



REPUBLIC OF KENYA



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**Rudi Marquardt Electronic Company Limited v Khazalwa & 4 others (Environment & Land Case 48 of 2014) [2025] KEELC 84 (KLR) (21 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 84 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ENVIRONMENT & LAND CASE 48 OF 2014**  
**SO OKONG'O, J**  
**JANUARY 21, 2025**

**BETWEEN**

**RUDI MARQUARDT ELECTRONIC COMPANY LIMITED ..... PLAINTIFF**

**AND**

**VALLERY JIMOI KHAZALWA ..... 1<sup>ST</sup> DEFENDANT**

**JOHN ODINDO OGILO ..... 2<sup>ND</sup> DEFENDANT**

**OSCAR OGILO ODINDO ..... 3<sup>RD</sup> DEFENDANT**

**STALINE YUAYA ODINDO ..... 4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit against the 1<sup>st</sup>- 4<sup>th</sup> Defendants on 3<sup>rd</sup> March 2014 through a plaint dated 28<sup>th</sup> February 2014. The Plaintiff later amended the plaint on 14<sup>th</sup> April 2014 pursuant to the leave granted by the court on 14<sup>th</sup> March 2014 and added the Attorney General to the suit as the 5<sup>th</sup> Defendant. The Plaintiff further amended its plaint on 11<sup>th</sup> March 2020. In its further amended plaint, the Plaintiff averred that it was the owner and the legally registered proprietor of two parcels of land known as Title No. Kisumu/Konya/4794 and Title No. Kisumu/Konya/5087 (hereinafter together referred to as “the suit properties” and individually as “Plot No. 4794” and “Plot No. 5087” respectively) and was in possession of their title deeds Serial Numbers 272863 and 272583 issued on 9<sup>th</sup> December 2010 and 27<sup>th</sup> December 2010 respectively.
2. The Plaintiff averred that the suit properties were properly, lawfully and procedurally transferred to it and were registered in its name on 6<sup>th</sup> December 2010. The Plaintiff averred that in September 2013, the Plaintiff through its officials discovered that the suit properties had on 24<sup>th</sup> August 2012 been fraudulently transferred to the 1<sup>st</sup> Defendant without the knowledge, consent or participation of the



Plaintiff's majority shareholder, Rudi Marquardt and that the 1<sup>st</sup> Defendant subsequently transferred the same to the 2<sup>nd</sup> - 4<sup>th</sup> Defendants on 16<sup>th</sup> October 2013.

3. The Plaintiff averred that through its official it notified the Kisumu District Land Registrar of the irregular transfers on 29<sup>th</sup> November 2013 after which the Kisumu District Land Registrar issued a notice dated 5<sup>th</sup> December 2013 to the 1<sup>st</sup> - 4<sup>th</sup> Defendants. The Plaintiff averred that despite the said notice, the illegal transfers remained on the register and the other records at the lands office. The Plaintiff averred that the 1<sup>st</sup> Defendant was at all material times to this suit a minority shareholder in the Plaintiff holding one (1) ordinary share with a par value of Kshs. 10 while the 2<sup>nd</sup> - 4<sup>th</sup> Defendants were strangers to the Plaintiff.
4. The Plaintiff averred that it had never transferred its proprietary interest in the suit properties to the 1<sup>st</sup> - 4<sup>th</sup> Defendants whether jointly or severally and had in its possession the original title deeds for the suit properties. The Plaintiff averred that the 2<sup>nd</sup> - 4<sup>th</sup> Defendants had not acquired proper titles to the suit properties. The Plaintiff averred that the title deeds and/or any other ownership documents in respect of the suit properties allegedly issued by the Kisumu District Land Registrar to the 1<sup>st</sup> Defendant and subsequently to the 2<sup>nd</sup> - 4<sup>th</sup> Defendants were obtained fraudulently, irregularly and illegally because the majority shareholder in the Plaintiff did not participate or consent to the transfer of the suit properties.
5. The Plaintiff pleaded several particulars of fraud, illegality and misrepresentation on the part of the Defendants. The Plaintiff reiterated that no proper titles to the suit properties were acquired by the 2<sup>nd</sup> - 4<sup>th</sup> Defendants. The Plaintiff averred that it was the legal owner of the suit properties holding indefeasible titles to the suit properties and as such no valid titles of ownership could be or were capable of being conferred upon the Defendants. The Plaintiff averred that it had suffered and had continued to suffer tremendous loss and damage due to the actions and/or omissions of the Defendants and the Plaintiff claimed mesne profits from the Defendants since the actions of the 2<sup>nd</sup> - 4<sup>th</sup> Defendants amounted to trespass. The Plaintiff prayed for judgment against the Defendants for;
  1. A declaration that the transfer of the suit properties to the 1<sup>st</sup> - 4<sup>th</sup> Defendants was null and void ab initio.
  2. An order directing the Kisumu District Land Registrar to recall, revoke, cancel or nullify the title deeds issued in favour of the 1<sup>st</sup> - 4<sup>th</sup> Defendants.
  3. An order of rectification directing Kisumu District Land Registrar to rectify the records or register at the Lands Registry Kisumu to read and/or reflect the Plaintiff as the current and only registered owner of the suit properties.
  4. A declaration that the Plaintiff was entitled to possession of the suit properties and that the Defendants by themselves or through their servants and/or agents were trespassers thereon.
  5. An order of a permanent injunction restraining the 1<sup>st</sup> - 4<sup>th</sup> Defendants from encroaching into, remaining on and/or in any other way whatsoever interfering with the Plaintiff's quiet possession and/or enjoyment of the suit properties.
  6. A declaration of a constructive trust of the proprietary interest in the suit properties in favour of the Plaintiff and an order that transfers in realisation thereof be executed and registered in favour of the Plaintiff by the Defendants and in default, the Deputy Registrar of the Court to do so.
  7. Damages for trespass and loss of mesne profits.
  8. Costs of the suit together with interest until payment in full.



6. The 1<sup>st</sup> Defendant entered appearance and filed a statement of defence on 30<sup>th</sup> July 2020. The 1<sup>st</sup> Defendant averred that she was a director and a shareholder in the Plaintiff and that in that capacity, she would raise preliminary points of law and apply that the suit be struck out with costs. The preliminary points of law she intended to raise were that; there had never been a meeting of the board of directors of the Plaintiff in which it was resolved that this suit be filed, no company resolution had been made to authorise, empower and/or direct that Rudi Marquardt acts as a sole director to the exclusion of his co-director in the management and activities of the Plaintiff. The 1<sup>st</sup> Defendant contended that the suit was an abuse of the rights of the minority shareholder in the Plaintiff and was against the findings of fact by a competent court in Kisumu CMC Criminal Case No. 542 of 2015, Republic v. Vallery Jimoi Khazalwa.
7. The 1<sup>st</sup> Defendant denied the allegations of fraud in the plaint and averred that the majority shareholder in the Plaintiff duly signed, executed and/or was privy to the signing and execution of the documents, memoranda and entries leading to the transfer of the suit properties. The 1<sup>st</sup> Defendant averred that the transfer and subsequent registration of the suit properties in the names of the 2<sup>nd</sup>- 4<sup>th</sup> Defendants was carried out lawfully, regularly and procedurally. The 1<sup>st</sup> Defendant contended that there was no fraud in the process or procedure undertaken in the transfer and subsequent registration of the suit properties in the names of the said Defendants.
8. The 1<sup>st</sup> Defendant averred that the suit was bad in law, an abuse of the court process and was misconceived considering the relevant provisions of the *companies Act*, 2015. The 1<sup>st</sup> Defendant averred that the Plaintiff had no legal capacity, locus standi and statutory power/authority to institute this suit. The 1<sup>st</sup> Defendant prayed that the suit be dismissed with costs.
9. The 2<sup>nd</sup>- 4<sup>th</sup> Defendants entered appearance and filed a joint statement of defence on 20<sup>th</sup> March 2014 which was later amended on 14<sup>th</sup> May 2020. The 2<sup>nd</sup>- 4<sup>th</sup> Defendants denied all the allegations pleaded against them in the plaint. The 2<sup>nd</sup>- 4<sup>th</sup> Defendants averred that they purchased the suit properties from the 1<sup>st</sup> Defendant for value after doing due diligence at the District Land Office in Kisumu. The 2<sup>nd</sup>- 4<sup>th</sup> Defendants averred that they were innocent and bona fide purchasers for value without notice of any defect in the 1<sup>st</sup> Defendant's titles. The 2<sup>nd</sup>- 4<sup>th</sup> Defendants averred that their titles were absolute and indefeasible.
10. The 2<sup>nd</sup>- 4<sup>th</sup> Defendants averred that at the time of purchasing the suit properties, the same were registered in the name of the 1<sup>st</sup> Defendant, and no cautions or encumbrances were registered against the titles. The 2<sup>nd</sup>- 4<sup>th</sup> Defendants averred that the suit raised no reasonable cause of action against them and that the suit was defective for misjoinder. The 2<sup>nd</sup>- 4<sup>th</sup> Defendants averred the suit was time-barred and should be dismissed and/or struck out on that account with costs. The 2<sup>nd</sup>- 4<sup>th</sup> Defendants prayed that the suit be dismissed with costs.
11. The 5<sup>th</sup> Defendant filed a statement of defence on 9<sup>th</sup> June 2014. The 5<sup>th</sup> Defendant denied the Plaintiff's claim in its entirety. The 5<sup>th</sup> Defendant averred that if any transfer was effected by the 5<sup>th</sup> Defendant, the same was made in good faith in accordance with the laid down procedure.
12. The Plaintiff filed separate replies to the 1<sup>st</sup>- 4<sup>th</sup> Defendants' statements of defence on 1<sup>st</sup> September 2020 in which it joined issue with the 1<sup>st</sup>- 4<sup>th</sup> Defendants in their defences save where the same consisted of admissions.
13. On 9<sup>th</sup> March 2015, the 2<sup>nd</sup>- 4<sup>th</sup> Defendants filed a Notice of Claim against the 1<sup>st</sup> and 5<sup>th</sup> Defendants. In their Notice of Claim, the 2<sup>nd</sup>- 4<sup>th</sup> Defendants claimed against the 1<sup>st</sup> and 5<sup>th</sup> Defendants indemnity for any damages, loss and costs that may be suffered by them arising from this suit by the Plaintiff and



from any judgment that may be entered against them in the suit in favour of the Plaintiff. The 2<sup>nd</sup> - 4<sup>th</sup> Defendants averred that the 1<sup>st</sup> Defendant offered the suit properties for sale to the 2<sup>nd</sup> - 4<sup>th</sup> Defendants and represented that she was the lawfully registered proprietor thereof. The 2<sup>nd</sup> - 4<sup>th</sup> Defendants averred that the 5<sup>th</sup> Defendant represents the Land Registry, a government department vested with the role of keeping all land records and issuing title deeds. The 2<sup>nd</sup> - 4<sup>th</sup> Defendants averred that the 5<sup>th</sup> Defendant through the certificates of official search that it issued to the 2<sup>nd</sup> - 4<sup>th</sup> Defendants confirmed that the suit properties were registered in the name of the 1<sup>st</sup> Defendant and that the 1<sup>st</sup> Defendant was the lawful owner of the properties with authority to dispose of the same. The 2<sup>nd</sup> - 4<sup>th</sup> Defendants averred that it was on the basis of those representations and warranties from the 1<sup>st</sup> and 5<sup>th</sup> Defendants that they purchased the suit properties from the 1<sup>st</sup> Defendant.

14. The 2<sup>nd</sup> - 4<sup>th</sup> Defendants who had served a Notice of Claim against the 1<sup>st</sup> and 5<sup>th</sup> Defendants were required under Order 1 rule 22 as read with Order 1 rule 24 (2) of the Civil Procedure Rules to apply to the court for directions on whether the 2<sup>nd</sup> - 4<sup>th</sup> Defendants' claim against the 1<sup>st</sup> and 5<sup>th</sup> Defendants would be heard at the trial of the Plaintiff's claim against the Defendants or after such trial. The 2<sup>nd</sup> - 4<sup>th</sup> Defendants never made the application. The court having heard the suit without such directions, I am of the view that the 2<sup>nd</sup> - 4<sup>th</sup> Defendants Notice of Claim against the 1<sup>st</sup> and 5<sup>th</sup> Defendants is spent and requires no further consideration by this court in these proceedings.
15. At the trial, the Plaintiff called Rudi Marquardt (PW1) as its first witness. PW1 told the court that he was born in and was living in Germany. He adopted his witness statement filed on 3<sup>rd</sup> March 2014 as part of his evidence in chief. He produced copies of his Passport as P.EXH. 1A and P.EXH.1B. He stated that he was a director of the Plaintiff. He produced a copy of the resolution of the Plaintiff authorising him to file a suit against the Defendants as P.EXH.2 and the Plaintiff's Certificate of Incorporation as P.EXH.3. He stated that the Plaintiff had two directors; the 1<sup>st</sup> Defendant and he. He produced a copy of the Plaintiff's Memorandum of Association as P.EXH.4. He stated that the Plaintiff had a share capital of Kshs. 10,000/- represented by 10,000 shares. He stated that he held 9,999 shares while the 1<sup>st</sup> Defendant held 1 share in the Plaintiff company. He stated that the Plaintiff was issued with a title deed for Kisumu/Konya/4794 (Plot No. 4794) on 9<sup>th</sup> December 2010. He produced a copy of the extract of the register for Plot No. 4794 as P.EXH.5. He stated that Kisumu/Konya/5087 (Plot No. 5087) was registered in the name of the Plaintiff on 6<sup>th</sup> December 2010 and a title deed for the same was issued to the Plaintiff on 27<sup>th</sup> December 2010. He produced a copy of the extract of the register for Plot No. 5087 as P.EXH. 6.
16. PW1 stated that the original title deeds for Plot No. 4794 and Plot No. 5087 (the suit properties) were in his custody. He produced copies of the title deeds as P.EXH. 7 (a) and P.EXH. 7 (b) respectively. He stated that he discovered the fraudulent dealings with the suit properties between September and December 2013. He stated that he learnt that the suit properties had been transferred and registered in the name of the 1<sup>st</sup> Defendant on 24<sup>th</sup> August 2012 and title deeds issued to her on the same date. He stated that the board of directors of the Plaintiff did not authorise the transfer of the suit properties to the 1<sup>st</sup> Defendant. He stated that he did not sign any agreement with the 1<sup>st</sup> Defendant for the sale of the suit properties to the 1<sup>st</sup> Defendant. PW1 stated that the plaintiff company did not receive any consideration for the suit properties from the 1<sup>st</sup> Defendant. PW1 stated that he did not sign transfer forms and applications for consent of the Land Control Board. He stated that no Land Control Board consent was issued for the transaction. PW1 stated that he was not in Kenya in August 2012. He stated that he travelled to Kenya 2 times in 2012. He stated that he was in Kenya between 28<sup>th</sup> January 2012 and 12<sup>th</sup> February 2012 and between 1<sup>st</sup> June 2012 and 16<sup>th</sup> June 2012. He produced his single journey visas serial number 02752084 as P.EXH.8 (a) and serial number 03011241 as P.EXH. 8 (b).



17. PW1 told the court that on 29<sup>th</sup> November 2013, he went to the District Land Registrar and complained of the fraudulent dealings. He stated that the Land Registrar wrote to the 1<sup>st</sup> Defendant on 3<sup>rd</sup> December 2013. He stated that the 2<sup>nd</sup> – 4<sup>th</sup> Defendants were the purchasers of the suit properties. He stated that the Land Registrar did not cancel the fraudulent entries in the registers of the suit properties. He stated that the suit properties were still registered in the names of the 2<sup>nd</sup> – 4<sup>th</sup> Defendants. He stated that the 2<sup>nd</sup> – 4<sup>th</sup> Defendants were in possession of the suit properties. He stated that the 1<sup>st</sup> Defendant was charged with the offences of obtaining registration of land contrary to Section 320 of the Penal Code and obtaining money by false pretences contrary to Section 330 of the Penal Code. He stated that the 1<sup>st</sup> Defendant was not convicted. He stated that the Plaintiff purchased the suit properties when they were already developed. He stated that the Plaintiff had planned to rent out the properties. He stated that the Plaintiff did not receive any income from the properties. He stated that he was claiming Kshs. 50,000,000/- from the Defendants. He stated that he was also praying for the cancellation of the titles held by the Defendants and for possession of the properties. He stated that the 1<sup>st</sup> Defendant was the caretaker of the suit properties.
18. The Plaintiff's second witness was Nyandoro David Nyambaso (PW2). PW2 stated that he was working with the Ministry of Lands as Senior Assistant Chief Land Registrar and at the time of giving evidence, he was the acting Chief Land Registrar. He stated that he prepared a report dated 15<sup>th</sup> April 2021 concerning the suit properties, Title No. Kisumu/Konya/4794 and Title No. Kisumu/Konya/5087. He stated that they received a complaint from the Plaintiff that was addressed to the Cabinet Secretary Ministry of Lands dated 14<sup>th</sup> March 2020. He stated that in the complaint, the Plaintiff reported that the suit properties had been transferred to third parties without the company's knowledge. He stated that he wrote to the District Land Registrar Kisumu to give a report explaining the circumstances under which the transactions took place and the supporting documents. He stated that on 23<sup>rd</sup> October 2020, the Land Registrar, Kisumu then Mr. Nyangweso gave a response in which he stated that the transfer of the suit properties from the Plaintiff to the 1<sup>st</sup> Defendant, Vallery Jimoi Khazalwa did not have supporting documents in the file. He stated that it also became clear that the 1<sup>st</sup> Defendant was one of the directors of the Plaintiff. He stated that on the basis of the said information, he wrote a letter dated 15<sup>th</sup> April 2021 to the Plaintiff setting out the facts as they were and supplying him with the documents he had received from the Land Registrar, Kisumu. He stated that the transaction relating to Plot 5087 was captured in the register as entry No. 6 in favour of the 1<sup>st</sup> Defendant and in respect to Plot No. 4794, the transaction was captured also as entry No. 6 both of 24<sup>th</sup> August 2012.
19. PW2 stated that he also contacted the Land Registrar whose signature appeared in the documents. He stated that Monica Bor told him that she had already made a statement with DCI on the matter. PW2 stated that he told the complainant that they could not continue with further investigations because the matter was before the court. PW2 produced the letter dated 15<sup>th</sup> April 2021 as P.EXH. 10. He stated that all the documents that he received from Kisumu Land Registry were from George Nyangweso. He stated that the letter dated 5<sup>th</sup> December 2013 came to his attention during a conversation when he was told that the complainant had complained against Mr. Gachihi. He stated that it was after that that Mr. Nyangweso forwarded the letter to him. He stated that Mr. Gachihi was the Kisumu Land Registrar at the time. He stated that Mr. Gachihi had moved to the office of the Attorney General.
20. The Plaintiff's third witness was George Gachihi (PW3). PW3 stated as follows in his evidence in chief: He was a state counsel at the Attorney General's Chambers in Eldoret. Previously he worked as a land registrar from 1993 to 2014. He was a land Registrar in Kisumu from 2011 to 2014. When he was a land registrar in Kisumu, Rudolf Marquardt (PW1) visited his office on 29<sup>th</sup> November 2013. He



was accompanied by one Alice Chepkemoi Ngeno who was the previous owner of the suit properties. Alice Chepkemoi was the one who sold the properties to PW1. PW1 had in his possession the original title deeds for the suit properties in the name of the Plaintiff. At that time, the two properties had been transferred to the 1<sup>st</sup> Defendant and a title deed had been issued on 24<sup>th</sup> August 2012. The properties were thereafter transferred to the 2<sup>nd</sup> - 4<sup>th</sup> Defendants. A title deed was issued to them on 16<sup>th</sup> October 2013. The Plaintiff's ownership was entered in the register as entry 4 on 6<sup>th</sup> December 2010 and a title was issued on 27<sup>th</sup> December 2010.

21. PW3 told the court that the purpose of PW1's visit to his office was to get the facts. He had heard that the suit properties had been transferred and he was still holding the original title deeds. After the visit by PW1 with the original title deeds, he wrote a letter to the 1<sup>st</sup> Defendant to whom the property had been transferred and also the other transferees to whom the 1<sup>st</sup> Defendant had sold the properties. He produced the letter dated 5<sup>th</sup> December 2013 as P.EXH.9. He stated that he presumed that the letter was received by the 1<sup>st</sup> Defendant. He stated that the letter was sent to her postal address. He stated that during the hearing of the Criminal Case, the 1<sup>st</sup> Defendant produced the letter and the 2<sup>nd</sup> - 4<sup>th</sup> Defendants were also present at the trial. He stated that the letter dated 5<sup>th</sup> December 2013 was sent to them through their Post Office Box Number 9097, Kisumu.
22. The 1<sup>st</sup> Defendant, Vallery Jimoi Khazalwa (DW1) gave evidence after the close of the Plaintiff's case. DW1 stated as follows in her evidence in chief: She was staying in Kisumu. She was a businesswoman. She knew Rudi Marquardt (PW1). PW1 was her husband. She was a director of the Plaintiff. PW1 was also a director of the Plaintiff. She filed a witness statement dated 29<sup>th</sup> July 2020 which she adopted as part of her evidence in chief. She produced her bundle of documents filed on 17<sup>th</sup> September 2020 as D.EXH.1. She stated that the Plaintiff resolved to sell and transfer the suit properties. She stated that she signed the resolution and gave it to Rudi Marquardt (PW1). She stated that she took the transfer forms which were signed by PW1 to the Lands office. She stated that it was PW1, Rudi Marquardt who transferred the suit properties to her before she sold the same to the other Defendants.
23. The next witness was the 3<sup>rd</sup> Defendant, Oscar Ogilo Odindo (DW2). He stated as follows in his evidence in chief. He was an advocate. He resided in Nairobi where he also practiced. He was giving evidence on his own behalf and on behalf of the 2<sup>nd</sup> and 4<sup>th</sup> Defendants. He recorded a witness statement jointly with the 2<sup>nd</sup> and 4<sup>th</sup> Defendant on 9<sup>th</sup> April 2014 which he wished to adopt as his evidence in chief. The same was adopted. He did an official search on the titles of the suit properties. He produced the certificates of official search on the two properties as DEXH.2 (a) and 2 (b). He also produced the documents attached to the 2<sup>nd</sup> - 4<sup>th</sup> Defendants' list of documents dated 9<sup>th</sup> April 2014 filed on 11<sup>th</sup> April 2014 as D.EXH. 3 to 14 respectively. He prayed that the Plaintiff's suit be dismissed with costs to them.
24. The last witness was Joseph Musomba (DW3). He stated as follows in his evidence in chief: He was an advocate of the High Court. He was practicing in the law firm of Kulecho, Musomba & Co. Advocates in Nairobi and Kisumu. He recorded a witness statement on 8<sup>th</sup> September 2020 which was filed on 9<sup>th</sup> September 2020 which he adopted as his evidence in chief.
25. The 5<sup>th</sup> Defendant closed its case without calling a witness. After the close of evidence, the parties made closing submissions in writing.

### **The Plaintiff's submissions**

26. The Plaintiff filed submissions dated 8<sup>th</sup> March 2024. The Plaintiff submitted that the main issue arising for determination was whether the Plaintiff was entitled to the reliefs sought in the Further



Amended Plaintiff. The Plaintiff submitted that the 1<sup>st</sup> Defendant, without the consent, participation and knowledge of the majority shareholder in the Plaintiff, illegally and fraudulently transferred the suit properties from the Plaintiff to the 1<sup>st</sup> Defendant on 24<sup>th</sup> August 2012. The Plaintiff submitted that the Plaintiff's Memorandum of Association showed that Rudolf Georg Marquardt (PW1) held 9,999 shares while Valarie Jimoi Khazalwa held 1 share in the Plaintiff which had a total of 10,000 shares. The Plaintiff cited *East African Portland Cement Ltd v. Capital Markets Authority & 4 Others* [2018] KLR and submitted that a company can make decisions only through the agency of its organs such as the board of directors, and the shareholders. The Plaintiff submitted that without a resolution by the Plaintiff's board of directors authorising the transfer of the suit properties from the Plaintiff to the 1<sup>st</sup> Defendant, the transfer of the suit properties from the Plaintiff to the 1<sup>st</sup> Defendant and subsequent registration of the suit properties into her name as the proprietor thereof were null and void ab initio.

27. The Plaintiff submitted that in paragraph 11A of the further amended plaintiff, it pleaded that the Defendants held the suit properties in trust for it. The Plaintiff submitted that a constructive trust is an equitable remedy imposed by the court against one who has acquired property through wrongdoing. In support of this submission, the Plaintiff relied on *Twalib Hatayan & another v. Said Saggat Ahmed Al-Heidy & 5 others* [2015] eKLR. The Plaintiff submitted that the circumstances under which the Defendants acquired the suit properties were sufficient to place the acquisition of the suit properties by the 2<sup>nd</sup> - 4<sup>th</sup> Defendants within the definition of wrongdoing for the purposes of constructive trust which ought to bind the 2<sup>nd</sup> - 4<sup>th</sup> Defendants who were claiming to be the bona fide purchasers of the suit properties for value without notice.
28. On the issue of whether the 2<sup>nd</sup> - 4<sup>th</sup> Defendants' titles could be protected by the doctrine of bona fide purchaser for value without notice, the Plaintiff cited *Samuel Kamere v. Land Registrar Kajiado* [2015]eKLR in which the Court of Appeal held that to be considered a bona fide purchaser for value, the person seeking to invoke the doctrine must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the property. The Plaintiff submitted that a purchaser will be held to have had constructive notice if he would have been aware of the prevailing state of the property had he checked for himself. The Plaintiff submitted that checking would include all those enquiries and inspections which he ought to have reasonably made including but not limited to official searches and site inspections. The Plaintiff submitted that a purchaser should always visit a property because he may be bound by rights that may only be discovered by physical inspection of the property or by checking whether registrable rights had been registered against the property.
29. The Plaintiff submitted that contrary to the averments in paragraph 13 of the 2<sup>nd</sup> - 4<sup>th</sup> Defendants' amended statement of defence filed on 14<sup>th</sup> May 2020 that they purchased the suit properties after undertaking a search, it became clear during the defence hearing, and in particular, from the testimonies of DW2 and DW3 that there was absolutely no due diligence conducted by the 2<sup>nd</sup> to 4<sup>th</sup> Defendants before they purported to purchase the suit properties. The Plaintiff submitted that it was instructive to note that despite being conversant with land acquisition processes, DW2, who was an advocate of the High Court of Kenya, neglected to carry out any physical or local enquiries or investigations to ascertain the actual land owner from the neighboring residents and the local administration or the area chief. The Plaintiffs submitted that the 2<sup>nd</sup> - 4<sup>th</sup> Defendants purchased the suit properties before obtaining official search certificates in respect thereof. The Plaintiffs submitted that in *Samuel Kamere v. Land Registrar Kajiado* (Supra) the court found under almost similar circumstances that the impugned transfers arose as a direct consequence of the laxity in the conduct of proper investigations to ascertain the rightful owner of the property.



30. The Plaintiff submitted that a right to property guaranteed under Article 40 of *the Constitution* is subject to limitations set out thereunder. The Plaintiff submitted that Article 40(6) of *the Constitution* provides that that right does not extend to any property that is found to have been acquired unlawfully. The Plaintiff cited the Supreme Court of Kenya decision in *Dina Management Limited v. County Government of Mombasa & 5 Others* [2023] eKLR in which the court held that the protection accorded to a bona fide purchaser for value does not apply where the title to a property is obtained irregularly or illegally. The Plaintiff praised the decision as a judicial pronouncement that upset the country's Torrens System of land registration and management.
31. On the issue of whether the Plaintiff was entitled to damages for trespass and mesne profits, the Plaintiff submitted that mesne profits are profits received from a party who is in wrongful possession of premises and are calculated from the date of occupation. In support of this submission, the Plaintiff cited *Maina Kabuchwa v. Gachuma Gacheru* [2018] eKLR. The Plaintiff submitted that the Plaintiff would have generated profits had he remained in possession of the suit properties which he lost sometime in 2013. The Plaintiff urged the court to award it mesne profit.
32. The Plaintiff submitted that it had discharged the burden of proof to the required standard and urged the court to grant the prayers sought in the further amended Plaintiff.

#### **The 1<sup>st</sup> Defendant's submissions**

33. The 1<sup>st</sup> Defendant filed submissions dated 14<sup>th</sup> March 2024. The 1<sup>st</sup> Defendant framed three main issues for determination by the court namely; Who bore the burden of proof and what was the standard of proof? Has the Plaintiff discharged the burden of proof of his allegations of fraud against the Defendants jointly and/or severally? Is the Plaintiff entitled to the orders prayed for?
34. The 1<sup>st</sup> Defendant submitted that the Plaintiff bore the burden of proof which in this case was higher than a balance of probabilities and slightly lower than beyond reasonable doubt given that the Plaintiff's case was founded on alleged fraud. In support of this submission, the 1<sup>st</sup> Defendant relied on *Halbury's Laws of England 4<sup>th</sup> Edition Vol. 17* at paragraphs 13 and 14, *Palace Investment Ltd v. Geoffrey Kariuki Mwendwa & Another* [2015] e KLR and *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Co. Ltd., Civil Appeal No. 101 of 2000* [2005] 1EA 280.
35. The 1<sup>st</sup> Defendant submitted the law on proof of fraud was settled that allegations of fraud must not only be pleaded and particularised but must be proved to a standard above a balance of probabilities and slightly lower than beyond reasonable doubt. The 1<sup>st</sup> Defendant cited *R.G. Patel v. Lalji Makanji* [1957] E.A 314 in support of this submission. The 1<sup>st</sup> Defendant submitted that the Plaintiff had not established the allegations of fraud made in the plaint to the required standard. The 1<sup>st</sup> Defendant submitted that PW1 admitted that the 1<sup>st</sup> Defendant was tried in *Kisumu CMC Criminal Case No. 542 of 2015* and was acquitted under section 210 of the Criminal Procedure Code.
36. The 1<sup>st</sup> Defendant submitted that PW1's testimony before this court contradicted his testimony and the testimony of the other witnesses in the said Criminal Case. The 1<sup>st</sup> Defendant cited *Mclkenney v. Chief Constable of West Midlands Police Force* [1980] 2 ALL ER 229, *Behan & Okero Advocates v. National Bank of Kenya* [2007] e KLR, *Evans v. Bartlam* [1973] 2 ALL ER 649 at page 652, *Kenya Akiba Micro Finance Ltd v. Ezekiel Chebii & 14 Others* [2012] e KLR and *Jacinta Wanjala Mwatela v. IEBC & 3 Others* [2013] eKLR in support of her submissions on this issue. The 1<sup>st</sup> Defendant submitted that there were contradictory statements among witnesses on the issue of whether or not there were documents in the parcel file at the time the suit properties were transferred to the 1<sup>st</sup> Defendant.



37. The 1<sup>st</sup> Defendant submitted that the Plaintiff had failed to prove any of the particulars of fraud alleged against the 1<sup>st</sup> Defendant to the required standard. The 1<sup>st</sup> Defendant submitted that the documents alleged to have been forged had not been availed to the court neither were they subjected to forensic examination. The 1<sup>st</sup> Defendant prayed that the suit be dismissed with costs.

#### **The 2<sup>nd</sup>-4<sup>th</sup> Defendant's submissions**

38. In their submissions dated 15<sup>th</sup> April 2024, the 2<sup>nd</sup>- 4<sup>th</sup> Defendants framed the following issues for determination by the court;
- a. Whether or not the Plaintiff had a right to maintain this action against the Defendants;
  - b. Whether or not the 2<sup>nd</sup> - 4<sup>th</sup> Defendants' title was obtained through fraud;
  - c. Whether or not there could be a declaration of constructive trust in favour of the Plaintiff; and
  - d. Whether or not the 2<sup>nd</sup> - 4<sup>th</sup> Defendants were innocent purchasers for value.
39. The 2<sup>nd</sup>-4<sup>th</sup> Defendants submitted that although they did not plead that the Plaintiff's suit was incompetent, the issue which is a point of law had been raised by the 1<sup>st</sup> Defendant and as such the 2<sup>nd</sup>- 4<sup>th</sup> Defendants were not precluded from raising the issue in their submissions. In support of their submission on this issue, the 2<sup>nd</sup>- 4<sup>th</sup> Defendants cited Kenya Agricultural and Livestock Research Organization v. Okoko & another (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Judgment). The 2<sup>nd</sup>-4<sup>th</sup> Defendants submitted that PW1 Rudolf Georg Marquardt who was one of the directors of the Plaintiff did not produce a copy of a resolution of the board of directors of the Plaintiff authorising him to file this suit as required by the law. The 2<sup>nd</sup>- 4<sup>th</sup> Defendants submitted that the suit was defective on that account and should be dismissed with costs. In support of this submission, the 2<sup>nd</sup>- 4<sup>th</sup> Defendants relied on Auto Japan (Mombasa) Limited v. Malik Ali Zaka & 2 others [2021] eKLR.
40. The 2<sup>nd</sup> - 4<sup>th</sup> Defendants submitted that the Plaintiff claimed that the 2<sup>nd</sup> - 4<sup>th</sup> Defendants obtained registration of the suit properties in their names through fraud a fact that was denied by the 2<sup>nd</sup>- 4<sup>th</sup> Defendants in their statement of defence. The 2<sup>nd</sup>- 4<sup>th</sup> Defendants submitted that the suit properties were registered in the name of the 1<sup>st</sup> Defendant when they purchased the same. The 2<sup>nd</sup>- 4<sup>th</sup> Defendants submitted that courts have held that fraud must be pleaded with particulars and specifically proved by way of evidence. The 2<sup>nd</sup> - 4<sup>th</sup> Defendants cited Kenya Broadcasting Corporation v. Housing Finance Company of Kenya Limited & 2 others [2019] eKLR, Kuria Kiarie & 2 others v. Sammy Magera [2018] eKLR and Koinange & 13 others v. Charles Karuga Koinange 1986 KLR and submitted that the Plaintiff failed to prove the allegations of fraud pleaded against the 2<sup>nd</sup> - 4<sup>th</sup> Defendants.
41. On the issue of constructive trust, the 2<sup>nd</sup>- 4<sup>th</sup> Defendants submitted that the doctrine of constructive trust does not apply to the case at hand. The 2<sup>nd</sup>-4<sup>th</sup> Defendants submitted that there was no wrongdoing established as against the 2<sup>nd</sup> - 4<sup>th</sup> Defendants in the transfer and registration of the suit properties in their names. The 2<sup>nd</sup> - 4<sup>th</sup> Defendants submitted that they were not holding the suit properties as trustees for the Plaintiff. The 2<sup>nd</sup>- 4<sup>th</sup> Defendants submitted that there was no trust in existence and it had also not been established that they had taken advantage of their position in any way. In support of this submission, the 2<sup>nd</sup>- 4<sup>th</sup> Defendants cited Baron Mathenge Munyoki v. Dedan Mbangula Kithusi [2022] eKLR and Juletabi African Adventure Limited & another v. Christopher Michael Lockley [2017] eKLR.



42. On the issue of whether or not the 2<sup>nd</sup> - 4<sup>th</sup> Defendants were innocent purchasers for value, the 2<sup>nd</sup> - 4<sup>th</sup> Defendants cited Section 26 of the Land Registration Act 2012, *Weston Gitonga & 10 others v. Peter Rugu Gikanga & another* [2017] eKLR and the Ugandan case of *Katende v. Haridar & Company Limited* [2008] 2 E.A.173 and submitted that the 2<sup>nd</sup> - 4<sup>th</sup> Defendants met the criteria for a bona fide purchaser for value as held in the said decisions. The 2<sup>nd</sup> - 4<sup>th</sup> Defendants submitted that they had valid title deeds issued by the land registry and they purchased the suit properties in good faith and made payments for the same. The 2<sup>nd</sup> - 4<sup>th</sup> Defendants submitted that when they purchased the suit properties from the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant had valid title deeds for the properties issued by the land office and there was no notice of fraud if any and if at all there was fraud, there was no evidence that they were parties to it. The 2<sup>nd</sup> - 4<sup>th</sup> Defendants submitted that the evidence of Joseph Musomba advocate, who handled the process of sale and transfer of the suit properties to the names of the 2<sup>nd</sup> - 4<sup>th</sup> Defendants was never challenged.
43. The 2<sup>nd</sup> - 4<sup>th</sup> Defendants submitted that there was no evidence that there was any corrupt scheme, illegality or procedural irregularity perpetuated by the 2<sup>nd</sup> - 4<sup>th</sup> Defendants in procuring the registration of the suit properties in their names as the proprietors thereof. The 2<sup>nd</sup> - 4<sup>th</sup> Defendants submitted that the law should protect them as innocent purchasers for value. In support of this submissions, the 2<sup>nd</sup> - 4<sup>th</sup> Defendants cited *Charles Kangayia v. Alfred Musavi & another* [2020] eKLR. The 2<sup>nd</sup> - 4<sup>th</sup> Defendants submitted that the Plaintiff failed to prove its case on a balance of probabilities and urged the court to dismiss the same with costs.

### **Analysis and determination**

44. I have considered the pleadings, the evidence and the submissions filed by the advocates for the parties. I am of the view that the issues arising for determination in this suit are the following;
- a. Whether the Plaintiff's suit is competent;
  - b. Whether the 1<sup>st</sup> Defendant acquired the suit properties lawfully;
  - c. Whether the titles held by the 2<sup>nd</sup> - 4<sup>th</sup> Defendants in respect of the suit properties are indefeasible;
  - d. Whether the Plaintiff is entitled to the reliefs sought against the Defendants; and
  - e. Who is liable for the costs of this suit?

### **Whether the Plaintiff's suit is competent.**

45. In *Moir v. Wallersteiner* [1975] 1 ALL ER 849 Lord Denning MR stated as follows at page 857:

“It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrong doer, the company itself is the one person to sue for the damage. Such is the rule in *Foss V. Harbottle* [1843] 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue”.

46. In *Arthi Highway Developers Limited v. West End Butchery Limited & 6 others* [2015] eKLR, the Court of Appeal approved the decision of the Supreme Court of Uganda to the effect that any director of a limited liability company who has authority to act on behalf of the company can instruct an



advocate to file a suit in the name of the company, and that it is not necessary for the board of directors of a company to pass a resolution before a valid suit can be maintained in the name of a company. In that case, the Court of Appeal stated as follows in part:

“The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; Bugerere Coffee Growers Ltd v Sebaduka & Anor (1970) 1 EA 147. The court in that case held:-

“When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”

47. To their credit, the appellant’s Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme court. The authority is Tatu Naiga & Emporium vs. Virjee Brothers Ltd Civil Appeal No 8 of 2000. The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the Bugerere case was no longer good law as it had been overturned in the case of United Assurance Co. Ltd v Attorney General: SCCA No.1 of 1998. The latter case restated the law as follows:-

“... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”

The decision has since been applied in Kenyan courts, for example, in Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR.

... For the above reasons we find no merit in the procedural challenge and accordingly reject that ground of appeal.”

48. From the evidence before the court, this suit was filed on the instructions of Rudolf Georg Marquardt (PW1). PW1 was a director and a shareholder in the Plaintiff. There is no evidence on record that he was not authorised to act on behalf of the Plaintiff in which he was the majority shareholder. On the authorities that I have cited, I am satisfied that PW1 had the power to instruct the advocates who filed this suit in the name of the company to do so. The other director of the company was Vallery Jimoi Khazalwa (DW1) who was accused by PW1 of committing fraud against the company and against whom the suit was to be filed. It would not have been possible for DW1 and PW1 to have a meeting to resolve that a suit be filed against among others, DW1 for the recovery of the Plaintiff’s properties which DW1 was accused of fraudulently selling to the 2<sup>nd</sup> – 4<sup>th</sup> Defendants. In Arthi Highway Developers Limited v. West End Butchery Limited & 6 others (supra), the court stated as follows in a situation such as the one before the court:

“The submission made that the two fraudsters were capable of passing a lawful resolution for filing suit in the name of West End, in our view, offends common sense and is not tenable.”



49. There is evidence that PW1 on behalf of the Plaintiff instructed the firm of advocates who filed this suit in the name of the Plaintiff. This is clear from what was referred to as “Special Resolution of Rudi Marquardt Electronic Co. Limited” that was produced in evidence by PW1 as P.EXH. 2. Due to the foregoing, it is my finding that the suit herein is properly before the court. The objection to the suit by the Defendants for want of a resolution of the board of directors is overruled.

**Whether the 1<sup>st</sup> Defendant acquired the suit properties lawfully.**

50. The suit property was registered under the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed). When the suit properties were transferred to the 1<sup>st</sup> Defendant and subsequently sold to the 2<sup>nd</sup> – 4<sup>th</sup> Defendants, the Registered *Land Act* had been repealed and replaced by the *Land Registration Act*, 2012.

51. Sections 24, 25, and 26 of the *Land Registration Act*, 2012 provide as follows:

24. Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

52. It is common ground that the suit properties were registered in the name of the Plaintiff as the proprietor thereof on 6<sup>th</sup> December 2010 and the Plaintiff was issued with the titles deeds in respect



thereof thereafter. It is also common ground that before the registration of the 1<sup>st</sup> Defendant as the owner of the suit properties on 24<sup>th</sup> August 2012, the Plaintiff was the registered owner of the two properties. It follows from the foregoing that only the Plaintiff could have lawfully transferred the suit properties to the 1<sup>st</sup> Defendant.

53. The Plaintiff had two directors and shareholders, PW1, Rudolf George Marquardt and the 1<sup>st</sup> Defendant, Vallery Jimoi Khazalwa. If the suit properties were to be transferred to the 1<sup>st</sup> Defendant lawfully, it could only have been done through a resolution by the two directors of the Plaintiff who could have also executed an instrument of transfer in favour of the 1<sup>st</sup> Defendant and obtained the necessary consents for the transaction before the properties could be registered in the name of the 1<sup>st</sup> Defendant.
54. PW1 who was the majority shareholder in the Plaintiff denied any knowledge or involvement in the transfer of the suit properties to the 1<sup>st</sup> Defendant. PW1 told the court that he did not participate in the passing of any resolution authorising the transfer of the suit properties to the 1<sup>st</sup> Defendant. PW1 told the court further that he did not also execute instruments of transfer of the suit properties in favour of the 1<sup>st</sup> Defendant and he did not also sign any application for Land Control Board consent. PW1 placed evidence before the court showing that he was not in Kenya on 24<sup>th</sup> August 2012 when the suit properties were registered in the name of the 1<sup>st</sup> Defendant. PW1 also placed evidence before the court showing that the original tile deeds for the suit properties that were issued to the Plaintiff on 9<sup>th</sup> December 2010 for Plot No. 4794 and on 27<sup>th</sup> December 2010 for Plot No. 5087 were still in his possession.
55. Since the suit properties were at all material times registered in the name of the Plaintiff before being transferred to the 1<sup>st</sup> Defendant, the circumstances under which the suit properties were transferred to the 1<sup>st</sup> Defendant are and must be taken to be within the 1<sup>st</sup> Defendant's personal knowledge. In her statement of defence, the 1<sup>st</sup> Defendant averred that PW1 had knowledge and participated in the processes leading to the transfer of the suit properties to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant averred that the transfer and registration of the suit properties in the name of the 1<sup>st</sup> Defendant was lawful and procedural. In her witness statement dated 29<sup>th</sup> July 2020 which she adopted as her evidence in chief, the 1<sup>st</sup> Defendant reiterated the contents of her defence. The 1<sup>st</sup> Defendant produced documentary evidence (DEXH.1) which consisted mainly of the charge sheet, proceedings and ruling that was made in Kisumu Chief Magistrate's Court Criminal Case No. 542 of 2015.
56. In *George Mbiti Kiebia & Another v. Isaya Theuri M'lintari & Another* [2014] eKLR the Court of Appeal stated that:

“Under Section 112 of the *Evidence Act*, 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. How the appellant got registered as proprietor of Land Parcel No. 70 is a fact within the knowledge of the appellant and it was incumbent upon the appellant to dislodge the notion that Land Parcel No. 70 was ancestral clan land and refute that he was not registered as proprietor as a representative of the family of the late M'Kiebia.”
57. I agree with the 1<sup>st</sup> Defendant that the legal burden of proof was upon the Plaintiff to prove its allegations that the 1<sup>st</sup> Defendant acquired the suit properties illegally and fraudulently. PW1 who gave evidence on behalf of the Plaintiff tendered evidence showing that; he was the only other director and shareholder of the Plaintiff, he was not in Kenya when the suit properties were transferred to the 1<sup>st</sup> Defendant, he did not know of the transaction and did not participate in it. The initial investigations



carried out at the Land Registry Kisumu on the transaction between the 1<sup>st</sup> Defendant and the Plaintiff found that there was no document at the Land Registry to support the registration of the 1<sup>st</sup> Defendant as the owner of the suit properties on 24<sup>th</sup> August 2012. The Land Registrar who was alleged to have registered the 1<sup>st</sup> Defendant as the owner of the suit properties (Monica Bor) disowned her signatures and stamps in the register against the entries relating to the registration of the 1<sup>st</sup> Defendant as the owner of the suit properties and termed them forgeries. See, the letter dated 15<sup>th</sup> April 2021 by the Senior Assistant Chief Land Registrar(P.EXH.10) and the evidence of Reuben Tambaa (PW4 in the Criminal Case No. 542 of 2015). Reuben Tambaa produced a forensic document examiner's report in the Criminal Case which concluded that the Land Registrar, Ms. Monica Bor did not register the 1<sup>st</sup> Defendant as the owner of the suit properties on 24<sup>th</sup> August 2012 and that her signature and stamp were forged. See also the evidence of Monica Bor (PW5 in the Criminal Case No. 542 of 2015). The proceedings of the Criminal Case were produced in evidence in this suit by the 1<sup>st</sup> Defendant as D.EXH.1. The 1<sup>st</sup> Defendant had a duty to tell the court how the suit properties came to be registered in her name. This court was surprised by the 1<sup>st</sup> Defendant's contention in her submissions that the lack of documentation on how she acquired the suit properties was proof that she did not acquire the properties fraudulently.

58. The legal burden of proof is static but the evidential burden of proof keeps shifting during the trial. Once the Plaintiff placed evidence before the court showing that the Plaintiff did not transfer the suit properties to the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant had to answer that evidence. In other words, the evidential burden shifted to the 1<sup>st</sup> Defendant to prove that the suit properties were transferred legally to her by the Plaintiff. The majority of the Supreme Court in Presidential Election Petition No. 1 of 2017, Raila Amolo Odinga & Another v. IEBC & 2 Others [2017] eKLR stated as follows on the evidential burden of proof in paragraphs 132 and 133 of the judgment:

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law...”

59. In *Munyu Maina v. Hiram Gathiha Maina*[2013] eKLR, the Court of Appeal stated as follows:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and



free from any encumbrances including any and all interests which need not be noted on the register.”

60. The 1<sup>st</sup> Defendant did not produce any agreement between her and the Plaintiff for the sale and/or transfer of the properties to her, any resolution by the directors of the Plaintiff authorising the transfer of the suit properties to her, the instruments of transfer of the suit properties executed by the Plaintiff in her favour, evidence of payment of stamp duty and evidence of application for consent of the Land Control Board and evidence of such consent having been issued by the Board. The 1<sup>st</sup> Defendant did not place evidence before the court of how she came to be registered as the owner of the suit properties. In the absence of such evidence, the evidence adduced by the Plaintiff that the registration was illegal and fraudulent is unrebutted. What other proof of fraud and illegality would the court require from the Plaintiff? The suit properties were registered in the name of the Plaintiff. PW1 who was one of the Plaintiff’s directors and majority shareholder had in his custody in Germany the original title deeds for the suit properties. Without a company resolution, a transfer executed by the company, payment of stamp duty and consent of the Land Control Board, the 1<sup>st</sup> Defendant caused herself to be registered as the owner of the suit properties. The 1<sup>st</sup> Defendant had contended in her submissions that PW3 had stated in his evidence in the Criminal Case that the original title deeds for the suit properties in the name of the Plaintiff were surrendered by the 1<sup>st</sup> Defendant when the properties were transferred to her. This submission is not supported by any credible evidence. None of the witnesses from the Land Registry who gave evidence in the Criminal Case and before this court stated that they had in their records the original title deeds for the suit properties which were issued to the Plaintiff and that the same were surrendered during the transfer of the properties to the 1<sup>st</sup> Defendant. Their evidence was that they had nothing on record to support the transfer of the suit properties from the Plaintiff to the 1<sup>st</sup> Defendant. The issue that PW3 and the investigator had taken up with PW1 was that he had refused to hand over the original title deeds for the suit properties to them for investigation for which I cannot blame PW1 in the circumstances. Who can trust an official of a land registry where a land registrar’s signature and stamp can be forged and used to dispossess a land owner of his land worth millions of Kenya Shillings?
61. For the foregoing reasons, it is my finding that the 1<sup>st</sup> Defendant’s title to the suit property that was acquired without a transfer, payment of stamp duty and land control board consent using a forged signature of a land registrar (Monica Bor) was illegal, fraudulent, null and void.

#### **Whether the titles held by the 2<sup>nd</sup> – 4<sup>th</sup> Defendants are indefeasible**

62. I have held that the 1<sup>st</sup> Defendant acquired the suit properties illegally and fraudulently and as such the titles that she held in respect of the suit properties were null and void. Could the 1<sup>st</sup> Defendant who held invalid titles in the suit properties pass a good title to the 2<sup>nd</sup> – 4<sup>th</sup> Defendants? My answer is in the negative. The 2<sup>nd</sup> – 4<sup>th</sup> Defendants contended that they were innocent purchasers of the suit properties for value without notice of any defect in the titles that were held by the 1<sup>st</sup> Defendant. In *Mwangi James Njehia v. Janetta Wanjiku Mwangi & another* [2021] eKLR, the court stated as follows:

“37. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others*, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of *Katende v. Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that: -

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



For a purchaser to successfully rely on the bona fide doctrine as was held in the case of Hannington Njuki v William Nyanzi High Court civil suit number 434 of 1996, he must prove that:

1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

38. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have “purchased’ properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi.

39. The elephant in the room is whether genuine, legitimate owners of property should be dispossessed of their hard earned property, because a party has “purchased” the property on the basis of an “apparent title” at the land registry which had been transplanted in place of the genuine title, only for the genuine one to reemerge after the transaction? In our view, no legitimate owner of property should be divested of their property unlawfully, under the guise that the “purchaser” was duped to buy land which he/she could have believed to be genuinely owned by the person holding himself out as the vendor.”

63. The Plaintiff who is the legitimate owner of the suit properties cannot be divested of the suit properties on account of the illegal titles that the 2<sup>nd</sup> – 4<sup>th</sup> Defendants obtained from the 1<sup>st</sup> Defendant who acquired the same illegally and fraudulently however innocent the 2<sup>nd</sup> – 4<sup>th</sup> Defendants were while



undertaking the transaction and irrespective of whether they had notice of the fraud or not. In *Alberta Mae Gacie v. Attorney General & 4 Others* [2006] eKLR the court stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come...”

64. The title that was held by the 1<sup>st</sup> Defendant was fraudulent, illegal, null and void. The 1<sup>st</sup> Defendant had no legal interest in the suit properties that she could pass to the 2<sup>nd</sup> - 4<sup>th</sup> Defendants. The title that the 2<sup>nd</sup> - 4<sup>th</sup> Defendants obtained from the 1<sup>st</sup> Defendant was a nullity. In *Wambui v. Mwangi & 3 others*, (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) the Court of Appeal stated as follows:

“70. Sixth, the title was also tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was subsequently declared null and void ab initio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title allegedly vested in the 3<sup>rd</sup> respondent and subsequently passed on to the appellant having stemmed from court proceedings that were subsequently declared null and void also stood vitiated by the same nullity and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.

71. Seventh, section 80 of the Act is explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. The title purportedly acquired by the 3<sup>rd</sup> respondent and subsequently passed on to the appellant having been demonstrably shown to have been tainted with fraud, deceit and nullity fits the description of title that has been acquired not only irregularly and unprocedurally but also through a corrupt scheme. The corrupt scheme herein arises from the facts informing the vitiated High Court proceedings which we find no need to rehash but adopt as already highlighted above.

72. In light of all the above, we reiterate that the Judge’s reasoning as to why appellant’s title to the suit property was vitiated was well founded both in fact and in law and is therefore unassailable.”

65. It is my finding from the foregoing that the 2<sup>nd</sup> - 4<sup>th</sup> Defendants have no lawful interest in the suit properties. The lawful and legitimate owner of the suit properties is the Plaintiff.

66. There is an issue I have noted from the evidence on record which was not raised by any of the parties but casts doubt on the innocence of the 2<sup>nd</sup> - 4<sup>th</sup> Defendants and the 5<sup>th</sup> Defendant in the alleged transaction that the 2<sup>nd</sup> - 4<sup>th</sup> Defendants had with the 1<sup>st</sup> Defendant. PW1 told the court in his evidence in chief and cross-examination by the advocate for the 2<sup>nd</sup> - 4<sup>th</sup> Defendants that he first learnt of the sale of the suit properties in September 2023 before the properties were transferred to the 2<sup>nd</sup> - 4<sup>th</sup> Defendants. He stated that before he came to Kenya to attend to the matter, he asked a representative to visit the land registry at Kisumu to find out what was happening. He stated that his representative talked to the land registrar who requested for copies of the Plaintiff’s titles. He stated that he also engaged an advocate



during that time who did a search and confirmed that the suit properties were still in the name of the Plaintiff. PW1's evidence before this court as to when he discovered the fraudulent dealing with the suit properties is consistent with what he told the court in the Criminal Case. In the Criminal Case, Dave Lungaho Siganga advocate gave evidence for the prosecution as PW3. He told the Criminal Case court that he was instructed by PW1 to look for a security firm to secure the suit properties. The advocate told the court that he got a security firm and when the said firm went to the suit properties, they found another security firm guarding the premises, and he informed PW1 of the development and a report was also made to the Police. The advocate told the court that he also did a search on PW1's instructions in October 2013 which confirmed that the properties were still registered in the name of the Plaintiff.

67. I am of the view that the Land Registrar, George Gachihi who gave evidence before this court as PW3 and the 2<sup>nd</sup> – 4<sup>th</sup> Defendants were aware that there was a dispute over the suit properties before the same were transferred and registered in the names of the 2<sup>nd</sup> – 4<sup>th</sup> Defendants. I say so because the registration of the instruments of transfer of the suit properties in the names of the 2<sup>nd</sup> – 4<sup>th</sup> Defendants seems to have been back-dated and this could only have been done to cover up an illegality, fraud or a mistake.
68. According to the Transfer of Land forms for Plot No. 4794 and Plot No. 5087 which were produced by the 2<sup>nd</sup> - 4<sup>th</sup> Defendants in evidence as D.EXH. 6, the transfers were presented for registration on 22<sup>nd</sup> October 2013 under Presentation Book No. 171/10/2013 and No. 172/10/2013 respectively. On the face of the two Transfer of Land forms, Stamp Duty was paid on 22<sup>nd</sup> October 2013. The instruments of transfer that were presented for registration on 22<sup>nd</sup> October 2013 and Stamp Duty in respect thereof paid on 22<sup>nd</sup> October 2013 could not have been registered on 16<sup>th</sup> October 2013 as indicated in the registers for the suit properties and the titles held by the 2<sup>nd</sup> – 4<sup>th</sup> Defendants. The Transfer of Land form in respect of Plot No. 4794 shows that its initial date of registration was 22<sup>nd</sup> October 2013. The date 22<sup>nd</sup> was subsequently cancelled and 16<sup>th</sup> written on top of it. The Land Registrar could not have registered a transfer before it was presented and before the Stamp Duty was paid. If the 2<sup>nd</sup> – 4<sup>th</sup> Defendants were innocent, I wonder why they would have presented the instruments of transfer for registration on 22<sup>nd</sup> October 2013 and left with title deeds dated 16<sup>th</sup> October 2013, copies of the registers certified on 22<sup>nd</sup> October 2013 and certificates of official search dated 22<sup>nd</sup> October 2013 all showing that they were registered as owners of the suit properties on 16<sup>th</sup> October 2013. All these documents were signed and certified where necessary by PW3 and handed over to the 2<sup>nd</sup> – 4<sup>th</sup> Defendants who produced them in evidence. The 2<sup>nd</sup> – 4<sup>th</sup> Defendants are therefore not innocent purchasers of the suit properties for value without notice not that it would have made any difference even if they were.

### **Whether the Plaintiff is entitled to the reliefs sought against the Defendants**

69. I have set out at the beginning of this judgment the reliefs sought by the Plaintiff in its further amended plaint. I am satisfied that the Plaintiff has proved its case against the Defendants and as such is entitled to the reliefs sought. In addition to the declaratory, injunctive and other non-pecuniary reliefs sought the Plaintiff also sought damages for trespass and mesne profits.
70. In *Park Towers Ltd. v. John Mithamo Njika and 7 Others* 2014 eKLR, the court stated as follows:

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case.”



71. In Halsbury's Laws of England 4<sup>th</sup> Edition Volume 45 para. 26, 1503 the authors have stated as follows on assessment of damages for trespass:

- a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.
- b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.
- d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
- e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased."

72. In Attorney General v. Halal Meat Products Limited [2016] eKLR the Court of Appeal stated as follows on mesne profits:

"It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18thEd. para 34-42."

73. In Rajan Shah T/A Rajan S. Shah & Partners v. Bipin P. Shah [2016] eKLR the court stated as follows:

"The term 'mesne profits' relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is a settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits."

74. The Plaintiff proved that the Defendants occupied and dispossessed the Plaintiff of the suit properties illegally. In its submissions, the Plaintiff did not submit what in its opinion would be reasonable damages. The Plaintiff submitted that although it had claimed both damages for trespass and mesne profits, in the circumstances the court could only award it damages under one head of claim. I would therefore award only general damages for trespass. PW1 told the court that the Plaintiff was claiming Kshs. 50,000,000/- as damages. PW1 told the court that the suit properties were developed with buildings and the Plaintiff intended to rent them out. PW1 did not give any indication as to the rental income the Plaintiff was expecting. There was also no evidence as to what use the 2<sup>nd</sup> – 4<sup>th</sup> Defendants had put the suit properties. Due to the foregoing, it is difficult to assess from the evidence on record the Plaintiff's loss. The court takes note however of the fact that the Plaintiff has been kept out of the suit



properties for the last 10 years. Doing the best I can, I am of the view that an award of Kshs. 6,000,000/- would be a reasonable compensation to the Plaintiff for the loss occasioned by the Defendants' trespass.

### **Conclusion**

75. In conclusion, I hereby enter judgment for the Plaintiff against the Defendants jointly and severally for;
1. A declaration that the transfer of Title No. Kisumu/Konya/4794 and Title No. Kisumu/Konya/5087 to the 1<sup>st</sup>- 4<sup>th</sup> Defendants is null and void ab initio.
  2. An order that the title deeds for Title No. Kisumu/Konya/4794 and Title No. Kisumu/Konya/5087 that were issued to the 1<sup>st</sup>- 4<sup>th</sup> Defendants are cancelled.
  3. An order that the District Land Registrar Kisumu shall rectify the registers of Title No. Kisumu/Konya/4794 and Title No. Kisumu/Konya/5087 ("the suit properties") by cancelling the registration of the 1<sup>st</sup>-4<sup>th</sup> Defendants as the proprietors thereof and restoring the properties into the name of the Plaintiff as the owner thereof.
  4. A declaration that the Plaintiff is entitled to possession of the suit properties and that the Defendants by themselves or through their servants and/or agents are trespassers thereon.
  5. An order of a permanent injunction restraining the 1<sup>st</sup>- 4<sup>th</sup> Defendants from encroaching into, remaining on and/or in any other way whatsoever interfering with the Plaintiff's quiet possession and/or enjoyment of the suit properties.
  6. Kshs. 6,000,000/- being damages for trespass to be paid by the 1<sup>st</sup> - 4<sup>th</sup> Defendants together with interest at court rates from the date hereof until payment in full.
  7. Costs of the suit.

**DELIVERED AND DATED AT KISUMU ON THIS 21<sup>ST</sup> DAY OF JANUARY 2025**

**S. OKONG'O**

**JUDGE**

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERCING PLATFORM IN THE PRESENCE OF:**

Mr. Mwesigwa for the Plaintiff

Ms. Onsongo for the 1<sup>st</sup> Defendant

Mr. P.D. Onyango for the 2<sup>nd</sup> – 4<sup>th</sup> Defendants

N/A for the 5<sup>th</sup> Defendant

Ms. J. Omondi-Court Assistant

