July 2015**, while the 2nd, 3rd and 4th Defendants filed their Defence on **15th December 2014**, and denied in totality all the averments contained in the Plaintiff. It was the 1st Defendant's defence that he bought and completed settling the purchase price of the disputed land parcel known as **L.R. No. 4953/478**, from its duly registered owner who was the 4th Defendant, where the 2nd and 3rd Defendants in their capacity as the Directors of the 4th Defendant duly executed a sale agreement and indeed the Plaintiffs even consented to that effect.

It was the 1st Defendant's further defence that he paid the full agreed purchase price of **Kshs.32,250,000/=** which was the market price then as assessed by **M/S Cyrus Kariuki & Co. Associates**. He contended that the Plaintiffs were all along aware that their consents were of paramount importance to the completion of the transaction. It was his further contention that under **clause 2(h)** of the sale agreement, which was set out at **Paragraph 9(iv)** of the Plaintiff, the down payment together with the balance of the purchase price thereon were on various dates between **5th May 2010** to **1st July 2012**, forwarded to the advocates of the Plaintiffs and the 2nd, 3rd and 4th Defendants in full and therefore the 1st Defendant was fully discharged and released from the said transaction under clause 5 of the sale agreement.

Further that the Plaintiffs have dishonestly and/or deliberately failed to bring to the attention of the Court that the transactions and allegations subject to this suit were also subject of criminal proceedings in **Criminal Case No. 1022 of 2011**, at Nairobi being **Republic vs Jotham Njami Mwariri & Another**, wherein the 1st Defendant was charged with **three** counts related to conspiracy to defraud the administrator of the suit estate, but were acquitted under **section 210** of the **Criminal Procedure Code**. Therefore, the 1st Defendant averred that the Plaintiffs suit did not disclose any reasonable cause of action against him and he sought for dismissal of the whole suit.

The 2nd, 3rd and 4th Defendants filed their Defence on **15th December 2014**, and admitted incorporation of the 4th Defendant which was strictly in line with the **Will** of the deceased **Gatuthu Njuguna**, which did not place any duty on them to refer to the beneficiaries before incorporating the 4th Defendant. They further admitted that the Plaintiffs, 1st, 2nd and 3rd Defendants are all related and that they trusted the 1st Defendant as a family member. Further that the 2nd and 3rd Defendants are elderly and illiterate. The 2nd, 3rd and 4th Defendants conceded that **L.R. No. 4953/478 I.R Number 13765**, situated in **Thika Town** was fraudulently transferred to the 1st Defendant. Further they averred that the said land was **unlawfully, illegally** and **fraudulently** transferred to the 1st Defendant solely on the basis of **fraud, misrepresentation, illegality** and **deceit** committed by the 1st Defendant alone and that they were not parties to the said fraud.

It was their averments that around **May 2010**, and **April 2011**, the 1st Defendant advanced to 2nd and 3rd Defendants **Kshs.18,000,000/=** to develop the suit premises on the understanding that on completion of the same, the 1st Defendant would lease the said premises and offset the amount advanced from the rentals. Further that as a security on the said advance, the 3rd Defendant released to the 1st Defendant the original title to the premises.

They alleged that thereafter the 1st Defendant requested the 2nd and 3rd Defendants to sign documents allegedly to acknowledge that they had received the said **Kshs.18,000,000/=** and they would pay the same. Further that even if the 2nd and 3rd Defendants agreed to execute, the 1st Defendant fraudulently took advantage of their illiteracy and caused them to execute a sale agreement and transfer of the suit premises while knowing that the 2nd and 3rd Defendants had only acknowledged their debts.

The particulars of fraud and misrepresentation were stated in paragraph 8 of their defence among them concealing to the 2nd and 3rd Defendants that what they were signing is sale agreement and transfer of the land in question disguised as an acknowledgement of debt. They further alleged that the act of the 1st Defendant has denied the beneficiaries of the **Estate of Gatuthu Njuguna**, their inheritance under the **Will** and that they have suffered loss and damage and so has the 2nd, 3rd and 4th Defendants. They also contended that the 2nd and 3rd Defendants were ready and willing to refund the sum of **Kshs.18,000,000/=** friendly loan received from the 1st Defendant, after he has transferred the suit land back to the 4th Defendant. They prayed that the Plaintiffs' suit be allowed as prayed against the 1st Defendant with costs.

However, on **9th March 2015**, the 3rd Defendant filed a **Notice to Withdraw** of the Defence and alleged that she had not instructed **M/s Gichure & Associates** to act for her. Consequently, she withdrew her Defence filed in Court on **15th December 2014**, and filed her fresh Defence dated **9th March 2015**, through **Muturi Kamande & Company Advocates**.

She denied that the Plaintiffs herein filed the suit on behalf of the beneficiaries of the **Estate of Gatuthu Njuguna**. She further denied that while incorporating, the 4th Defendant, **Esther Mumbi** and **herself**, were not obligated to make any reference to the beneficiaries as claimed by the Plaintiffs. She further admitted that the suit property herein **L.R. No. 4953/478**, was on **5th July 2010**, transferred to the 4th Defendant, but she denied that in transferring the same, to the 1st Defendant on **8th March 2012**, the Defendants acted unlawfully, fraudulently or in breach of trust or that the said transfer was **unlawful** as claimed by the Plaintiffs. Further she denied all the particulars of trust and fraud as pleaded in the Plaintiff.

It was her contention that the sale of and transfer of the suit property to the 1st Defendant was **regular** and **lawful** and that the sale proceeds were distributed to the beneficiaries of the estate, the Plaintiffs included. She alleged that the Plaintiffs' suit has no basis and urged the Court to dismiss the same with costs.

The matter proceeded via *viva voce* evidences from 27th February 2018 and Defence was closed on 18th June 2019. Thereafter parties filed their respective written submissions.

The Plaintiffs called **four** witnesses to support their case. The 1st Defendant called three witnesses and the 2nd and 4th Defendants called one witness and the 3rd Defendant gave evidence for herself and called no other witness.

PLAINTIFFS' CASE

PW 1 Joseph Karanja Gatuthu, one of the beneficiaries of the Estate of **Gatuthu Njuguna** identified the deceased's **Will** dated **19th January 1988**. He confirmed that the said **Will** had made provisions for incorporation of a company known as **Gatuthu Njuguna Estates Ltd**. He confirmed that the said company was incorporated as per the Certificate of Incorporation attached to his statement. That under the said **Will**, the Deceased properties were to be transferred to the said Company and the Directors were to hold the property in trust for the beneficiaries. It was his testimony that the suit property **L.R. No. 4953/478**, was sold and transferred to the 1st Defendant without involvement of the beneficiaries. He identified the sale agreement for the sale of the suit property which he said he was not party to. Further that he did not receive any money from the sale proceeds. Further that the 1st Defendant only gave him **Kshs.270,000/=** as a loan and he could not recall the date that the said loan was advance to him. However, he recalled he received the loan and the said money before the sale agreement was drawn. He reiterated that he was not involved in the sale of the suit property to the 1st Defendant. Further he acknowledged that he was aware of **Kshs.18,000,000/=** received by the 2nd and 3rd Defendants from the 1st Defendant in three instalments of **Kshs.6,000,000/=**. However, he denied that the said money was part of the purchase price, but stated that it was a loan for carrying out renovations of the commercial house on the suit property. Further that the 1st Defendant is a tenant in the suit property and the said loan was to be used to off-set his rent that was payable to the Company. That the beneficiaries had not agreed that the suit property was to be sold to the 1st Defendant. That the said property was supposed to be used for the benefit of the beneficiaries of the **Estate of Gatuthu Njuguna**. That the 2nd Defendant did not seek authority for the sale of the said house and he urged the court to cancel the said sale and transfer to 1st Defendant. He also testified that from the sale agreement, the purchase price was **Kshs.32,250,000/=** whereas the transfer to **Jotham Njami Mwariri** stated that **Kshs.10,000,000/=** was the purchase price. He denied that the Plaintiffs appointed **Karanja Kangiri Advocate** to act for the beneficiaries during the sale transaction.

PW 2; Peter Njuguna Gatuthu, the 2nd Plaintiff adopted his witness statement and confirmed that there was a complaint filed at the CID Headquarters in the **year 2012**. That he was also a complainant in the said complaint. He testified that as per the Valuation Report, the suit property was valued at the **Kshs.75,000,000/=** whereas the same was sold to the 1st Defendant for **Kshs.32 million**. In cross examination, he acknowledged that the family of **Gatuthu Njuguna** received **Kshs.18,000,000/=** from the 1st Defendant, which he paid in three instalments. However, he alleged that the said amount was a loan for building stalls on the suit property although there was **no** loan agreement to that effect. Further that the 1st Defendant was to recover the said amount from the rent for a period that he could not recall. He also confirmed that **Gatuthu Njuguna Estates Ltd**, was a family Company and their mothers were the Co-Directors. He also confirmed that the 1st Defendant gave him a loan of an amount that he could not recall. That he reported to the Police on the illegal transfer as he did not know that the land got registered in the name of the 1st Defendant. That after investigations, the CID charged the 1st Defendant and the **Advocate Karanja Kangiri**. He however did not know the outcome of the said criminal case. Further that though they were not satisfied with the outcome of the criminal case, they did not appeal, but instead filed the instant case. He also confirmed that he received some money from the 1st Defendant, but the said amount was a loan. He also admitted that they had earlier sold another property to the 1st Defendant but alleged that the same was sold fairly to him. It was his testimony that the 1st Defendant tricked his parents to sign the sale agreement and sell the suit property herein to him.

PW3; Mwathi Kungu Ruthiagwo, a licenced surveyor told the court that he was instructed to value **L.R No. 4953/478**. That he visited the said premises and prepaid a Valuation Report. That he valued the property at **Kshs.75 million**. Further that in **2012**, the property was valued **Kshs.60 million** and it stands at **0.14 ha**. He produced the Valuation Report as exhibit in court. In cross examination, he confirmed that the figures he quoted was an opinion and not scientific and that another Valuer can come up with a different figure so long as the difference is not more than **15%**. He further confirmed that he did not know what was on the suit property in the **year 2012**. Further that he considered the rental income in the year **2012**.

PW4; Samuel Njuguna Gatuthu, the 3rd Plaintiff adopted his witness statement as part of his evidence. It was his testimony that the family of **Gatuthu Njuguna** raised a complaint to the CID on the sale of the suit property. That there was a sale agreement dated **11th November 2010**, drawn by **Wachira Nderitu & Co Advocates**. He also referred to the Valuation Report produced in court as exhibit No. 9. He told the court that he sued the Defendants because he was not involved in the sale transaction, though he was a beneficiary of the **Estate of Gatuthu Njuguna**. That there was a sale transaction between the Directors of the 4th Defendant and the 1st Defendant, but the Plaintiffs who are beneficiaries of the estate were not involved. That the Directors were supposed to involve them in the sale of the suit property, but they were not involved. He admitted that the sale agreement dated **28th September 2011**, was drawn in the office of **Karanja Kangiri Advocate**, who was a family advocate. Further that though the said sale agreement had his signature, he denied ever signing the same. He claimed that he was in jail during that time and he was not aware of the transaction. However, he admitted to have received a friendly loan from the 1st Defendant and that he signed some documents to show that he received the said loan. He could not recall how much he received from the 1st Defendant as loan. He denied ever participating in the signing of the sale agreement. He also denied that the money that he received from the 1st Defendant was part of the proceeds for the sale of the suit property. It was his further evidence that the 1st Defendant paid his parents **Kshs.18 million**, which was to be used for renovating of the suit property and the other instalments was rent payment. He further admitted that his family has sold other properties to the 1st Defendant, but the beneficiaries consented to the said sale. It was his admission that they last collected rent over the suit premises in the year **2014**. In cross examination, he admitted that the signature on the sale agreement was his, but he alleged that he signed on a blank page but not the sale agreement in issue. He further admitted that the suit property was owned by **Gatuthu Njuguna Estate Ltd** and the 2nd and 3rd Defendants, who are their mothers were Directors of the said company and that the Directors did not involve them in the sale of the suit property.

DEFENCE CASE

1ST DEFENDANT'S EVIDENCE

DW 1; Jotham Njami Mwariri told the court that he lives in **Gatanga area** and he is a business man. He relied on the Replying Affidavit that he had filed earlier together with the list of documents annexed thereto.

He confirmed that the suit property is situated in **Thika Township** and it is owned by him at the moment. He denied that the suit property was inspected on **10th May 2018**, for Valuation. He alleged that he purchased the suit property and paid the whole purchase price. He denied having obtained the said property fraudulently. That the Directors of the 4th Defendant appended their signatures and availed photographs which are in the transfer document. He contended that he bought the suit property from the original owners and asked the court to dismiss the suit.

In cross examination, he confirmed that the suit property was purchased at **Kshs.32,250,000/=** and that he paid the whole amount to the Vendors. That he deposited **Kshs.18 million** in the **Gatuthu Njuguna's family account** which was in the names of the 2nd and 3rd Defendants. He confirmed that the property was sold to him on **28th September 2011**, and transferred to his name on **8th March 2012**. He further confirmed that the **Gatuthu Njuguna's** family herein had sold another property to him, which is not in dispute. Further that he is related to **Gatuthu family** by marriage, and had a cordial relationship before the sale.

He also admitted that he was charged in a criminal case with offences of **Conspiracy to defraud and Obtaining registration of land by false pretences**, but he was eventually acquitted. It was his evidence that the sale agreement in issue did not indicate that any money was to be paid to the beneficiaries. He denied that he ever tricked the 2nd and 3rd Defendants over this transaction. He also reiterated that he paid all the purchase price before the suit property was transferred to him. Further that all the eight beneficiaries of the **Estate of Gatuthu Njuguna** signed the sale agreement apart from **Joseph Karanja Gatuthu**. That the parties agreed that the purchase price was **Kshs.32,250,000/=** and he paid the said money in full.

DW 2; Cyrus Kariuki Kanyi, a Valuer practising with **Cyrus Kariuki & Associates** identified the Valuation Report that he prepared for **L.R No.4953/478, Thika Municipality**, which is dated **7th September 2011**. That he was instructed by the Directors of **Gatuthu Njuguna Estates Ltd**, to prepare the Valuation Report. He was to advise them on the then current market value of the property. That he gave a value of **Kshs.32,250,000/=** at that time. He first ascertained where the property was and that the persons who instructed him were **Monicah and Hannah**, the Directors of the Company. That in valuing the property, he considered the rental income and the open market value and since he was the one collecting rent from the tenants of the suit property and also managing it, he knew the rental income. He further confirmed that valuation is not an exact science and that two valuers cannot arrive at the same figures, but the variance should not be too high. He denied that at the time of sale, the suit property was valued at **Kshs.60 million**, since he valued the property based on the source of income on rental which he was in possession of. In cross examination, he confirmed the rental income of the property was **Kshs.260,000/=** per month which was an exact figure as he had records as the Managing agent of the said property. He also confirmed that valuation of property differs depending with the purpose of the valuation. That valuation for Stamp duty purpose would differ with valuation for the market value purpose.

DW 3; Antony Karanja Kangiri Advocate who practices as **Karanja Kangiri & Co Advocates** adopted his witness statement dated **2nd December 2018**, as evidence in court. He told the court that he knew the parties herein as they come from the same village. He also confirmed that he prepared the sale agreement dated **28th September 2011**, and the Directors of **Gatuthu Njuguna Estates Ltd** were **Hannah Njeri and Monicah Waithera**, the 2nd and 3rd Defendants herein. That the vendor was **Gatuthu Njuguna Estate Ltd**. That the property was **L.R No. 4953/478**, and the purchase price was **Kshs.32,250,000/=**. That he was given the original title and the Valuation Report. He then prepared the sale agreement and the vendor had already received **Kshs.15 million**. That at the time of the agreement, the Vendors acknowledged receipt of **Kshs.23,962,100/=**. Further that the Directors appended their thumbprints to acknowledge receipt of the money. That the breakdown of what each house received was also given. Further that in paragraph 3, the parties emphasized that there was consent from the whole family and the beneficiaries were the children of **Gatuthu Njuguna** and their mothers. That all the beneficiaries signed the sale agreement apart from **Joseph Karanja Gatuthu**, one of the Plaintiffs. That the Directors affixed their thumb prints and the Seal of the company was also affixed. It was his evidence that the beneficiaries and the Directors of the Estate voluntarily signed the sale agreement and he also signed the same. Further, that there were no disagreements and each of them happily collected his/her cheque. That the valuation was requested by the Vendors and the Valuer was also commissioned by the vendors. He denied that the valuation was done at the behest of the 1st Defendant. That the vendors had already been paid **Kshs.15 million** and the balance of the purchase price was paid through bank transfers and cheques to various beneficiaries. He also denied having acted contrary to the terms of the sale agreement and that the persons paid were the stakeholders. That he was given oral instructions to pay them. He also admitted to having been charged with a criminal case due to the instant transaction. He was charged together with 1st Defendant, but they were later acquitted under **Section 210** of the **Criminal Procedure Code** and that the Directors of 4th Defendant never gave evidence in the said criminal case.

He denied having acted in unprofessional manner and there is no complaint against him at the **Law Society of Kenya**. He also emphasized that the transfer in issue was not **fraudulent** and each of the beneficiary was paid at the behest of the Directors. Further that he was not informed about any trust by the beneficiaries and all the beneficiaries were aware of the said transfer. That the agreement was signed voluntarily by the Vendors and each of the beneficiaries received their share of the money. He therefore denied all the allegations contained in the Plaintiff.

He also stated that the amount disclosed in the transfer form was **Kshs.10,000,000/=** for the purpose of Stamp duty and the said disclosure did not affect the payment of the purchase price. Further that the valuation by the Government was given at **Kshs.26 million**. He admitted that some of the purchase price was paid through his office, but he alleged that he transmitted the said monies to the beneficiaries and whatever was received, he paid immediately to the beneficiaries. Further that none of the beneficiaries complained that he withheld their monies and that the suit herein was a change of heart. That none of the Directors Complained at the time of the transaction and that no one

was defrauded through the said transaction.

2ND AND 4TH DEFENDANTS' CASE

DW 4; Hannah Njeri Gatuthu, a peasant farmer from **Gatura village** stated that she was born in **1938**, as per the **ID Card No. 2010232** shown to court. Further that she had recorded her statement with the advocate **Gichure** on **6th May 2016**, which she adopted as her evidence. She further produced a list of documents as her exhibits. The list of documents included **Statement of Account** which was marked as 2nd Defendant Exhibit 1.

In cross-examination, she denied having gone to the office of her **Advocate Gichure** (now deceased) with the 3rd Defendant. She confirmed that in the **year 2010**, Monicah and herself leased the suit building to **Njami**, the 1st Defendant, but she could not recall how much he was paying as rent. That during the said leasing, her children were present. Further that they wanted to construct stalls in the building and she could not recall how many stalls were to be constructed. She also confirmed that they were paid **Kshs.18,000,000/=** by the 1st Defendant which was deposited in their Joint Account for the said development. That the said **Kshs.18 million**, was paid in three instalments of **Kshs.6,000,000/=** and they used the money to build stalls. That the said **Kshs.18 million** was a loan from the 1st Defendant which they were to repay through offsetting of rent. Further that the 1st Defendant is recouping the money from rent because he does not pay any rent for the suit premises.

It was her contention that they did not consent to have **Mwariri**, the 1st Defendant purchase the suit property. She admitted that **Mwariri** had bought another building from the family. She denied that the **Gatuthu family** owe the 1st Defendant **Kshs. 18 million** and that the family consented to the sale of the suit property to him. She alleged that the 1st Defendant caused the transfer of the building to himself without their consent. It was her further allegation that she does not know how to write and her children were not present when she put her thumb print on the sale agreement produced by the 1st Defendant. She also denied that 3rd Defendant and herself conspired to sell the building to Mwariri without involving their children. She denied having sold the suit property to the 1st Defendant, and that she reported the matter to the police. She denied knowing about the criminal case against the 1st Defendant and DW 3. She also denied having gone to Nairobi for the said criminal case. She acknowledged that 1st Defendant paid her hospital bill and further admitted that she has not paid the money back. She also admitted not having paid back **Kshs.18 million**, that 1st Defendant deposited in their Joint account. Further, she denied having received any money from **Karanja Kangiri Advocate** via a cheque of **Kshs.200,000/=**. She also denied having admitted that she received **Kshs.7,500,000/=** from the 1st Defendant.

It was her further contention that though the family has not repaid **Kshs.18,000,000/=** to 1st Defendant, he is recouping the same through non-payment of rent. She contended that the 1st Defendant took possession of the suit property without their consent. She also admitted that the building is part of their inheritance and there is a **Will** on how the **Estate of Gatuthu Njuguna** was to be distributed. She reiterated that the family asked the 1st Defendant to lend them money, so that they could build stalls on the suit property. That the family was unable to repay the said loan and they entered into an agreement that the 1st Defendant was to repay himself using the expected monthly rent. Further that the 1st Defendant asked the two Directors of the **Gatuthu Njuguna Estates Ltd** to go to the office of the advocate to reduce the said agreement into writing. That they were made to sign some documents, but they did not know what was written on the documents. She denied that she was signing the said documents for the sale of the building. It was her evidence that the title of the suit property was with **Monicah Gatuthu**, the 3rd Defendant and she did not know when **Monicah** handed over the title to the advocate. Further that she did not report the matter to the police and she did not know if her children reported the matter to the police. She also reiterated that she did not agree with her children to sell the suit property to the 1st Defendant.

3RD DEFENDANT'S CASE

DW 5 Monicah Waithera Gatuthu adopted her witness statement as evidence in court. She admitted that she is one of the wives of the late **Gatuthu Njuguna**. The other two are **Hannah Njeri** and **Esther Mumbi** (deceased). That **Gatuthu Njuguna Estates Ltd**, was incorporated after their husband died. The said **Gatuthu Njuguna** left behind three buildings at **Thika Municipality** and the suit property was one of them. Further that the 1st Defendant **Jotham Njami Mwariri**, is related to her as her son has married from his family. She admitted that the family of **Gatuthu Njuguna** sold the suit property to the 1st Defendant for **Kshs.32,250,000/=**. That they sold the same as Directors of **Gatuthu Njuguna Estates Ltd**.

Further that they had earlier sold three building to the 1st Defendant and they signed the sale agreements. She identified her thumb print in court and that she signed the sale agreement in the presence of **Hannah Njeri** who also signed the same as she was one of the Directors. She confirmed that one of her sons **David Muturi Gatuthu** was present and he also signed the agreement. That the purchase price was paid to them through various cheques. That she was given her share of the money from the proceeds of sale of the suit property. She identified the transfer document in court. She also identified their photographs as Directors in the transfer form. Further that the photograph of the purchase was also appended to the transfer form. It was her evidence that 2nd Defendant, **Hannah Njeri** was present and she signed the transfer form too. That they voluntarily sold the suit property to the 1st Defendant and he paid to them the full purchase price. She acknowledged that she had no claim against the 1st Defendant.

It was her further evidence that the Plaintiffs were not present when the Directors signed the sale agreement because they had all agreed to sell the suit property to the 1st Defendant. She also admitted that they received **Kshs.18 million** from the 1st Defendant which was paid to them in three instalments. That they were later paid other amounts until the full purchase price was paid. She denied that the 1st Defendant lend them **Kshs.18 million** to renovate the building. She confirmed that the Directors sold the suit property to the 1st Defendant and signed the transfer document and that 2nd defendant was present when the transfer document were signed. Further that they were not forced to sign the sale agreement and that 2nd Defendant (Hannah) did not complain during the signing of the said sale agreement. However, later 2nd

Defendant changed her mind. She contended that she had no claim against the 1st Defendant herein as he paid the full purchase price. It was her further testimony that the building was not transferred to 1st Defendant **illegally** as the 2nd and 3rd Defendants sold the said building to him as Directors of the 4th Defendant. That 1st Defendant paid the full purchase price. She urged the court to dismiss the entire suit as she cannot be able to refund the money that was paid to her after the purchase price was paid.

After the close of the viva voce evidence, parties filed their respective written submissions through their advocates.

The plaintiffs filed their written submissions on **17th September 2019**, through Messrs **Njuguna & Partners Advocates** and submitted that the Plaintiff have proved their case on the required standard and urged the court to enter judgement in their favour. They further submitted that through their evidence, they were able to prove that the suit property herein **L.R. No. 4953/478**, was held in trust for the beneficiaries of the **Estate of Gatuthu Njuguna**, by the 4th Defendant. Further that they also proved that the said property was **fraudulently** sold to the 1st Defendant as it was done without the consultation of the beneficiaries and was also undervalued. That the Directors of **Gatuthu Njuguna Estates Ltd**, who are 2nd and 3rd Defendants herein are illiterate and did not understand the nature of the sale agreement that they purported to have signed in favour of the 1st Defendant. They relied on various decided cases and provisions of law. Among such cases was the case of **Stephen Miheso vs Kaimosi Tea Estate Ltd (2014)Eklr**, where the court held that:-

“A person with illiteracy like the claimant is a person with disability and is entitled to the right of person with disabilities as protected in the Constitution and the relevant statutes. It is further holding of the court that the claimant being a person with illiteracy, he is entitled to other appropriate means of communication other than writing and reading as provided for in Article 54(1)(d) of the Constitution. In particular, the claimant was entitled to verbal explanation of application terms and conditions of service in a language that the claimant understands.”

The Plaintiffs further submitted that they did not received any proceeds from the sale of the suit property because the 1st Defendant did not pay the full purchase price to the registered owner or the vendor. It was also their submissions that they did not sign the sale agreement and that the suit property was transferred to the 1st Defendant at a gross undervalue. Therefore, the said transfer was an **illegality** and that 1st Defendant was not a bonafide purchaser for value. They urged the court to cancel and/or revoke the said transfer and relied on **Sections 26(1) and 80 of the Land Registration Act**.

The 1st Defendant through the **Law Firm** of Mssrs **C. M. Ngugi Rebiro & Co. Advocates**, filed his submissions on **8th October 2019**, and submitted that the Plaintiffs have not proved their case on the required standard. He urged the court to dismiss the instant case with costs. It was the 1st Defendant's submissions that he entered into a valid sale agreement with the 2nd and 3rd Defendants and fully paid the purchase price of **Kshs.32,250,000/=**. Further that the Directors of the 4th Defendant had admitted to have received **Kshs. 23,962,100/=** at the time of execution of the sale agreement. He relied on the case of **National Bank Ltd Vs Pipeplastic Samkolit (K) Ltd and Another (2002) 2EA**, where the court held that it cannot rewrite a contract between the parties.

He also submitted that the 1st and 4th Defendants executed a valid transfer instrument which transferred the legal ownership of the suit property to the 1st Defendant. Further, it was submitted that the suit property was legally registered to his name and that the said certificate of title is conclusive evidence of his proprietorship. He relied on **section 23(1) of the Registration of Title Act (repealed)** which states:-

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

He also relied on the case of **Joseph N. K. Arap Ngugi vs Mojjo Ole Keiwua & 4 others (1997)eKLR**.

It was his further submissions that the Plaintiffs did not establish fraud on the part of the 1st Defendant and relied on the case of **Vijay Morjaria vs Nansingh Madhu Singh Darbar & Another (2000)eKLR** where it was held:-

“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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

It was also submitted that from the pleadings and evidence adduce in court, there are no grounds to cancel the 1st Defendants titles. For this he relied on the case of **Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 others (2018)eKLR** where the Court of Appeal held:-

“In our view, a party making a claim for a declaration of title must succeed on the strength of his case and not on the weakness of the Defence.”

The 2nd and 4th Defendants through **Namiinda & Co Advocates**, filed there submissions on **13th November 2019**, and urged the court to allow the Plaintiffs' case. It was their submissions that the 1st Defendant was not a bonafide purchaser for value without notice of fraud. Further that the 2nd and 3rd Defendants were not the proprietors of the subject property and they did not have a good title. Therefore, they could not transfer the said property to 1st Defendant. It was their submissions that the transfer herein was done fraudulent and is bad in law. They relied on the case of **Lawrence Mukiri vs Attorney General & 4 others (2015) eKLR**, where the Court held:-

“A person who honestly intends to purchase the property offered on sale does not intend to acquire it wrongly.”

It was submitted that the 1st Defendant did acquire the suit property wrongly as he did not follow the necessary procedure before purchasing the said property. Further, they relied on the case of ***Iqbal Singh Rai Vs Mark Lecchini & the Registrar of Titles, Civil Case No. 1054 of 2001***, where the court held that since the purchaser did not deal with the registered proprietor of the land, then he was not a bonafide purchaser for value.

On her part, the 3rd Defendant through **Muturi Kamande & Co Advocates**, filed submissions on **8th October 2019**, and urged the Court to dismiss the Plaintiffs' case with costs.

She submitted that the 2nd and 3rd Defendants as Directors of 4th Defendant executed the sale agreement in issue and the transfer instruments. That the two Directors invited the children of the deceased to witness the execution of the said sale agreement as beneficiaries which they did and appended their signatures. She also submitted that the purchase price was fully paid and received by the Directors and beneficiaries. She further submitted that there was no fraud perpetuated by the Defendants in the instant transaction. She relied on the case of ***Central Bank of Kenya Ltd Vs Trust Bank Ltd and others 1996 eKLR***, where the Court of Appeal held:-

“The onus is on the party alleging fraud to provide evidence to the Court that rises to the standard of proof which is higher than in ordinary civil cases.”

It was further submitted that the said standard was held to be one beyond that of balance of probabilities as was held in the case of ***Elizabeth Kamene Ndolo vs George Matata Ndolo, Civil Appeal No. 28 of 1995*** where the court held:-

“We start by saying that it was the respondent who was alleging that the Will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.”

She further submitted that since the Plaintiffs failed to prove any fraud on the part of the 1st Defendant, then the Court should find that the sale and transfer of the suit property by the 4th Defendant to the 1st Defendant was valid and lawful.

The Court has carefully considered the available evidence, the exhibits on record, the rival written submissions, the cited authorities and the relevant provisions of law and makes the following findings:-

There is no doubt that the suit property herein **L.R. No. 4953/478 (IR Number 13765)**, was initially owned by the **Late Gatuthu Njuguna** who died on **19th January 1988**. Further there is no doubt that the said **Gatuthu Njuguna** left behind a **Will** dated **19th January 1988**, where in he directed that his three widows should incorporate a company to be known as **Gatuthu Njuguna Estates Ltd**, wherein the widows were to hold and subscribe equal shares which shares **were to be held in trust for each of the three houses**. Further he bequeathed and gave the said company all the buildings, plots and properties within **Thika Municipality**. The suit property was one of such properties that was bequeathed to the said company.

It is also not in doubt that on **25th March 1988**, the said company was incorporated as is evident from the Certificate of Incorporation attached to the Plaintiffs' list of documents. Further it is evident that the suit property herein was transferred to the said company – **Gatuthu Njuguna Estates Ltd** on **5th July 2010**. Thereafter, this suit property was transferred to **Jotham Njami Mwariri**, the 1st Defendant on **8th March 2012**.

From the available evidence, it is evident that another property **L.R. No. 4953/997**, was also transferred to the 1st Defendant. There is a sale agreement to that effect dated **6th March 2003**, but the said sale and transfer is not in dispute.

It is also not in doubt that after the transfer of the suit property **L.R. No. 4953/478**, to the 1st Defendant, the beneficiaries of the **Estate of Gatuthu Njuguna** filed a complaint at the CID Headquarter. The said complaint culminated in the arrest of the **1st Defendant** and **DW 3 Antony Karanja Kangiri**, who was the advocate who prepared the sale agreement dated **28th September 2011**, that resulted in the transfer of the suit property to the 1st Defendant. The two were charged in **Criminal Case No. 1022 of 2012**, at Nairobi with various counts related to the transfer of the suit property to the 1st Defendant. Among them were an offences of **Conspiracy to defraud** and **Obtaining registration of land (suit property) by false pretences**. However, after the prosecution case was closed, both accused persons were acquitted under **Section 210** of the **Criminal Procedure Code**, which meant that they had **no case** to answer.

It is evident that the proceedings in the said Criminal Case are relevant to this case. This court will consider the said proceedings as provided by **section 34(1)** of the **Evidence Act** which provides: -

“Admissibility of evidence given in previous proceedings: -

(1) Evidence given by a witness in a judicial

proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—

(a)

and where, in the case of a subsequent proceeding—

(b) *the proceeding is between the same parties*

or their representatives in interest; and

(c) *the adverse party in the first proceeding had*

the right and opportunity to cross-examine; and

(d) *the questions in issue were substantially the same in the first as in the second proceeding.”*

It is not in doubt that the 2nd and 3rd Defendants, are Directors of the 4th Defendant, the company that allegedly transferred the suit property to 1st Defendant. However, it is also evident that none of them were called as witnesses in the above Criminal Case. Further, it is also not in doubt that from the available evidence, that the 2nd Defendant has alleged that she did not sign the sale agreement and the transfer instrument in issue. However, the 3rd Defendant, the other Director of the Company has alleged that the two Directors did sign the sale agreement and transfer instrument herein and that the said transfer was lawful.

It is evident that the 1st Defendant and DW 3 were acquitted vide a Ruling delivered on **20th September 2013**. However, no appeal was preferred against the said Ruling. Instead the Plaintiffs filed the instant suit on **1st July 2014**, and sought for various orders.

As the court embarks on the consideration of the available evidence, it will take into account that it is trite law that **“He who alleges must prove.”** See **Sections 107 and 109 of the Evidence Act.**

“107(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.

109. 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.

The Plaintiffs are the ones who have alleged and therefore the **onus** was upon them to call sufficient evidence to prove their case on the required standard of balance of probabilities.

The above are the facts not in dispute. The Court finds the issue for determination are:-

(i) *Whether the suit property LR. No. 4953/478 IR number 13765 was to be utilized and held in trust and on behalf of the beneficiaries of the Estate of Gatuthu Njuguna by the 2nd, 3rd and 4th Defendants.*

(ii) *Whether the transfer of the suit property to the 1st Defendant by the 2nd and 3rd Defendants was unlawful, fraudulent and or in breach of trust.*

(iii) *Whether the transfer herein in favour of 1st Defendant should be cancelled and/or revoked.*

(iv) *whether the Plaintiffs are entitled to the orders sought in the plaint.*

(v) *who should bear costs of the suit?*

(i) Whether the suit property LR. No. 4953/478 IR number 13765 was to be utilized and held in trust and on behalf of the beneficiaries of the Estate of Gatuthu Njuguna by the 2nd, 3rd and 4th Defendants.

From the evidence of the Plaintiffs herein, they alleged that the suit property was held in trust and on behalf of the beneficiaries of the estate of their late father **Gatuthu Njuguna**. As the Court pointed out in the undisputed facts, there is no doubt that the **Late Gatuthu Njuguna** owned the suit property herein. The certificate of title produced by the Plaintiffs shows that the suit property was transferred to **Gatuthu Njuguna** on **4th December 1967**. It is also evident that from the **Will** left behind by the said **Gatuthu Njuguna**, in paragraph 4, he directed his wives to incorporate a company by the name of **Gatuthu Njuguna Estates Ltd** which they did incorporate. The three wives were to hold equal shares and such shares were to be held in trust for each of the three houses. The deceased properties in Thika Municipality were bequeathed to this company. The suit property was one of such properties and the 2nd and 3rd Defendants were Directors of 4th Defendant. The 4th Defendant was the registered owner of the suit property which the 2nd and 3rd Defendant held equal shares in trust for their respective houses. The respective houses consisted of the beneficiaries of the **Estate of Gatuthu Njuguna**. The Plaintiffs are some of the beneficiaries and it is therefore not in doubt that suit property was held in trust and on behalf of the beneficiaries of **Gatuthu Njuguna** by the 2nd, 3rd and

4th Defendants. The only question that would then need to be answered is whether the 2nd, 3rd and 4th Defendants were in breach of such trust. The above issue would only be answered after all the disputed issue have been dealt with.

(ii) Whether the transfer of the suit property to the 1st Defendant by the 2nd and 3rd Defendants was unlawful, fraudulent and or in breach of trust.

From the available evidence, the suit property herein **LR No. 4953/478** was transferred to the 1st Defendant on **8th March 2012**, after the transfer documents were allegedly executed by the 2nd and 3rd Defendants herein. The Certificate of Title was registered under the Registration of Titles Act Cap 281 (*repealed*). On the face of it, then under **Section 23(1)** of the said Registration of Titles Act (*now repealed*), the said certificate of title as taken is conclusive evidence that the 1st Defendant is the **absolute** and **indefeasible** owner of the said property. However, such proprietorship can be impeached on the grounds of **fraud** or **misrepresentation**.

The Plaintiffs herein have alleged that the 1st Defendant acquired the said registration through fraud. Therefore, the Plaintiffs had the duty to call evidence and prove such allegations of fraud. Indeed, the burden of proof is upon the Plaintiffs herein.

Fraud is described in the **Blacks Law Dictionary** as follows:-

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”

Further **Black Laws Dictionary Ninth Edition at Page 731** also defines fraud as:-

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment”

As has been held in various decided cases, allegations of fraud are serious and have to be strictly proved. See the case of **Mirko Blaeterman (Suing through his power of Attorney - Shabir Hatim Ali) & another v David Mwangi Muiruri & 2 others [2015] eKLR** the Court of Appeal held that:-

It must also be remembered that allegations of fraud must be strictly proved, so that whilst a standard of proof beyond reasonable doubt is not required, nevertheless a standard more than mere balance of probabilities is called for. (See R. G. PATEL V. LALJI MAKANJI (1957) EA 314).

Further in the case of **Kinyanjui Kamau vs. George Kamau (2015) eKLR** the Court held as follows: -

“It is trite law that any allegations of fraud must be pleaded and strictly proved.”

From the Complaint, the evidence in court and submissions by the Plaintiffs, it was alleged that the suit property herein was transferred to the 1st Defendant fraudulently.

The Plaintiffs alleged that the suit property was transferred to the 1st Defendant when it was supposed to be held and/or utilized **in trust** for the beneficiaries of the **Estate of Gatuthu Njuguna**. Indeed the court has held that the suit property was held by the 2nd, 3rd and 4th Defendants **in trust** for the beneficiaries. The Plaintiffs alleged that the Defendants transacted and transferred the suit property to the 1st Defendant without consulting them. However, it is very clear from the **‘Will’ of Gatuthu Njuguna** that his wives were to hold shares in the Company that was incorporated which was indeed incorporated and the shares were to be held **in trust** for the three houses. However, there was no requirement that in dealing with the said shares, the Directors were to consult the beneficiaries. It is evident that the suit property was sold to the 1st Defendant who alleged that he paid the full purchase price of **Kshs.32,250,000/=**. The Plaintiffs have denied the payment of the above purchase price. They also disputed receipt of any monies. However, from the available evidence, it is evident that **Kshs.18 million** was deposited in the joint account of 2nd and 3rd Defendants **Account No. xxxx** held at **Equity Bank**. Further the Plaintiffs have admitted to have received various monies from the 1st Defendant on various dates, which monies were received within the period that the transaction herein took place. It was the evidence of the Plaintiffs and the 2nd Defendant that the above monies - that is **Kshs.18 million**, deposited in the joint account of 2nd and 3rd Defendants and various other monies given to the Plaintiffs and other beneficiaries of the **Estate of Gatuthu Njuguna** were loans from the 1st Defendant. Further that the 1st Defendant was to **recoup** this money from the rent payable. However, there were no loan agreements produced as exhibits and there was also no evidence that the 1st Defendant was money lender and thus that he was capable of lending to the Plaintiffs such amounts of money.

The Plaintiffs are the ones who alleged and therefore they needed to prove their allegations. This court finds that though the suit property was transferred to the 1st Defendant, the proceeds from the purchase price were utilized by the beneficiaries of the **Estate of Gatuthu Njuguna**.

It was also alleged that the property was transferred to the 1st Defendant without the knowledge and consent of the beneficiaries. The Plaintiffs alleged that they did not **consent** to the transfer of this suit property to the 1st Defendant. That their mothers, 2nd and 3rd Defendants were illiterate and did not know the contents of the sale agreement that they signed in the office of their advocate DW 3. However, 3rd Defendant testified that the Directors of 4th Defendant being 2nd and 3rd Defendants duly signed the said sale agreement and the transfer form. Further that they were not coerced to sign the same but did so willingly. **DW3** also testified that he explained to the two the contents of the sale agreement in Kikuyu language which they were conversant with.

Further that the beneficiaries signed the sale agreement as witnesses and that PW 2 signed the sale agreement as the representative of the house of **Esther Mumbi**, who was deceased by the time of the transaction in issue. As the court stated earlier, it is evident that the 2nd and 3rd and 4th Defendants had sold another suit property being **LR No.4953/997**, to the 1st Defendant in the year **2003**. That transaction is not in dispute but the 2nd and 3rd Defendants signed the said sale agreement and transfer documents for the earlier transaction and the Plaintiffs herein have not alleged that the two did not understand the said earlier transaction. Further there were no minutes or any written documents produced by the Plaintiffs to confirm that they met and did give their consent for the earlier transaction of **2003**. If there was no such meeting for the earlier transaction, the court believe that even for the 2nd transaction in issue, the Plaintiffs did not need to give their consents in writing. Further the court has considered the proceedings in the **Criminal Case No. 1022 of 2012**, and noted that during the cross-examination therein, some of the Plaintiffs admitted to have signed the sale agreement. Further the document examiner in the said criminal case confirmed that the sale agreement was signed by almost all the beneficiaries named in the said sale agreement. Further in court, PW 2 admitted in cross examination by counsel for the 3rd Defendant to have been present at the advocate's office when the sale agreement dated **28th September 2011**, was signed by the 2nd and 3rd Defendant. The Court finds the evidence of the Plaintiffs herein shifty, full of mere denials and contrary to what they testified in **Criminal Case No. 1022 of 2012**. This court finds that the suit property herein was transferred to the 1st Defendant but with full knowledge and consent of the beneficiaries of the **Estate of Gatuthu Njuguna**, the Plaintiffs and 2nd Defendant included.

The Plaintiffs have also alleged that the purchase prices was never received and or accounted for to the beneficiaries or credited to the company accounts. There was **no** evidence adduced in court to the effect that the 4th Defendant held any Account in any Bank. However, there is evidence of existence of an account in the names of 2nd and 3rd Defendants held at **Equity Bank** being **Account No. 0090190340490**. Though the Plaintiffs alleged that the purchase price was never received, it is evident that the sale agreement that was signed by the two Directors of the Company dated **28th September 2011**, showed that at the time of signing the same, about **Kshs.23,962,100/=** had been received by the beneficiaries of the **Estate of Gatuthu Njuguna**. The Statement of Account produced in Court confirms that **Kshs.18 million**, was deposited in the Joint Account of 2nd and 3rd Defendant. There are documents and /or exhibits produced by 1st Defendant to show that various amounts of money were paid and received by the Plaintiffs herein and other beneficiaries of the Estate. The Court has rejected the evidence of the Plaintiffs and 2nd Defendant that the various amounts received by them from the 1st Defendant were loans. There was no evidence of renovation or construction of Stalls on the said property. The Bank Statement shows withdrawal of monies by the account holders and some withdrawals were in favour of **John Kariuki Gatuthu** and **David Gatuthu**. The Plaintiffs and Defendants have not repaid any of the said amount to date and there were no documentary evidence of any loan agreements for the said advances or payments.

As the court stated earlier, in the Criminal trial against the 1st Defendant and DW 3 which is relevant to this case, the 2nd Defendant did not testify in the said trial to confirm that she did not receive the purchase price in respect of the suit property herein. It is evident that at some point she was present in Court during the said trial. She cannot now claim that she was not aware of that criminal case.

From the account given by the 1st Defendant and the evidence of DW3 who was the lawyer for the family of **Gatuthu Njuguna**, all the purchase price were paid by the 1st Defendant and the money was deposited in the Account of 2nd and 3rd Defendants who are Directors of 4th Defendant. Other monies were paid to and received by the other beneficiaries at their own different times either through cheques or cash.

The 2nd and 3rd Defendants were the Directors of the 4th Defendant and were the ones running the said joint account. The two indeed received the bulk of the purchase price. Since the 2nd and 3rd Defendants held shares in trust for their respective houses and it is evident that a number of the beneficiaries received money from the proceeds of the purchase price, the court finds and holds the beneficiaries of the estate benefitted from the purchase price and cannot fault the 1st Defendant herein.

It was also the evidence of the Plaintiffs that the suit property was undervalued at **kshs.32,250,000/=** whereas it was valued at about **Kshs.100,000,000/=** at the time of sale. It is evident that this Value was given by DW2, **Cyrus Kariuki** through his Valuation Report dated **7th September 2011**. DW 2 told the court that he valued the property at that time by using the **market value** and the rental income of about **Kshs.260,000/=** per month, as he was the one managing the property. However, the Plaintiffs relied on the evidence of PW 4 **Mwathi Kungu Ruthiago**, who prepared his Valuation Report in the year **2018** during the pendency of this case, that is the report by **Interlink Real Estate Ltd** is dated **11th May 2018**. He told the Court that the value of the Property in **2011** was **Kshs.60,000,000/=** and in **2018**, it was about **Kshs.75,000,000**. It was evident that there was no comparable valuation report for the year **2011** from the neighbouring buildings. DW2 was managing the this property and was in a better position to give the value of the suit property in **2011** than PW 4 **Mwathi Kungu Ruthiago**, who prepared his Valuation Report in the year **2018**, with this suit in mind. Further PW 4 told the Court that his Valuation Report was not based on any scientific findings and was just a proposal or opinion. Therefore, the court finds that the Valuation Report produced by the Plaintiffs' witness, PW 4, **Mwathi Kungu Ruthiago**, was not cogent enough for this court to arrive at a finding that the suit property was undervalued in the year **2011**. Infact, the Court finds the evidence of DW2, **Cyrus Kariuki Kanyi**, who was managing the property at that time credible. There was no evidence adduced in Court to prove that in the year **2011**, the suit Property would have been sold at the excess of **Kshs.100,000,000/=** as pleaded by the Plaintiffs and not **Kshs.32,250,000/=** as per the sale agreement dated **28th September 2011**.

It was further also alleged that in the sale agreement the consideration was given as **Kshs.32,250,000/=** and the endorsement on the title was for **Kshs.10,000,000/=**. However, DW3 explained to this Court why there were different values stated. He further told the Court that the purchase price was never affected by the different values. Indeed the Court has noted that the Government Valuer gave a value of the suit property of **Kshs.26,000,000/=** and the stamp duty paid was in consideration of the value given at the Lands office. The Court has seen the KRA documents confirming that stamp duty for the suit property was paid and the given value was Kshs.26 million.

The 1st Defendant and DW 3 told the Court that **Kshs.10,000,000/=** on the transfer document and title document was just for 1st Defendant consumption. However, the purchase price paid was **Kshs.32,250,000/=**. The Court has seen the Statement of Account and indeed as earlier stated by the court, there is no doubt that **Kshs. 18 million** was paid into 2nd and 3rd Defendants Joint Account. There is also evidence that various amounts of monies were paid to other beneficiaries of this estate. The total amount paid as purchase price is certain and is

Kshs.32,250,000/= as stated in the sale agreement. On the issue of under valuing of the suit property, the court has held and found that there was no evidence to support that evidence and consequently finds that the suit property herein was not undervalued at the time of sale.

The 1st and 3rd Defendants adduced evidence to the effect that the suit property was lawfully transferred to the 1st Defendant and this Court finds no reason to fault or doubt their evidence.

Consequently, the court finds that in answer to issue no. 2, there is no evidence that the suit property was **unlawfully, fraudulently** and in **breach of trust** transferred to the 1st Defendant by the 2nd and 3rd Defendants.

(iii) Whether the transfer herein in favour of 1st Defendant should be cancelled and/or revoked.

The Plaintiffs alleged that the transfer of the suit property to the 1st Defendant was fraudulent. However, the court has found and held that there is no evidence of such fraudulent transfer. The 1st Defendant title is registered under the Registration of Title Act Cap 281 (now repealed). As the Court had held earlier, **section 23(1)** of the said Act provides that such Certificate of title or registration is conclusive evidence that the registered proprietor is the **absolute and undefeasible** owner of such parcel of land. The 1st Defendant is such an owner, but, his title can be impeached on the grounds of **fraud or misrepresentation**. See the case of ***Joseph N. K. Arap Ng'ok vs Moijo Ole Keivua & 4 others (1997) eKLR*** where the Court held

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title.”

The Plaintiffs needed to prove that the 1st Defendant registration was obtained through fraud or misrepresentation. They failed to do so. The 1st Defendant on his part alleged that he was an innocent purchaser for value without notice of any fraud.

The Black's Law Dictionary defines bonafide purchaser as:-

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

Further in the case of ***Weston Gitonga & 10 others v Peter Rugu Gikanga & another [2017] eKLR*** the Court of Appeal in quoted the Ugandan case of ***Katende v. Haridar & Company Limited [2008] 2 E.A.173*** held that:-

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- a. he holds a certificate of title;***
- b. he purchased the property in good faith;***
- c. he had no knowledge of the fraud;***
- d. he purchased for valuable consideration;***
- e. the vendors had apparent valid title;***
- f. he purchased without notice of any fraud;***
- g. he was not party to any fraud.***

[Emphasis added].

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

The 2nd and 4th Defendants submitted that the 1st Defendant was not a bonafide purchaser as he was involved in fraud. However, the court found that the 1st Defendant had lawfully purchased other properties owned by the **Estate of Gatuthu Njuguna** and there were no complaints. Further, the 1st Defendant was also acquitted of the Criminal offence of **Conspiracy to defraud** and **obtaining registration of land by false pretenses**. With the above acquittal and having found that there was no evidence of fraudulent transfer of the suit property to the 1st Defendants, then the Court finds that the said transfer cannot be cancelled and/or revoked. The Court further believe that the 1st Defendant was a bonafide purchaser for value without any notice of fraud and is entitled to enjoy the rights and privileges of an absolute and indefeasible owner.

Cancellation of certificate of title is done in obvious case of fraud. See the case of *Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR* the Court held that:-

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme.”

Further in the case of *Mary Wangui Muthoga v Samuel Ndung’u Chege & another [2016] eKLR* the Court held that:-

“As I have stated at the beginning of this judgment, this court has power to cancel a title and make an order for the rectification of the register of land where the title was acquired fraudulently.”

In the instant case, such evidence is lacking and consequently, the Court finds no reasons to order for the cancellation and revocation of the 1st Defendant’s Certificate of title or the transfer in his favour.

(iv) whether the Plaintiffs are entitled to the orders sought in the plaint.

Having found that the transfer of the suit property to the 1st Defendant was not done fraudulently and having found that the Plaintiffs and 2nd Defendant failed to prove the allegations of **fraud** on the part of the 1st Defendant, the court finds that the Plaintiffs herein are not entitled to the prayers sought in the Plaint.

The Court did find and hold that though the Plaintiffs alleged that the monies given to them by the 1st Defendant was for renovation of the suit property, there was no evidence of such renovation and further there was no evidence of any loan agreements. Further, there was no evidence that 2nd Defendant had complained that she had been forced to sign the sale agreement herein. In fact, she failed to testify in the criminal trial. The court finds and holds that the evidence of the beneficiaries of the **Estate of Gatuthu Njuguna**, was an afterthought or a change of heart as stated by DW 3, who was the family lawyer of the estate of **Gatuthu Njuguna**. For the above reasons, this court arrives at a finding that the Plaintiffs are not entitled to the prayers sought in the Plaint.

(v) who should bear costs of the suit?

As provided by **Section 27** of the **Civil Procedure Act**, costs are granted at the discretion of the Court. However, it is also trite that costs do follow the event and is awarded to the successful litigants. The Plaintiffs have failed to prove their case on the required standard and therefore the 1st and 3rd Defendant are the successful litigant and are entitled to costs of this suit.

Having carefully analyzed the available evidence, the court finds that the Plaintiffs herein have failed to prove their case on the required standard of balance of probabilities.

Consequently, the Plaintiffs case is dismissed entirely with costs to the 1st and 3rd Defendants herein. Further, the court having found that the 1st Defendant is an **absolute** and **indefeasible** owner of the suit property herein, directs that all the injunctive orders entered on the Certificate of title herein being entries no. **12, 13** and **14**, which were entered due to this case be removed or lifted forthwith.

It is so ordered.

Dated, signed and Delivered at Thika this 25th day of June 2020.

L. GACHERU

JUDGE

25/6/2020

Court Assistant - Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent and virtual appearance via zoom

No consent for the Plaintiff and no appearance

Mr. Ngugi for the 1st Defendant and holding brief for Mr. Muturi Kamande for 3rd Defendant

No consent and appearance for the 2nd and 4th Defendants

L. GACHERU

JUDGE

25/6/2020